NEW YORK STATE | Department of Taxation and Finance

OFFICE OF COUNSEL

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RECENTLY ASKED QUESTIONS ABOUT THE REAL PROPERTY TAX LAW on the topic of SOLAR ENERGY SYSTEMS

This is the second in a series of Recently Asked Questions (RAQs) from local officials about the Real Property Tax Law. In this edition, we will focus on the taxability of ***solar energy systems*** *(i.e., solar panels and associated equipment), since we have received more questions on that general topic than any other over the last several months. We must emphasize, however, that the observations offered on the following pages are purely advisory, should not be equated to formal Opinions of Counsel, and should not be construed as binding in any way. Assessors and other local officials seeking definitive legal advice, or seeking guidance on how the law applies to a specific set of facts, are advised to consult their municipal attorneys.*

Introduction

A solar energy system is "real property" once it has been permanently affixed to land or a structure (Real Property Tax Law § 102(12)(b); *see also,* Metromedia, Inc. v. Tax Commission of the City of New York, 60 N.Y.2d 85, 468 N.Y.S.2d 457 (1983); 8 Op. Counsel SBEA No. 3). As such, it is taxable unless it qualifies for an exemption (Real Property Tax Law § 300).

There is an exemption statute that applies specifically to solar energy systems: Section 487 of the Real Property Tax Law (RPTL). Section 487, which also covers wind power systems and farm waste energy systems, generally provides a 15-year exemption from real property taxation for the increase in value resulting from the installation of a qualifying system. A number of questions have recently arisen concerning the application of this exemption statute.

Local Option

1. Must every municipality offer the § 487 exemption?

   A: No. Each municipality may decide for itself whether to offer the exemption. Unlike most other local option exemptions, however, this exemption applies within a municipality unless the municipality has taken action to disallow it.

2. How does the local option feature work?

   A: The local option that's attached to the § 487 exemption is structured as an opt-*out*, not an opt-in. That means that the exemption is automatically in effect within a municipality unless it has adopted a local law, ordinance or resolution providing that the exemption shall *not* be available therein. In municipalities that have taken no action one way or the other, the exemption is in effect. If a local law, ordinance or resolution opting out of the exemption is adopted, a copy must be filed with the New York State Department of Taxation and Finance and the New York State Energy Research and Development Authority (NYSERDA).

3. May an opt-out be made retroactive?

   A: No. If a municipality opts out, it is effectively disallowing the exemption to solar energy systems where construction had *not* begun by the effective date of the applicable local law, ordinance or resolution (or by 1/1/1991, if later). See § 487(8)(a). Where a system's construction *had* begun by that date, it is not impacted by the opt-out and is entitled to the exemption if otherwise qualified (though it may be obligated to make PILOTs under certain circumstances; see Q. 6-10, below).

   Note that for purposes of the § 487 exemption, the construction of a solar energy system is deemed to have begun upon the execution of a contract or interconnection agreement with a utility or, if applicable, upon the payment of a deposit thereunder. The owner or developer must give written notice to the appropriate municipalities when such a contract or agreement is executed. See § 487(8)(b).

4. If a municipality has opted out, may it restore the exemption later?

   A: Yes. If a municipality that had opted out wishes to begin offering the exemption later, we believe it may do so by repealing the local law, ordinance or resolution that opted out. This is not stated explicitly in the law, but we believe such authority is implicit in statutes of this nature, absent language to the contrary. A copy of any local law, ordinance or resolution restoring the exemption should be filed with both the Department of Taxation and Finance and NYSERDA.

5. May a municipal opt out of the exemption for commercial property while leaving it in place for residential property?

   A: No. If a municipality *does* opt out – i.e., if it adopts a local law disallowing the exemption – it must do so for *all* properties. It cannot allow the exemption for one type of property while disallowing it for another, because § 487(8) states that once a municipality has opted out, "*no* exemption under this section shall be applicable within its jurisdiction" (emphasis added). If a municipality does *not* opt out, however, the law *may* allow it to treat commercial and residential properties differently when deciding what their PILOT obligations should be; see Q. 8, below.

PILOTs

If a municipality does *not* opt out – *i.e.*, if it leaves the exemption in place – then qualifying solar energy systems constructed in the municipality will be exempt from taxation for a period of 15 years. However, the municipality then has the option to require the owners of such systems to enter into contracts to make payments in lieu of taxes, which are generally referred to as "PILOTs."

6. If a municipality leaves the exemption in place and requires owners to pay PILOTs, how much should those payments be?

   A: That is largely a local decision, except that the statute sets limits on how large these PILOTs may be, and on how long they may last. Specifically, it provides that the PILOTs may not exceed the taxes that would have been payable if the property were not exempt under § 487. It also provides that the period over which the PILOTs are to be paid may not exceed 15 years. See § 487(9)(a). In effect, then, if a municipality leaves the exemption in place and imposes the maximum allowable PILOT obligation, the owner will be making payments to the municipality in the same amount as if the property were fully taxable. The primary difference is that those payments will have the legal status of PILOTs rather than property taxes.

7. What is the maximum PILOT for a solar farm built on vacant land?

   A: We have heard it suggested that if a solar farm is built on vacant land, the PILOT may not exceed the amount of taxes that were payable on the vacant land immediately before the solar farm was built. In our view, that is not correct. The limit on the PILOTs in such an instance is the amount of taxes that would have been levied on the parcel as it now exists – that is, the land *with* the panels – if the municipality had opted out of the exemption.

8. May different PILOT requirements be imposed upon commercial and residential systems?

   A: While it is clear that a municipality may not opt out of the § 487 exemption for one type of property while leaving the exemption in place for another type (see Q. 5, above), it is less clear whether it may impose different PILOT requirements on different property types. RPTL § 487(9)(a) states simply that the municipality may require "*the* owner of *a* property" that qualifies for the exemption "to enter into *a* contract" to make PILOTs (emphasis added). This wording, which arguably frames the PILOT question as an individualized determination rather than a collective one, provides no guidance as to how owners should be treated relative to one another. While principles of equal protection would clearly preclude a municipality from drawing arbitrary distinctions between similarly-situated owners when setting their PILOT requirements, we believe the law may reasonably be read as leaving open the possibility of treating owners of different types of property differently, as long as there is a rational basis for doing so. Accordingly, if differential treatment is desired, we suggest that the issue be directed to the municipal attorney, who would have to be satisfied that any such differentiation could successfully be defended in the event of litigation.

9. May a municipality enter into a PILOT agreement that requires the owner of a solar energy system to provide the municipality with energy at a discounted rate, or that bases the PILOT payments upon the amount of energy produced by the system or the value of the system?

   A: Nothing in § 487 prohibits a municipality from structuring a PILOT as described above. However, as noted above (see Q. 6-7), § 487(9)(a) states that PILOT agreements may require annual payments in an amount *not to exceed* the amounts that would have been payable if not for the exemption. Therefore, no matter how the arrangement is structured, the PILOT obligation imposed upon the owner must comply with this limitation.

10. Our municipality received a notice stating that the sender of the notice intends to construct a solar energy system within our municipality. What is the significance of this notice?

    A: In some cases, a municipality that has not opted out of the § 487 exemption may need to take action to preserve its rights to collect PILOTs on exempt property. The law now provides that the owner or developer of a solar energy system may notify a municipality in writing that it intends to construct such a system. If an owner or developer does so, and the municipality wishes to collect PILOTs on that system, then within 60 days of receiving the notice of intent, the municipality must notify that owner or developer that it intends to require it to enter into a PILOT contract. See § 487(9)(a). Note that the law does not require an owner or developer to use a specific form or include specific language when giving a municipality notice of its intent to construct a solar energy system.

Ownership

11. May solar panels receive the § 487 exemption if they are not owned by the owner of the underlying land or building?

    A: Yes. There is no ownership requirement in § 487, so solar panels that otherwise qualify are entitled to the § 487 exemption even if they are owned by a third party.

12. Solar panels will be installed on property that is owned either by a municipality or by a public or private college. The panels themselves will be owned by a private entity, which will sell the electricity to the municipality or college at a discounted rate. Due to the 15-year limit on the § 487 exemption, it has been suggested that the panels may be granted a permanent exemption under the exemption statutes that apply to municipal corporations or non-profit educational organizations, rather than under § 487. Is this permissible?

    A: No. The real property tax exemptions that apply to municipalities and non-profit educational organizations are embodied in RPTL §§ 406 and 420-a, respectively. Each statute provides that in order to qualify for the exemption real property must be both (1) "owned by" the eligible owner (i.e., the municipality or educational organization) and (2) used for qualifying purposes. Since these panels will be used to generate low-cost electricity for the municipality or college, it may reasonably be argued that these panels will be used for qualifying purposes.

    However, the use requirement is just *one* of the requirements that must be satisfied to qualify for exemption under § 406 and § 420-a. In each case, the property must *also* be *owned by* the exempt entity in order to qualify for exemption. Where the panels are owned by a third party, they may not properly be granted a § 406 or § 420-a exemption. We understand there are policy arguments in favor of extending those exemptions to panels in these cases, but doing so would require a change in the wording of the statutes. Under current law, only the § 487 exemption is potentially applicable to such systems.

    Note that this analysis does not require the removal of the § 406 or § 420-a exemption from the land or buildings to which the panels will be attached. If that land or those buildings will remain under the ownership of the municipality or college, we see no reason why the § 406 or § 420-a exemption should be removed from the land or buildings in these cases.

Residential conservation improvements

13. There is a separate exemption statute for "residential conservation improvements," namely, RPTL § 487-a. Do solar energy systems qualify for this exemption?

    A: No. RPTL § 487-a states in its entirety:

    > Insulation and other energy conservation measures hereafter added to one, two, three or four family homes, which qualify for (a) financing under a home conservation plan pursuant to article VII-A of the public service law, or (b) any conservation related state or federal tax credit or deduction heretofore or hereafter enacted, shall be exempt from real property taxation and special ad valorem levies to the extent of any increase in value of such homes by reason of such addition.

    It is undeniable that solar systems offer many benefits, but energy "conservation" is not among them. A conservation measure leads to the use of *less* energy. Examples include installing better insulation or upgraded thermostats, replacing leaky windows or inefficient furnaces, etc. Those are the types of improvements that § 487-a was enacted to exempt, as the legislative history indicates (see, e.g., L.1977, c.858, § 1, "Legislative Findings").

    Solar systems are in a different category: They lead to the use of clean, renewable energy in place of energy generated from fossil fuels, but they do not necessarily lead to the use of less energy overall. In fact, solar systems may actually lead to the use of *more* energy, since beyond the fixed cost of installation, the electricity they produce is essentially free.

    Moreover, it is a broadly-accepted principle of statutory construction that specific legislative language takes precedence over general language. While § 487-a generally applies to

"insulation and energy conservation measures," § 487 specifically applies to solar energy systems (as well as wind and farm waste energy systems). In fact, both statutes were enacted in the same year, just a few weeks apart (L.1977, c.322 and c.858). It only stands to reason that § 487-a must have been intended to apply to improvements *other than* solar energy systems.

We are aware that in 1980, three years after § 487-a was enacted, solar energy systems were added to the list of improvements that could qualify for financing under a home conservation plan pursuant to Article VII-A of the Public Service Law (L.1980, c.557). An indirect effect of that amendment was to render solar energy systems eligible for the § 487-a exemption for as long as that financing was available. However, the Article VII-A home conservation financing program was terminated on June 1, 1986 by § 135-c(1) of the Public Service Law. That being so, we believe the 1980 amendment that briefly extended this financing program to solar energy systems has no legal significance today.

Accordingly, we do not believe that the § 487-a exemption may properly be extended to solar energy systems.

Real Property Tax Law § 487

§ 487. Exemption from taxation for certain solar or wind energy systems or farm waste energy systems. 1. As used in this section:

(a) "Solar or wind energy equipment" means collectors, controls, energy storage devices, heat pumps and pumps, heat exchangers, windmills, and other materials, hardware or equipment necessary to the process by which solar radiation or wind is (i) collected, (ii) converted into another form of energy such as thermal, electrical, mechanical or chemical, (iii) stored, (iv) protected from unnecessary dissipation and (v) distributed. It does not include pipes, controls, insulation or other equipment which are part of the normal heating, cooling, or insulation system of a building. It does include insulated glazing or insulation to the extent that such materials exceed the energy efficiency standards required by law.

(b) "Solar or wind energy system" means an arrangement or combination of solar or wind energy equipment designed to provide heating, cooling, hot water, or mechanical, chemical, or electrical energy by the collection of solar or wind energy and its conversion, storage, protection and distribution.

(c) "Authority" means the New York state energy research and development authority.

(d) "Incremental cost" means the increased cost of a solar or wind energy system or farm waste energy system or component thereof which also serves as part of the building structure, above that for similar conventional construction, which enables its use as a solar or wind energy or farm waste energy system or component.

(e) "Farm waste electric generating equipment" means equipment that generates electric energy from biogas produced by the anaerobic digestion of agricultural waste, such as livestock manure, farming waste and food processing wastes with a rated capacity of not more than one thousand kilowatts that is (i) manufactured, installed and operated in accordance with applicable government and industry standards, (ii) connected to the electric system and operated in conjunction with an electric corporation's transmission and distribution facilities, (iii) operated in compliance with the provisions of section sixty-six-j of the public service law, (iv) fueled at a minimum of ninety percent on an annual basis by biogas produced from the anaerobic digestion of agricultural waste such as livestock manure materials, crop residues and food processing wastes, and (v) fueled by biogas generated by anaerobic digestion with at least fifty percent by weight of its feedstock being livestock manure materials on an annual basis.

(f) "Farm waste energy system" means an arrangement or combination of farm waste electric generating equipment or other materials, hardware or equipment necessary to the process by which agricultural waste biogas is produced, collected, stored, cleaned, and converted into forms of energy such as thermal, electrical, mechanical or chemical and by which the biogas and converted energy are distributed on-site. It does not include pipes, controls, insulation or other equipment which are part of the normal heating, cooling or insulation system of a building.

2. Real property which includes a solar or wind energy system or farm waste energy system approved in accordance with the provisions of this section shall be exempt from taxation to the extent of any increase in the value thereof by reason of the inclusion of such solar or wind energy system or farm waste energy system for a period of fifteen years. When a solar or wind energy system or components thereof or farm waste energy system also serve as part of the building structure, the increase in value which shall be exempt from taxation shall be equal to the assessed value attributable to such system or components multiplied by the ratio of the incremental cost of such system or components to the total cost of such system or components.

3. The president of the authority shall provide definitions and guidelines for the eligibility for exemption of the solar and wind energy equipment and systems and farm waste energy equipment and systems described in paragraphs (a) and (b) of subdivision one of this section.

4. No solar or wind energy system or farm waste energy system shall be entitled to any exemption from taxation under this section unless such system meets the guidelines set by the president of the authority and all other applicable provisions of law.

5. The exemption granted pursuant to this section shall only be applicable to solar or wind energy systems or farm waste energy systems which are (a) existing or constructed prior to July first, nineteen hundred eighty-eight or (b) constructed subsequent to January first, nineteen hundred ninety-one and prior to January first, two thousand twenty-five.

6. Such exemption shall be granted only upon application by the owner of the real property on a form prescribed and made available by the commissioner in cooperation with the authority. The applicant shall furnish such information as the commissioner shall require. The application shall be filed with the assessor of the appropriate county, city, town or village on or before the taxable status date of such county, city, town or village. A copy of such application shall be filed with the authority.

7. If the assessor is satisfied that the applicant is entitled to an exemption pursuant to this section, he or she shall approve the application and enter the taxable assessed value of the parcel for which an exemption has been granted pursuant to this section on the assessment roll with the taxable property, with the amount of the exemption as computed pursuant to subdivision two of this section in a separate column. In the event that real property granted an exemption pursuant to this section ceases to be used primarily for eligible purposes, the exemption granted pursuant to this section shall cease.

8. (a) Notwithstanding the provisions of subdivision two of this section, a county, city, town or village may by local law or a school district, other than a school district to which article fifty-two of the education law applies, may by resolution provide that no exemption under this section shall be applicable within its jurisdiction with respect to any solar or wind energy system or farm waste energy system which began construction subsequent to January first, nineteen hundred ninety-one or the effective date of such local law, ordinance or resolution, whichever is later. A copy of any such local law or resolution shall be filed with the commissioner and with the president of the authority.

(b) Construction of a solar or wind energy system or a farm waste energy system shall be deemed to have begun upon the full execution of a contract or interconnection agreement with a utility; provided however, that if such contract or interconnection agreement requires a deposit to be made, then construction shall be deemed to have begun when the contract or interconnection agreement is fully executed and the deposit is made. The owner or developer of such a system shall provide written notification to the appropriate local jurisdiction or jurisdictions upon execution of the contract or the interconnection agreement.

9. (a) A county, city, town, village or school district, except a school district under article fifty-two of the education law, that has not acted to remove the exemption under this section may require the owner of a property which includes a solar or wind energy system which meets the requirements of subdivision four of this section, to enter into a contract for payments in lieu of taxes. Such contract may require annual payments in an amount not to exceed the amounts which would otherwise be payable but for the exemption under this section. If the owner or developer of such a system provides written notification to a taxing jurisdiction of its intent to construct such a system, then in order to require the owner or developer of such system to enter into a contract for payments in lieu of taxes, such taxing jurisdiction must notify such owner or developer of its intent to require a contract for payments in lieu of taxes within sixty days of receiving the written notification.

(b) The payment in lieu of a tax agreement shall not operate for a period of more than fifteen years, commencing in each instance from the date on which the benefits of such exemption first become available and effective.