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

TSB-A-96 (87) S
Sales Tax
December 27, 1996

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO.S960718A

On July 18, 1996, the Department of Taxation and Finance received a Petition for Advisory Opinion from Cushman & Wakefield, Inc., 51 West 52nd Street, New York, New York 10019. Petitioner, Cushman & Wakefield, Inc., provided additional information pertaining to the Petition on October 23, 1996.

The issue raised by Petitioner is whether the sale of condenser water by commercial building owners to tenants is subject to New York State sales tax.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Condenser water is water which is circulated through pipes and is part of a condenser water system. This system works in conjunction with other air conditioning units in a building to transfer heat from inside the building to the outside. The heat within a building is absorbed by the chilled water system that is distributed by pipes through the various building systems (fans, induction units, etc.). The chilled water gives up this heat to the refrigerant in the chiller. The refrigerant is then compressed and passed into the condenser, where it gives up the heat to the condenser water system. The condenser water is circulated by pipes through the cooling tower on the roof, where the condenser water gives up the heat to the atmosphere as it evaporates while passing through the cooling tower.

The building owners own the base building air conditioning systems to which the condenser water is provided. However, some tenants have their own supplemental systems, to which condenser water is also distributed. Whether the building owners are providing condenser water to their own base building air conditioning systems or to the tenants' supplemental systems, the water is always distributed through a piping/valving system.

Condenser water requirements are written into the lease agreements as separate clauses. Petitioner submitted four typical clauses covering condenser water. Three characterized overtime charges for the water as additional rent, while the fourth, involving a tenant owned supplemental unit, characterized the additional amount as a charge.

A typical clause covering condenser water reads as follows:

> Section 31.04. If Tenant utilizes condenser water during hours other than the Building's regular hours or on days other than Business Days, Tenant shall pay on demand, as additional rent, $476 per connected ton per year (the "Charge"), subject to increase (but not decrease) as hereinafter provided.

Where the tenant provided a supplementary air conditioning unit, the following clause was used:

> As part of the Initial Alterations, Tenant may install a water cooled supplementary DX air conditioning system reasonable [sic] approved by Landlord of up to eighty-five (85) tons capacity per floor of the Premises to service the Premises. In connection therewith, Tenant, at Tenant's sole cost and expense, may tap into the existing condenser water pipes of the Building to obtain condenser water for the system. Landlord shall furnish to the floor of the Premises serviced by such system condenser water to service such system at such times as Tenant shall request. Any installations required to connect Tenant's supplementary air conditioning system to the condenser pipe shall be made by Landlord. Tenant shall also pay Landlord for the supply of condenser water, within ten (10) days after rendition of a bill therefor, an annual charge per ton of cooling capacity of the system so connected equal to the then Building standard charge per ton (which amount was $841.75 as of December 31, 1995). Landlord shall not be liable to Tenant for any failure or defect in the supply or character of condenser water supplied to Tenant by reason of any Requirement, act or omission of the public service company serving the Building or for any other reason not attributable to the gross negligence or willful misconduct of Landlord, its agents, contractors and employees.

APPLICABLE LAW

Section l105(b) of the Tax Law imposes a tax upon:

> [T]he receipts from every sale, other than for resale, of gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature, and from every sale, other than sales for resale, of telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service and from every sale, other than sales for resale, of a telephone answering service.

Section 1115(a)(2) of the Tax Law exempts "[w]ater, when delivered to the consumer through mains or pipes."

In Debevoise & Plimpton v New York State Dept. of Taxation and Finance, 80 NY2d 657, 661, the Court of Appeals held that the tenant's payments for overtime heat, ventilation and air conditioning services were incidental to the rental of the commercial premises and not the sale of a refrigeration and steam service and, therefore, not subject to the sales tax pursuant to Section l105(b) of the Tax Law.

In Empire State Building Company v New York State Dept. of Taxation and Finance, 81 NY2d 1002, the Court of Appeals held that the tenant's payments of an Electricity Rent Inclusion Factor were for an electric service provided only as an incident to the rental of the commercial premises and not as part of "separate transactions which have as their primary purpose the furnishing of utilities or utility services," and therefore, not subject to tax as a sale of utility services under Section l105(b) of the Tax Law.

As described by Petitioner, the landlord is not actually selling condenser water or water through mains or pipes, but is providing an air conditioning service. The fact that a tenant may use a supplemental air conditioning unit connected to a landlord's unit does not change the nature of the transaction from the provision of a service to the sale of water. The courts have held that an air conditioning service that is provided as part of the rental of real property is not subject to New York State sales tax. Therefore, the provision in this case of a portion of that same service is likewise not subject to sales tax.

/s/

DATED: December 27, 1996

John W. Bartlett
Deputy Director
Technical Services Bureau

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