Letter Ruling 94-1: Sales Tax on Electricity Charges Designated as Additional Rent to Commercial Shopping Mall Tenants

February 3, 1994

You request a letter ruling concerning the application of the Massachusetts sales tax, G.L. c. 64H, to the furnishing of electricity by ********** ("the Landlord"), to tenants of various shopping malls pursuant to leases of realty. Specifically, you ask whether the Landlord's charges to commercial shopping mall tenants for electricity furnished by the Landlord which are designated as "additional rent" pursuant to leases of realty, are subject to sales tax under G.L. c. 64H.

RULING

For reasons discussed below, we rule that the Landlord's charges to commercial shopping mall tenants for electricity which are designated as "additional rent" pursuant to leases of realty are not subject to sales tax under G.L. c. 64H.

FACTS

The taxpayer ("the Landlord") is one of five ********** partnerships (collectively, "the Group"), each of which operates a shopping mall in Massachusetts. The Landlord operates ********** ("the Shopping Mall") located in Massachusetts. The Landlord purchases electricity used at the Shopping Mall from ("the Utility Company"). Currently, the ********** partnerships comprising the Group each pay sales tax to the utilities supplying them with electricity.

The Landlord leases its space to commercial tenants at the shopping mall, in accordance with written lease provisions which provide that the landlord will furnish electricity purchased through a single master meter to the tenants and charge each tenant for consumption and demand according to individual tenant requirements, as determined by engineer surveys. Each lease also provides that in addition to the monthly base electricity charge, the Landlord will add an administrative reimbursement charge to cover the cost of the Landlord's expense and overhead in the electricity redistribution process. The electricity charges, including the administrative reimbursement charge, are designated in the leases as "additional rent."

It is the Landlord's position that it does not "sell" electricity to its shopping mall tenants. Rather, the Landlord contends that it provides electricity as part of its contractual obligation under its real property lease, and that the charges to tenants for electricity and for the administrative reimbursement charges are nontaxable "additional rent" rather then taxable sales of electricity.

DISCUSSION

A. General

Massachusetts imposes a five percent sales tax on sales at retail of tangible personal property by any vendor in Massachusetts, unless a statutory exemption applies. See G.L. c. 64H, § 2. Since 1990, sales of gas, steam, electricity and fuel have been subject to tax as sales of tangible personal property, with certain exemptions not here relevant. See G.L. c. 64H, § 1, as amended by St. 1990, c.121. Sales and rental of real property are not subject to sales tax under G.L. c. 64H. See, e.g. Letter Ruling 82-122. G.L. c. 64H, §§ 1, 6. A "sale at retail" is a sale of tangible personal property for any purpose other than resale in the regular course of business. G.L. c. 64H, § 1.

B. Small Business Regulation

The Commissioner has promulgated regulations which set forth the rules for determining who must pay sales tax when one party purchases taxable fuel or services which are used by another party. See, e.g. Qualifying Small Business Exemption regulation, 830 CMR 64H.6.11. Although the exemption provided for sales of taxable fuel or services to a qualifying small business is not expressly at issue in this ruling, the general principles embodied in that regulation may be analogized to the circumstances you present. Under the Qualifying Small Business regulation, as a general rule, the person who pays for the taxable fuel is the purchaser of such fuel for purposes of determining whether the sale of such fuel is subject to sales or use tax. However, when the payor is an agent of another person, such other person is deemed to be the purchaser of the taxable fuel for purposes of determining whether the purchaser is a small business that is exempt on its purchases. See 830 CMR 64H.6.11(6). Section (7) of that regulation sets forth a number of criteria for determining whether one party will be deemed an agent of another party when making taxable purchases of fuel.

In 830 CMR 64H.6.11(7)(g) Example 2, the Commissioner provided an example of a landlord which purchases electricity for a number of office building tenants who share a common meter.

> "[T]he meter-sharing tenants consist of both small businesses and large businesses. Because the landlord ordinarily would not meet all of the criteria in 830 CMR 64H.6.11(7)(a)-(f), (e.g. 830 CMR 64H.6.11(7)(c), (d)), the landlord is not acting as an agent of the tenants. Therefore, the status of the landlord as a small business, rather than the status of the tenant, governs the applicability of the exemption. If the landlord is a qualifying small business, the landlord's purchases of electricity for the tenants in question would not be subject to tax.
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> If, however, the landlord is not a qualifying small business, the electricity charges attributable to purchases for a meter-sharing tenant are subject to tax, even if one or more such meter-sharing tenants is a small business. This is because the status of the landlord governs the applicability of the exemption when the landlord is not acting as an agent of the tenants."

Id.

Under the facts and circumstances you describe, the Landlord is not acting as an agent of its commercial shopping mall tenants and is therefore considered the purchaser of the electricity that it re-distributes to its tenants. Accordingly, the Landlord must pay sales tax on its purchases of electricity. Since the status of the retail purchaser determines eligibility for exemption as a small business, it is likewise the landlord's status as retail purchaser that determines his liability for the sales tax. To conclude that the landlord is not the purchaser, but rather a reseller of electricity in this instance would be inconsistent with the principles of the Qualifying Small Business Exemption regulation. Moreover, if a landlord were to sell electricity to his tenants, he would need authorization to do so and would be subject to the requirements of G.L. c. 164. Typically, electricity is sold by

electric companies registered as utility corporations and not by landlords in the business of leasing space. See, LR 83-25.

C. Other Jurisdictions

Massachusetts courts have not yet addressed the issue of whether charges for electricity by a landlord to commercial tenants of a shopping mall are subject to tax, when such charges are designated as "additional rent" in the tenants' leases. At least two jurisdictions, however, have addressed the issue under facts which are substantially similar to those you present, and found that such charges are not subject to tax. See e.g. Empire State Building Company v. New York State Dep't of Taxation & Fin., ("Empire State II") 81 N.Y.2d 1002; 615 N.E.2d 1020; 599 N.Y.S.2d 536 (1993), affirming Empire State Bldg. Co. v. New York State Dep't of Taxation & Fin., ("Empire State I") 185 AD2d 201; 586 N.Y.S.2d 597 (1992); Debevoise & Plimpton v. New York State Dep't of Taxation & Fin., 80 NY2d 657, 661, (1993). In the Matter of Rubo Sales Corp., D.T.A. No. 807347 (1992); In the Matter of Richman Brothers D.T.A. No. 804948 (1991); In the Matter of Parklane Hosiery Co., Inc. (1990); see also Omni International of Miami v. Department of Banking and Finance, 444 So.2d 540 (1984). Essentially, these cases have looked to the overall substance of the transaction and concluded that such charges are made only as an incident to the rental of commercial premises and not as part of separate transactions which have as their primary purpose the furnishing of utilities or utility services. See, e.g. Empire State II, 81 N.Y.2d 1002, citing Debevoise & Plympton, 80 NY2d 657, 661 (1993).

CONCLUSION

Under the facts you have presented, the Landlord does not purchase electricity as the agent of its tenants under the general principles of the Qualifying Small Business Exemption regulation, 830 CMR 64H.6.11. Therefore, we conclude that the Landlord's charges for electricity furnished through a master meter to commercial tenants and billed as "additional rent" are not subject to sales tax. However, the Landlord, as the consumer of the electricity, must itself pay sales tax on its purchases of electricity.

Very truly yours,

/s/Mitchell Adams

Mitchell Adams
Commissioner of Revenue

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