

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-95 (3)S
Sales Tax
January 19, 1995

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S940825B

On August 25, 1994 a Petition for Advisory Opinion was received from Suburban Propane, P.O. Box 206, Whippany, New Jersey 07981.

The issue raised by Petitioner, Suburban Propane, is whether the sale of propane used to heat a swimming pool is exempt from sales tax as a medical supply when the heated pool is temporarily being used as part of a physical therapy program following knee surgery.

Petitioner's customer, Barbara Kelly, in June 1994 was under the medical supervision of Dr. Lyle J. Micheli at The Children's Hospital, Boston Massachusetts in the Sports Medicine clinic. She was being treated for articular cartilage degeneration, medial femoral condyle, and medial tibial plateau and was in status-post arthroscopy, debridement, and chondroplasty of her knee. Due to this particular injury and necessity for surgical intervention, performed on February 16, 1994, Dr. Micheli prescribed an intensive program of water therapy for her. He felt that it was medically necessary for the temperature of the pool to be regulated in order for her to benefit completely from this therapy. This water therapy had to be performed on a daily basis as a beneficial and necessary part of her rehabilitation.

Section 1105(a) of the Tax Law imposes sales tax upon "[T]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article".

Section 1105(b) of the Tax Law imposes sales tax upon "[T]he receipts from every sale, other than sales for resale, of gas,...and gas...service of whatever nature...".

Section 1105-A of the Tax Law states, in part:

Notwithstanding any other provisions of this article, but not for the purposes of the taxes imposed by section eleven hundred seven or eleven hundred eight or authorized pursuant to the authority of article twenty-nine of this chapter, the taxes imposed by subdivision (a) or (b) of section eleven hundred five on the ... receipts from every sale, other than for resale, of propane (except when sold in containers of less than one hundred pounds),...used for residential purposes shall be paid ...at the rate of zero percent on and after October first, nineteen hundred eighty....

Section 1115(a)(3) the Tax Law provides an exemption from the sales tax imposed under Section 1105(a) of the Tax Law for:

Drugs and medicines intended for use, internally or externally, in the cure, mitigation, treatment or prevention of illnesses or diseases in human beings, medical equipment (including component parts thereof) and supplies required for such use or to correct or alleviate physical incapacity, and products consumed by humans for the preservation of health but not including cosmetics or toilet articles notwithstanding the presence of medicinal ingredients therein or medical equipment (including component parts thereof) and supplies, other than such drugs and medicines, purchased at retail for use in performing medical and similar services for compensation.

Section 527.2(b)(1) of the Sales and Use Tax Regulations provides in part that "[A]ll types of gas service and gas sold...in containers with a capacity of 100 pounds of gas or more, for heating...purposes by residential...users are subject to the tax imposed under subdivision (b) of section 1105 of the Tax Law".

Section 527.13 of the New York State Sales and Use Tax Regulations states, in part:

Certain energy sources and services. [Tax Law, 1105-A]

(d) Definitions. (1) The term residential purposes means any use of a structure or part of a structure as a place of abode, maintained by or for a person, whether or not owned by such person, on other than a temporary or transient basis with the exclusion of accommodations subject to tax under subdivision (e) of section 1105 of the Tax Law.

(2) The term nonresidential purposes means any use other than for residential purposes, as defined in paragraph (1) of this subdivision, including any use in the conduct of a trade, business or profession, whether such trade, business or profession is carried on by the owner of the structure or some other person.

(e) Certification and allocation. (1) Purchases of energy sources used exclusively for residential purposes shall receive the reduced tax rate without the necessity of certification.

(f) Customer classification. (1) Vendors of energy sources which are regulated by the New York State Public Service Commission and which have on file therewith a tariff or rate schedule which classifies its customer either as residential or nonresidential, may request from the Department of Taxation and Finance approval to use such classifications for determining the eligibility of its customer for a reduced sales tax rate without certification.

(3) Every supplier of energy sources who has received from his customer a certification claiming eligibility for a reduced sales tax rate shall not be held liable, except in the case of his fraud, for any misrepresentations made by the customer on the certification or for any tax not collected by granting the sales tax rate reduction based on such certification.

(4) Where a customer is eligible for the reduced tax rate, as a residential customer described in paragraph (1) ... of subdivision (e)[sic] of this section, but the supplier of energy sources has not classified him as a residential user, the customer should furnish the supplier with a certification.

(g) Collection of tax. (1) Every vendor, making a sale of energy sources to a customer who is classified as a residential customer, shall collect the sales tax at the reduced sales tax rate on such customer's total purchase.

(2) Every supplier of energy sources who has received from his customer a certification shall collect the sales tax at the reduced rate on the portion of the purchase shown as being used for residential purposes and shall collect the tax at the full rate on the remainder which is used for nonresidential purposes.

(3) Every vendor making sales of energy sources which are used for nonresidential purposes shall collect the sales tax at the full rate.

The propane gas sold by Petitioner to Barbara Kelly is sold to her in containers with a capacity of 100 pounds of gas or more for residential heating purposes and thus, in accordance with Section 527.2(b)(1) of the Sales and Use Tax Regulations, is subject to the tax imposed under Section 1105 (b) of the Tax Law and not the tax imposed under Section 1105(a) of the Tax Law. Since the exemption for medical supplies provided by Section 1115(a)(3) of the Tax Law only applies to those things that are taxable under Section 1105(a) of the Tax Law, it cannot be used to provide an exemption from sales tax of the sale of propane gas as described above which is taxable under Section 1105(b) of the Tax Law. Therefore, the sales of propane gas by Petitioner to Barbara Kelly are subject to sales tax unless otherwise exempted from tax as sales of gas for residential purposes.

However it is Department policy that purchases of electricity and gas for use in the operation of an individual homeowner's personal residential recreational appurtenances and equipment, in a non-commercial manner, are considered purchases of gas and electricity for residential purposes. Gabe Silver, adv op comm T&F, August 8, 1994, TSB-A-94(34)S.

Therefore, in the instant matter, Barbara Kelly's purchases of propane gas for use in the operation of her pool are considered to be purchases of propane gas for residential purposes and thus are not subject to State sales tax after October 1, 1980 in accordance with the meaning and intent of Section 1105-A of the Tax Law since such section reduces the rate to 0% after said date.

However, in accordance with section 527.13(f)(4) of the Regulations, since Petitioner collected and continues to collect sales tax at the full rate on the receipts from sales of energy for use in the operation of Barbara Kelly's swimming pool, Barbara Kelly should give Petitioner a properly completed form TP-385, Certification of Residential Use of Energy Purchases. Under the provisions of Section 527.13(g)(2) of the Sales and Use Tax Regulations, Petitioner, upon receipt of the completed form TP-385, should collect the statewide sales tax at the reduced rate of 0% on the receipts from sales of energy for use in the operation of Barbara Kelly's swimming pool. Under the

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provisions of Section 527.13(f)(4) of the Regulations, form TP-385 will also substantiate that Petitioner is relieved from any liability to collect the statewide sales tax on the receipts from sales of energy for use in Barbara Kelly's swimming pool.

Additionally, since the State sales tax was collected erroneously from Barbara Kelly, she is entitled to a refund of such erroneously collected tax. Section 1139 of the Tax Law provides that "the tax commission shall refund ... any tax ... erroneously ... collected ... if application therefor shall be filed with the tax commission (i) in the case of tax paid by the applicant to a person required to collect tax, within three years after the date when the tax was payable by such person to the tax commission...." Accordingly, Barbara Kelly may apply for a refund of the statewide sales tax which was erroneously collected during the three year period immediately preceding the filing date of her claim, by completing a form AU-11, Application for Credit or Refund and mailing such form to State of New York Department of Taxation and Finance, Office Audit Bureau Sales Tax, W. A. Harriman Campus, Albany, NY 12227.

It is noted that Section 1210(a)(3) of the Tax Law authorizes localities to impose a tax on sales of residential gas (including propane in containers of 100 pounds or more) service.

However, in the instant matter, the customer's residence is located within Saratoga County which has not elected to impose a local tax on residential gas (including propane in containers of 100 pounds or more) service. Accordingly, the customer was not required to pay a local sales tax on purchases of propane in containers of 100 pounds or more used to heat the pool located at her home.

DATED: January 19, 1995

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

NOTE: The opinions expressed in Advisory Opinions
are limited to the facts set forth therein.