STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MUTUAL REDEVELOPMENT HOUSES, INC.	:	DECISION DTA NO. 817075
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1990 through November 30, 1993.	:	

Petitioner Mutual Redevelopment Houses, Inc., 321 8th Avenue, New York, New York 10001-4896, filed an exception to the determination of the Administrative Law Judge issued on December 7, 2000. Petitioner appeared by Alan G. Blumberg, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Robert A. Maslyn, Esq., and James Della Porta, Esq., of counsel).

Petitioner filed a brief in support of its exception and the Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on December 12, 2001.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner DeWitt dissents for the reasons set forth in a separate decision.

ISSUES

I. Whether the provision of electricity by Mutual Redevelopment Houses, Inc. to both its residential tenant-shareholders and its commercial tenants is subject to sales tax.

II. Whether Mutual Redevelopment Houses, Inc. is an entity separate from its tenant-shareholders for sales tax purposes.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Mutual Redevelopment Houses, Inc. ("Mutual"), incorporated on March 14, 1958, is a domestic corporation organized and existing under Article 5 of the Private Housing Finance Law of the State of New York, also known as the Redevelopment Companies Law. Petitioner owns and operates a housing cooperative consisting of 2,820 moderate-income apartments contained in 5 single and 5 double 21-story buildings located between 23rd and 29th Streets and between Eighth and Ninth Avenues in the Borough of Manhattan, City of New York, together with appurtenant commercial spaces (including retail stores and offices), garage and parking areas, playgrounds and other facilities. It has approximately 30 retail stores most of which are located on Eighth or Ninth avenues.

Petitioner's residents are all shareholders of petitioner. Each tenant-shareholder's ownership of shares entitles the tenant-shareholder to occupy an apartment in the cooperative pursuant to an occupancy agreement between the tenant-shareholder and petitioner which sets forth the terms and conditions of the tenant-shareholder's rights to occupancy. Each tenant-shareholder has one vote regardless of the number of shares allocated to that shareholder's apartment.

The monthly rentals that Mutual's tenant-shareholders pay pursuant to their occupancy agreements are in addition to the payment they make for the purchase of their shares in Mutual.

Mutual's original tenant-shareholders paid the purchase price of their shares to Mutual. Mutual's subsequent tenant-shareholders paid the purchase price of their shares to the outgoing shareholders whom they succeeded.

Petitioner is a limited-equity cooperative. Shareholders buy shares in the cooperative at a limited market price set by the Private Housing Finance Law under which petitioner was created. Shareholders pay between $10,000.00 and $14,000.00 for their shares in the cooperative depending on the type and size of apartment that they are purchasing. In addition to the amount paid for the shares, each shareholder pays a monthly carrying charge ranging from approximately $350.00 for a studio apartment to approximately $800.00 for a three-bedroom apartment. As prescribed by Private Housing Finance Law § 128, when a tenant-shareholder voluntarily leaves the cooperative, that shareholder receives from the successor tenant-shareholder the price paid for the shares, plus the allocable share of the mortgage amortization paid during the shareholder's occupancy of the apartment, less the cost of restoring the apartment.

There are income limitations on the individuals eligible to become shareholders and residents of petitioner. Tenant-shareholders are also required to submit annual income affidavits reporting their income. Surcharges are imposed on tenant-shareholders whose income exceeds the limitations set under the Redevelopment Companies Law.

Petitioner's commercial tenants, i.e., professional, retail and office, are not shareholders of the cooperative. Rather, they are tenants whose rentals are subject to market rates, without any legal limitations.

The only sources of funds available to cover petitioner's costs of operation are the monthly charges imposed on the tenant-shareholders under their occupancy agreements, the monthly charges imposed on its commercial tenants under their leases, parking fees and other similar charges, and, at times, interest earned on reserve funds.

New York City Housing Preservation and Development ("HPD") and the New York City Council regulate petitioner. In order to increase the monthly charges which each residential tenant-shareholder must pay, petitioner must submit the proposed increase to HPD for its approval.

Legal title to the assets of petitioner is vested in petitioner, which is a corporation, and not in its tenant-shareholders, who are individuals. However, petitioner's tenant-shareholders hold the sole and complete beneficial interest in the property and assets of petitioner.

Since the opening of its first building in 1960, petitioner has furnished electricity to its tenant-shareholders pursuant to their occupancy agreements with petitioner. The occupancy agreement, which has not changed since the cooperative first opened, sets forth the terms and conditions for the leasing of an apartment by petitioner to a member (tenant-shareholder).

According to paragraph Second of the occupancy agreement, the member agrees to pay a specific sum, as an annual carrying charge, in equal monthly payments. That paragraph further provides that those payments "shall be deemed to be payments on account of the Member's annual obligations," i.e., the "Member's proportionate share of the operating costs of the Cooperative."[1]

---

[1] For purposes of the occupancy agreement, proportionate share means "that proportion which the carrying charge fixed herein bears to the total carrying charges paid by all Members to the Cooperative. In computing the proportionate share of each member, the amount of the carrying charge allocated to the cost of gas and electricity on

(continued...)

Paragraph Third of the occupancy agreement sets forth the obligations of petitioner. Under paragraph Third(1), petitioner agrees "[t]o provide elevator service; hot and cold water in reasonable quantities at all times; heat at reasonable hours during the cold seasons of the year; air cooling at such times as the Cooperative shall deem reasonable; electricity; gas for cooking purposes. . . ."

Paragraph Fifth of the occupancy agreement sets forth the mutual obligations of petitioner and the member. Paragraph Fifth(13), the electricity clause, provides, as follows:

> Cooperative may without further notice discontinue the unmetered service of electric current to demised premises, in which event the carrying charges hereinabove provided for shall be reduced by that portion thereof allocated to the cost of electricity on the books of the Cooperative. In the event such condition occurs and if electric current be supplied by the Cooperative through a meter, Member covenants and agrees to purchase the same from Cooperative or Cooperative's designated agent at the terms, classification and rates not in excess of those charges to such consumers by the public utilities corporation serving the part of the city where the building is located. Bills therefor shall be rendered at such times as Cooperative may elect and the amount, as computed from a meter, shall be deemed to be, and be paid as additional carrying charges.

Since its inception, petitioner has also provided electricity to most of its commercial tenants pursuant to their leases. During the period September 1, 1990 through November 30, 1993, all but three of petitioner's commercial tenants[2] were required by their leases to obtain all of their electricity consumption from petitioner. The leases between petitioner and its commercial tenants are not identical.

---

[1](...continued)
the books of the Cooperative will not be considered." (Paragraph Second of the occupancy agreement.)

[2] The three commercial tenants that obtained electricity from Consolidated Edison were Associated Food Stores on 26th Street, McDonald's on Eighth Avenue and a movie theater for which Consolidated Edison provided approximately two-thirds of the electrical power and petitioner provided the remaining third.

A typical electricity clause from petitioner's commercial leases in use during the period September 1, 1990 through November 30, 1993, provided, in pertinent part, as follows:

> Landlord shall furnish to tenant all electricity reasonably required in connection with the use of the demised premises, and tenant shall pay to Landlord as additional rent each month an amount which shall be the sum of the cost of Landlord of the kilowatt - hours of electricity used by Tenant during the preceding month, plus an administrative surcharge of two cents ($.02) per kilowatt hour used by Tenant during the preceding month. The administrative surcharge shall be increased annually as of January 1 of each year by the same percentage as the percentage of increase in the average annual cost of electricity paid by Landlord for the preceding year. Landlord shall keep in good repair any necessary meter or meters for measuring Tenant's consumption of electricity, and shall have the right to enter the demised premises at reasonable times for such purpose.

An atypical electricity clause from petitioner's commercial leases in use during the same period provided, in pertinent part, as follows:

> (i) Landlord shall furnish to Tenant all electricity, steam and air cooling reasonably required in connection with the use of the demised premises, and Tenant shall pay to Landlord as additional rent on the first day of the month following each month during the term of this lease, beginning with the first day of the month following the effective date of this Modification, an electricity charge (the "Monthly Electricity Charge"), the amount of which will be computed by multiplying the monthly rate per kilowatt hour of electrical consumption paid for electricity usage by the residential tenant-cooperators of Landlord (exclusive of all extraordinary, non-routine, administrative, reserve fund or other charges, surcharges, taxes or assessments) during each month Tenant is obligated to pay a Monthly Electricity Charge times the number of kilowatt hours of electricity actually consumed by Tenant during each such month. In the event that the residential tenant-cooperators are charged at different rates, then the lowest of such rates shall be applied in determining the Monthly Electricity Charge. In addition, the Tenant will pay an administrative surcharge equal to the lesser of (i) ten (10%) percent of the Monthly Electricity Charge for kilowatt hours of electricity actually consumed, computed as set forth above, exclusive of all sales or other taxes or charges; or (ii) one ($.01) cent per kilowatt hour of electricity actually consumed.
>
> (ii) Tenant's actual monthly consumption of electricity shall be measured each month by a meter or meters which Landlord shall at its own cost and expense

> provide in the building of which the demised premises are a part and which Landlord shall keep in good repair. . . .
>
> * * *
>
> (iv) Each monthly bill for the Monthly Electrical Charge to be furnished by the Landlord to Tenant will show: (1) the kilowatt hours recorded on each meter installed by Landlord used to determine the actual monthly electrical consumption by the Tenant; (2) the total actual monthly kilowatt hours of electrical consumption by Tenant; and (3) the actual numbers read on the meters and the factor by which the same have been multiplied in order to determine kilowatt hours of consumption by the Tenant. . . .

From Mutual's inception in the early 1960s until approximately 1986, it purchased the electricity consumed by it and its residential and commercial tenants from the local public utility, Consolidated Edison.

From 1960 until 1982, petitioner made no separate charge to its tenant-shareholders for the electricity consumed by them in their apartments. Rather, the costs of that electricity, obtained from Consolidated Edison, were included in each tenant-shareholder's monthly carrying charges - - the tenant-shareholder's allocated share of the cooperative's budgeted operating costs.

In 1982, after approval by shareholder vote, petitioner installed submeters and began to charge its tenant-shareholders for electricity consumed in their apartments based on the submetered readings of their actual consumption. Petitioner hoped to achieve two goals through its conversion to submetering - - to encourage conservation of electricity and to provide a fairer system of allocating the cost of electricity consumed in the tenant-shareholders' apartments. It did not convert to submetering to make a profit and petitioner makes no profit on submetering.

Within the first year of the conversion to submetering of electricity, petitioner's management noticed a significant drop in electricity consumption by its tenant-shareholders.

Commencing in 1986 and continuing at all times thereafter, petitioner has operated a cogeneration plant which produces the electricity consumed by petitioner and its residential and commercial tenants other than the few commercial tenants who obtain the electricity used in their premises directly from Consolidated Edison. In addition to electricity, petitioner's cogeneration plant uses the byproducts from the electric generation for other energy purposes, i.e., to heat the domestic water system (hot water), to provide heat for the buildings in the winter and to provide chilled air cooling to the buildings in the summer.

At all times relevant to this matter, including the years 1990 through 1993, Mutual measured the usage of electricity that it provided to its residential tenant-shareholders and its commercial tenants by a submetering system. At all times since 1982, and including the period in issue, petitioner has billed its residential tenants for the electricity consumed in their apartments based on submetering. The electricity charge, for a time period two months earlier than the billing month, is billed as a separate charge on each tenant-shareholder's monthly rent bill. During the period September 1, 1990 through November 30, 1993, petitioner also billed its commercial tenants for electricity consumed in their leased premises based on submetering. The electricity charge was billed as a separate charge on each commercial tenant's monthly rent bill.

Electricity is used in all of the common areas of petitioner's buildings, including, among others, the public hallways, the lobbies, the elevators, the pump rooms, the mechanical rooms, senior citizens center, and the central power plant. The common areas are not separately metered. There is an overall meter for the entire plant. The cost of the electricity used in the common areas is factored into petitioner's operating costs on an annual basis.

On occasion, a residential tenant-shareholder fails to pay the monthly carrying charge, i.e., base rent, and the electricity charge. Petitioner will send that tenant-shareholder a late notice requesting payment. If the tenant-shareholder fails to respond to the late notice, petitioner will file suit in the New York City Housing Court for the unpaid monthly carrying charge and the electricity charge. If petitioner prevails in its suit, the housing court awards judgment to it for both the base rent and the electricity charge.

If a commercial tenant fails to pay the monthly base rent and the electricity charge, petitioner issues a late notice to that tenant. If the commercial tenant fails to respond to the late notice, petitioner brings suit in the New York City Commercial Landlord/Tenant Court for the unpaid base rent and electricity charge. If petitioner prevails in its suit, the commercial landlord/tenant court awards judgment to it for both the base rent and the electricity charge.

Petitioner does not provide electricity to any persons or entities other than its residential tenant-shareholders and its commercial tenants, all of whom are entitled to obtain electricity from petitioner pursuant to their occupancy agreements or leases with petitioner.

Mutual has never collected or paid sales taxes on the charges it imposes on its residential tenant-shareholders and commercial tenants for electricity provided to them pursuant to their occupancy agreements or leases.

During the fiscal years of petitioner that include the period September 1, 1990 through November 30, 1993, petitioner reported its receipts for electricity charges on its annual financial statements. For the fiscal years ending June 30, 1990 and June 30, 1991, petitioner's accountants prepared a document entitled "Statements of Operations" on which items constituting operating income and expenses were reported. On that statement, petitioner

reported income that it received from electricity charges as separate items under the headings "Income from cooperators" and "Stores and offices," and included it in total income for both fiscal years. For the fiscal years ending June 30, 1992 and June 30, 1993, petitioner's accountants prepared a document entitled "Statements of Revenues, Expenses and Deficit" on which, among other things, items constituting revenues and expenses were reported. On that statement, petitioner reported income that it received from electricity charges as separate items under the headings "Income from cooperators" and "Income from commercial tenants," and included it in total revenues for both fiscal years.

The Federal corporate income tax returns (Form 1120) that petitioner filed for the fiscal years that include the period September 1, 1990 through November 30, 1993, report that petitioner's total income consisted of interest income, gross rents and other income - - identified in a separate statement as including laundry income, television antenna fees, fees from Penn Station South, Inc., administrative fees, apartment exchange fees, fines and late fees, telephone, flooring reimbursement, cleaning reimbursement, painting reimbursement, repairs reimbursement and kitchen cabinet reimbursement. A comparison of the financial statements and the Federal corporate tax returns that are in the record indicates that petitioner included the electricity charges that it received from both its residential and commercial tenants in the amount reported as gross rents on its Federal corporate income tax returns.

In September 1993, the Division of Taxation (the "Division") commenced a sales tax field audit of petitioner's books and records for the period September 1, 1990 through August 31, 1993. The audit period was subsequently expanded to cover the period September 1, 1990 through November 30, 1993. The auditor requested petitioner's books and records, reviewed

same, and performed a detailed audit of petitioner's transactions. Upon review of petitioner's records, the Division determined, among other things, that petitioner was generating electricity and providing it to its tenants (residential and commercial), that the tenants were being charged for the electricity on a usage basis as measured by submeters and that the electricity was billed as a separate charge on each tenant's monthly statement. The Division concluded that the sale of electricity by petitioner to its tenants was a separate, independent transaction, and that petitioner was obligated to collect and pay sales taxes on the charges it imposed on its residential and commercial tenants for that electricity. The auditor calculated the total electricity income that petitioner received from its residential tenants for the period September 1, 1990 through November 30, 1993 to be $2,405,992.00, and the resulting additional sales tax due at 4% (pursuant to Tax Law § 1107[a]) to be $96,239.68.[3] She determined the total electricity income from the commercial tenants, including offices, for the period September 1, 1990 through November 30, 1993 to be $1,093,814.00, and the resulting additional tax due at 8.25% (pursuant to Tax Law §§ 1105[b]; 1107[a]; 1109) to be $90,239.66.

All other matters raised by the audit were resolved by the parties and are not at issue in this proceeding. However, the issue of whether petitioner's charges to its residential and commercial tenants for electricity consumed by them in their leased premises pursuant to either their occupancy agreements or leases were subject to sales tax was not resolved. Petitioner requested, and received on May 22, 1996, an advisory opinion (TSB-A-96[34]S) from the Department of Taxation and Finance concerning the taxability of petitioner's charges to its

[3] The auditor calculated the sales tax due on the total electricity income from residential tenants at a reduced rate of tax pursuant to Tax Law § 1105-A(a).

residential and commercial tenants for electricity provided pursuant to their occupancy agreements or leases.

During the course of the audit, petitioner executed a total of 10 consents, extending the period of limitations for assessment of sales and use taxes for the period September 1, 1990 through November 30, 1993. On October 31, 1997, petitioner, by David Smith, Chairman, executed the last consent having the effect of extending the period of limitations for assessment of sales and use taxes for the period September 1, 1990 through November 30, 1993 to March 20, 1998.

As a result of the sales tax field audit, the Division, on January 23, 1998, issued a Notice of Determination (Notice No. L 014624015-2) to petitioner asserting additional sales taxes due in the amount of $186,479.34, plus minimum interest, for the period September 1, 1990 through November 30, 1993.

The basis for the assessment was the Division's determination that petitioner was obligated to collect and pay sales taxes with respect to the charges it imposed on its residential and commercial tenants for electricity furnished pursuant to their leases, as measured by submetering, for the period September 1, 1990 through November 30, 1993.

On April 22, 1999, Mutual filed a timely petition challenging the assessment of the additional sales tax. Petitioner is not disputing the calculation of the additional sales taxes resulting from the audit adjustments. Rather, petitioner is challenging the Division's determination that its provision of electricity based on submetering to its residential and commercial tenants, pursuant to their respective leases, is subject to sales tax.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In her determination, the Administrative Law Judge noted pertinent provisions of the Tax Law which impose sales tax on receipts from sales, other than sales for resale, of electricity and electric service of whatever nature.

The Administrative Law Judge concluded that in the instant matter, petitioner provided electricity to its residential and commercial tenants pursuant to their occupancy agreements or leases. The Administrative Law Judge also concluded that petitioner's provision of electricity to its residential and commercial tenants was a sale of "electricity or electric service" and, therefore, taxable pursuant to Tax Law § 1105(b).

The Administrative Law Judge rejected petitioner's alternative argument that only the payments for electricity made to it by its commercial tenants are subject to sales tax because payments for electricity made to petitioner by its residential tenant-shareholders for the cost of electricity to those tenant-shareholders do not constitute sales. The Administrative Law Judge concluded that petitioner's argument that the payments for electricity made by its residents were made as part of a cost-sharing arrangement between a cooperative and its members, rather than as part of sales transactions between a seller and buyer, was without merit. Petitioner, a corporation organized and existing under Article 5 of the Private Housing Finance Law, owns and operates a housing cooperative, the residents of which are all shareholders of petitioner. Despite the tenant-shareholders' ownership of shares in petitioner, petitioner is a corporation. Legal title to petitioner's assets and real property is vested in petitioner, not in its tenant-shareholders. Thus, the Administrative Law Judge determined that petitioner and its tenant-

shareholders are separate entities, and, as such, transactions between them are subject to sales tax pursuant to Tax Law § 1105(b).

ARGUMENTS ON EXCEPTION

On exception, petitioner would add to the facts found by the Administrative Law Judge that petitioner's revenues from electricity charges to its tenants were listed separately on its financial statements so that petitioner's management could ascertain the amount of revenue attributed to electricity charges from its tenants.

Petitioner points out that the Administrative Law Judge found that petitioner furnished electricity to its tenants pursuant to their leases and did not furnish electricity to any person or entity other than its tenants. Therefore, petitioner argues that this matter is controlled by ***Debevoise & Plimpton v. New York State Dept. of Taxation & Fin.*** (80 NY2d 657, 593 NYS2d 974) and ***Empire State Bldg. Co. v. New York State Dept. of Taxation & Fin.*** (81 NY2d 1002, 599 NYS2d 536).

Petitioner argues that, in ***Debevoise*** and ***Empire State Building***, the Court of Appeals placed no emphasis on the method used by the landlord to calculate its utility charges. To the contrary, the billing method used in ***Debevoise*** indicates that although a meter was not used, the charges were based only on the dates and times the service was used, rather than being a fixed monthly charge. Thus, the billing was directly linked to the tenant's actual consumption of the services provided.

Petitioner asserts that the Administrative Law Judge's conclusion as to what constitutes "rent" was unduly restrictive. Petitioner states that the charges imposed by the landlord in ***Debevoise*** and ***Empire State Building*** also represented the landlord's economic cost of

electricity yet were found by the Court to constitute rent. Thus, petitioner argues that the Administrative Law Judge incorrectly concluded that the monthly electric charges of petitioner represent the economic cost of electricity and not an element of rent.

Petitioner maintains that the rent bills utilized by petitioner herein are virtually identical to those in ***Debevoise***. Moreover, the Court of Appeals held in ***Debevoise*** that the fact that a separate additional rent is charged for the overtime HVAC services did not change the fact that such services were furnished as a part of the rental of the premises and it should not be treated differently from the same services furnished during regular business hours. Finally, petitioner posits that it is not relevant whether or not New York City treated the electricity payments as rent for purposes of the commercial rent and occupancy tax imposed on petitioner's commercial tenants. Petitioner advances its alternative argument presented to the Administrative Law Judge that only payments made by its commercial tenants are subject to sales tax, since payments by residential tenant-shareholders to petitioner do not constitute sales. Petitioner compares this situation to the exemption of parking charges imposed by a homeowners association on its tenant-shareholders from sales tax provided by Tax Law §1105(c)(6).

The Division, in opposition to the exception, argues that the receipts from petitioner's sales of electricity are taxable as separate and independent sales of electricity in that actual usage was measured by submeters and each tenant was charged for actual usage by a separately stated charge. The Division asserts that metering of HVAC charges was not an issue in ***Debevoise*** nor was the taxpayer in ***Debevoise*** billed based on actual usage. In ***Empire State Building***, the Division maintains that the only issue before the Court was the appropriateness of sales tax on rent inclusion charges for nonmetered electricity. The Division states that the Court of Appeals,

in affirming the Appellate Division, held that sales tax should not be imposed on non-metered electricity charges included in rent based on a square footage formula because the electric service was provided only as an incident to the rental of the premises and was not a separate transaction which has as its primary purpose the furnishing of utilities or utility services.

The Division believes that in the present case petitioner is selling electricity measured by actual consumption in a transaction that is separate and distinct from the furnishing of premises for occupancy. The Division alleges that where charges are based upon actual consumption, there is no factual basis or legal authority for treating them as a part of the rental of the premises. They were separately measured and billed and were in addition to the rental charge, not a service furnished incidental to the rental. Although furnishing utility services is not the primary business of petitioner, the Division argues that when petitioner sells electricity to its tenants, it supplies and charges for electricity in the same manner as an outside utility. This is different from HVAC, which is not customarily available from an outside source and is more aptly incidental to the leasing of premises.

The Division states that because petitioner separately itemizes the electricity charges and identifies them as additional carrying charges, this is evidence of the distinction between rent and electricity charges. All the indicia of a sale exist in relation to the electricity charges. Pursuant to the ***Empire State Building*** decision, the rent inclusion factor was determined to be inseparable from charges for rent because the charge was not measured by actual consumption. The Division asserts that in ***Empire State Building***, the Court recognized that electricity charges based upon actual consumption is a distinct transaction and taxable as an identifiable sale of electricity. In the Appellate Division decision, the Division states that the Court noted that the

New York City Commercial Rent or Occupancy Tax on commercial tenants treats rent inclusion charges for electricity as part of rent subject to the rent tax. The Division argues that sales tax on that amount would be impermissible double taxation. However, the Division claims that, with petitioner's charges, petitioner generates its own electricity so there is no sale for resale and New York City tax is not imposed on electricity charges because the City considers them sales of electricity. To exempt petitioner's sales of electricity from taxation, maintains the Division, would confer on petitioner a competitive advantage over landlords who purchase electricity from a public utility and who pay sales tax on the purchase.

The Division agrees with the Administrative Law Judge's conclusion that petitioner has a distinct legal existence apart from its shareholders for purposes of the sales tax and that transactions between them are subject to sales tax, notwithstanding the provisions of Tax Law § 1105(c)(6) concerning parking provided by cooperative housing corporations to its members.

OPINION

Petitioner argues that it furnishes electricity to its residential and commercial tenants solely as an incident of their leases and as part of the rental of their premises. Therefore, it contends that under the ruling in ***Debevoise & Plimpton v. New York State Dept. of Taxation & Fin.*** (***supra***), its tenants' payments to petitioner for electricity charges are not subject to sales tax under Tax Law § 1105(b).

Tax Law §1105(a) imposes a four percent sales tax on every retail sale of tangible personal property, except as otherwise provided. Section 1101(b)(6) of that law defines "tangible personal property" as "[c]orporeal personal property of any nature. However, except for purposes of the tax imposed by subdivision (b) of section eleven hundred five, such term

shall not include gas, electricity, refrigeration and steam." Tax Law § 1105(b) imposes a four percent sales tax on the receipts from every sale, other than sales for resale, of: "gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature." Pursuant to the provisions of Tax Law §§ 1105-A, 1107(a) and 1109, the actual rate of tax imposed on sales of such products and services varies depending on the location of the sale and whether the product or service is used for residential purposes.

In considering whether the provision of electricity by petitioner to its tenants is subject to sales tax pursuant to Tax Law §1105(b), we must ascertain whether there is a "sale" of such electricity. A "sale" is defined in Tax Law §1101(b)(5) as "[a]ny transfer of title or possession . . . in any manner or by any means whatsoever for a consideration." It appears, without more, that the indicia of a sale are present in the instant case in regard to the provision of electricity by petitioner to its tenants. However, we are guided by the decisions of the Court of Appeals in ***Debevoise & Plimpton v. New York State Dept. of Taxation & Fin.*** (***supra)*** and ***Empire State Bldg. Co. v. New York State Dept. of Taxation & Fin.*** (***supra***).

Debevoise involved a lease which provided that the tenant would pay an annual "fixed rent" in twelve equal monthly installments. The fixed rent included the tenant's use of heating, ventilation and air conditioning ("HVAC") during normal business days.

> [I]f Tenant shall require . . . [HVAC] service at any time other than during business hours [8:00 A.M. to 6:00 P.M.] on business days ("after hours") . . . Tenant shall pay landlord's then established charges therefor as *Additional Rent* on demand (***Debevoise & Plimpton v. New York State Dept. of Taxation & Fin.,*** 183 AD2d 521, 584 NYS2d 298, emphasis added).

Since the charges for after hours HVAC were billed based on the landlord's "established charges," it is inferred that they were computed based on square footage or some other formula.

The Court of Appeals in ***Debevoise*** considered "whether the [Division] may tax the provision of overtime heat, ventilation and air conditioning (HVAC) services as a sale of 'refrigeration and steam service' under Tax Law §1105(b)" which were billed pursuant to the lease as "additional rent"[4] ***(Debevoise & Plimpton v. New York State Dept. of Taxation & Fin., supra***, 593 NYS2d, at 975). The Court of Appeals, in affirming the courts below, stated that its decision depended entirely on the construction to be given Tax Law §1105(b), and concluded "that section 1105(b) authorizes a tax on a utility service only when furnished in an *identifiable sale transaction* as a commodity or article of commerce" (***Debevoise & Plimpton v. New York State Dept. of Taxation & Fin.***, ***supra***, emphasis added), and did not apply to additional rent paid for HVAC services when supplied as an incident to the rental of the premises.

> [I]t seems evident that if the words of section 1105(b) are given their natural and most obvious meaning, the statute authorizes a tax only on the receipts from those transactions which can be identified as independent sales of utilities or utility services. Thus, by its plain import, the statute applies only to *separate transactions* which have as their primary purpose the *furnishing of utilities or utility services.* The Department would broaden the reach of section 1105(b) . . . to impose a tax not only on sales of utilities and utility services but also on rent paid when HVAC services are supplied (***Debevoise & Plimpton v. New York State Dept. of Taxation & Fin., supra***, 593 NYS2d, at 976, emphasis added).

Debevoise stands for the proposition that Tax Law § 1105(b) does not authorize a sales tax on utility services that are not separately identifiable (by metered service or otherwise) and which are provided as part of the basic or additional rental payments. To be taxable, the amount charged the tenant for utilities must be a separately identifiable sales transaction. We interpret this as meaning that the charges for utility service must reflect the tenants' actual utility usage

---

[4]For language on the lease provisions and "additional rent," we rely on the Supreme Court decision in ***Debevoise & Plimpton v. New York State Dept. of Taxation & Fin.*** (149 Misc2d 571, 565 NYS2d 973).

measured in some way, so that the tax thereon can be properly computed. Utility services included as part of the property rental and billed as part of rent based on square footage or another formula would not meet the requirements of ***Debevoise***. The Court of Appeals in ***Debevoise*** found that the applicable provisions of the lease providing for HVAC services could "in no way be construed as a sales clause and nothing in the lease agreement suggests that the overtime HVAC services are to be sold separately or to be furnished in any transaction independent of the lease" (***Debevoise & Plimpton v. New York State Dept. of Taxation & Fin., supra***, 593 NYS2d, at 977). Further, the Court held that Tax Law § 1105(b), by its plain import, "applies only to *separate transactions* which have as their primary purpose the *furnishing of utilities* or utility services" (***Debevoise & Plimpton v. New York State Dept. of Taxation & Fin., supra***, 593 NYS2d, at 976). Thus, the furnishing of these HVAC services could not be taxed as a sale.[5]

In ***Empire State Building***, the courts considered whether payment by tenants of electric rent inclusion charges for *non-metered* electricity services was subject to sales tax pursuant to Tax Law § 1105(b).[6]

The Appellate Division found that:

> The instant *non-metered electricity service* charges are incidental to the commercial tenants' rent charges, and do not constitute "sales" or "resales" of electricity for purposes of Tax Law § 1105(b). Although *prorated per square foot* for each lease, such charges are for use and occupancy and are *not indicative of*

---

[5]The Court also noted that the only statutory basis for taxing the overtime supply of HVAC under Tax Law § 1105(b) was that such supply constituted a sale of "refrigeration and steam service." However, costs of steam and refrigeration were held to constitute only a minor part of the landlord's charges for heating and air conditioning. "Indeed," the Court stated, "on many occasions, the landlord's charges for HVAC on which the Department bases its tax, are for providing only ventilation and air circulation which have no connection with steam or refrigeration and could not be taxable under section 1105(b)" (***Debevoise & Plimpton v. New York State Dept. of Taxation & Fin., supra***, 593 NYS2d, at 977).

[6]Each party in the instant case has relied heavily on ***Empire State Bldg. Co. v. New York State Dept. of Taxation & Fin.*** (***supra***) as support for their position.

> *the amount of electricity consumed by each tenant (**Empire State Bldg. Co. v. New York State Dept. of Taxation & Fin.,*** 185 AD2d 201, 586 NYS2d 597, 598, ***affd*** 81 NY2d 1002, 599 NYS2d 536, emphasis added).

The Court of Appeals, in affirming the Appellate Division, stated:

> Plaintiff's tenants' payment of an Electricity Rent Inclusion Factor (ERIF) was for electric service provided only as an *incident to the rental* of commercial premises in plaintiff's building and *not as part of "separate transactions* which have as their primary purpose the furnishing of utilities or utility services" (***Debevoise & Plimpton v. New York State Dept. of Taxation & Fin.,*** 80 N.Y.2d 657, 661, 593 N.Y.S.2d 974, 609 N.E.2d 514). The taxing of the ERIF payments as a sale of utility services under Tax Law § 1105(b) was therefore improper. (***Empire State Bldg. Co. v. New York State Dept. of Taxation & Fin., supra***, 599 NYS2d, at 537).

Both ***Debevoise*** and ***Empire State Building*** involved the Division's attempt to assert sales tax on non-metered utility services where said services were included and billed as part of basic or additional rental of realty. In both cases, the courts found that the Division was overreaching in its attempt to tax services that were not separate transactions which have as their primary purpose the furnishing of utility services.

The Appellate Division rendered its ***Empire State Building*** decision prior to the decision by the Court of Appeals in ***Debevoise***. However, the clear rationale of the Court of Appeals in both ***Debevoise*** and ***Empire State Building*** is that if otherwise taxable gas, electricity, refrigeration and steam or such services are provided as an incident of a lease agreement and *not as separate transactions*, then they are not subject to sales tax.

Petitioner here urges that it provides electricity to its tenants solely as an incident of its tenant leases and as part of the rental of their premises. Therefore, petitioner argues, the payments for electricity charges made to it by its tenants are not subject to sales tax under Tax Law § 1105(b).

As noted by the Administrative Law Judge, to determine whether the electricity charges are part of the rent, it is necessary to look beyond the mere labeling of those charges in the occupancy agreements or leases as a form of rent. The term "rent" implies a fixed sum to be paid at certain times for the use of property (***see***, ***140 West 69th Street Corp. v. Simis***, 186 Misc 342, 61 NYS2d 548; ***see also***, 74 NY Jur 2d, Landlord and Tenant, § 329). The term "rent" as used in a lease, will not be extended to include all payments, which, by the terms of a lease, a tenant is bound to make, such as payments of taxes, cost of improvements, or obligations to perform collateral covenants (***see, Arcangel v. Holling***, 258 App Div 180, 15 NYS2d 975, ***lv denied*** 258 App Div 1031, 17 NYS2d 1002 [wherein the Supreme Court held that where a tenant is required to pay his own gas, light and water bills, such charges do not constitute rent]; ***see also***, 74 NY Jur 2d, Landlord and Tenant, § 330).

In the instant matter, the Division does not dispute that, when electric service is furnished by the landlord measured on a square foot basis, it is not subject to tax. The Division, however, argues that by measuring the individual consumption of such service by each tenant through the use of a meter, it becomes a separately identifiable sales transaction and subject to sales tax. We agree. While it may be an unintended consequence, when the landlord began to separately meter its tenants' actual electric usage, and separately bill for such service based on actual consumption, the service became taxable. This is not a situation where the tenant is paying rent and all electricity is included as part of the rental as in ***Debevoise*** and ***Empire State Building***.

Moreover, we find the terms of the lease instructive. As set forth above at page 5, section FIFTH at paragraph 13 of the lease agreement mandates that tenants *must* purchase electric

service from petitioner as a separate sales transaction and was not payment of additional rent. We conclude that since petitioner separately charges for electricity usage on its tenants' monthly rent bills and identifies them separately from rental income on its annual financial statements, petitioner's provision of electric service to its tenants is a taxable utility service.

For the reasons stated in the determination of the Administrative Law Judge, we also reject petitioner's alternative argument that only payments made by its commercial tenants are subject to sales tax since payments by its residential tenant-shareholders do not constitute sales.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Mutual Redevelopment Houses, Inc. is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Mutual Redevelopment Houses, Inc. is denied; and

4. The Notice of Determination, dated January 23, 1998, is sustained.

DATED: Troy, New York
June 6, 2002

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner

COMMISSIONER DeWITT dissenting:

In this case, we consider, as did the Court of Appeals in ***Debevoise*** and ***Empire State Building***, whether the electric service provided by petitioner/landlord is taxable pursuant to Tax Law § 1105(b). That section imposes a four percent sales tax on the receipts from every sale,

other than sales for resale, of: "gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature." The focus of our concern is whether there is a "sale" of such electricity. As noted by the majority, a "sale" is defined in Tax Law §1101(b)(5) as "[a]ny transfer of title or possession . . . in any manner or by any means whatsoever for a consideration." Although many of the indicia of a sale are present in the instant case, it is my opinion that the Court of Appeals, through ***Debevoise*** and ***Empire State Building***, has made it clear that the transactions scrutinized herein are not subject to sales tax.

In ***Debevoise***, the Court considered "whether the [Division] may tax the provision of overtime heat, ventilation and air conditioning (HVAC) services as a sale of 'refrigeration and steam service' under Tax Law §1105(b)" (***Debevoise & Plimpton v. New York State Dept. of Taxation & Fin., supra***, 593 NYS2d, at 975). The Court stated that its decision depended entirely on the construction to be given Tax Law § 1105(b). It found that Tax Law § 1105(b) did not apply "to additional rental for HVAC services when supplied incidentally as part of the rental of premises" (***Debevoise & Plimpton v. New York State Dept. of Taxation & Fin.***, ***supra***, 593 NYS2d, at 976). It found that the HVAC services at issue were furnished under a lease agreement for the rental of office space. The applicable provisions of the lease providing for such services could "in no way be construed as a sales clause and nothing in the lease agreement suggests that the overtime HVAC services are to be sold separately or to be furnished in any transaction independent of the lease" (***Debevoise & Plimpton v. New York State Dept. of Taxation & Fin.***, ***supra***, 593 NYS2d, at 977). Further, the Court held that Tax Law § 1105(b), by its plain import, "applies only to separate transactions which have as their primary purpose the furnishing of utilities or utility services" (***Debevoise & Plimpton v. New***

York State Dept. of Taxation & Fin., ***supra***, 593 NYS2d, at 976). Thus, the furnishing of these HVAC services could not be taxed as a sale.

The majority notes that the overtime charges in ***Debevoise*** were "established charges" by the landlord and it infers from this that these charges were computed (i.e., measured) based on square footage or some other formula. Thus, for use of these overtime HVAC services, the tenant in ***Debevoise***, in my view, was billed a clearly ascertainable amount based on usage or consumption of these services by that particular tenant. This charge was in addition to the overall rental charge which included use or consumption of such services during regular or stated business hours, as set forth in the lease. Yet, the Court of Appeals found that providing these services was not a separate transaction but they were furnished pursuant to the lease and, thus, were not taxable. It is important to note that when the Court refers to "separate" transactions it does not merely mean identifiable transactions. If this were so, then the Court's decision in ***Debevoise*** would surely have been different than what it was. The Court uses the term "separate" to specifically distinguish those transactions which are independent of the lease. As the Court points out, "the HVAC services in question are furnished under a lease agreement" (***Debevoise & Plimpton v. New York State Dept. of Taxation & Fin.***, ***supra***, 593 NYS2d, at 976). Thus, the Court found them to be nontaxable.

The Court in ***Debevoise*** also noted that the only statutory basis for taxing the overtime supply of HVAC under Tax Law § 1105(b) was that such supply constituted a sale of "refrigeration and steam service." However, costs of steam and refrigeration were held to constitute only a minor part of the landlord's charges for heating and air conditioning. "Indeed," the Court stated, "on many occasions, the landlord's charges for HVAC on which the

Department bases its tax, are for providing only ventilation and air circulation which have no connection with steam or refrigeration and could not be taxable under section 1105(b)" (***Debevoise & Plimpton v. New York State Dept. of Taxation & Fin.***, ***supra***, 593 NYS2d, at 977). In ***Debevoise***, it was unclear to what extent the Court relied, for its conclusion of nontaxability, on the fact that some of the services furnished by the landlord were not taxable in any event under Tax Law § 1105(b).

This ambiguity was clarified in ***Empire State Building*** where the Court of Appeals considered whether payment by tenants of an Electric Rent Inclusion Factor was subject to taxation pursuant to Tax Law § 1105(b). It is from the decision of the Appellate Division in ***Empire State Building*** that we learn that the services provided by the landlord were "non-metered electricity services" which were "prorated per square foot for each lease" (***Empire State Bldg. Co. v. New York State Dept. of Taxation & Fin.***, 185 AD2d 201, 586 NYS2d 597, 598).

Notably, and contrary to the argument of the Division and the implication of the majority herein, the Court of Appeals did not adopt the reasoning of the Appellate Division in ***Empire State Building*** that there was a distinction in taxability between charges for use and occupancy and charges for electricity which were based on consumption. Of particular importance is the fact that the Appellate Division rendered its ***Empire State Building*** decision prior to the decision by the Court of Appeals in ***Debevoise***. The clear rationale of the Court of Appeals in both ***Debevoise*** and ***Empire State Building*** is that if otherwise taxable gas, electricity, refrigeration and steam or such services are provided as an incident of a lease agreement, and not as separate transactions, then they are not subject to sales tax.

In this regard, I do not find that either Tax Law § 1105(b) or the above-referenced decisions contain any reference to the methodology used to measure a tenant's liability for such services. The focus is strictly on whether or not such services are furnished as an incident of the lease or whether they are "separate transactions which have as their primary purpose the furnishing of utilities or utility services" (***Empire State Bldg. Co. v. New York State Dept. of Taxation & Fin.***, ***supra***, 599 NYS2d, at 537, ***citing Debevoise & Plimpton v. New York State Dept. of Taxation & Fin., supra***).

The majority believes that the use of meters to measure consumption of electricity makes the providing of electricity a transaction independent of the lease. However, in regard to the electricity furnished by petitioner, the Administrative Law Judge made certain significant "findings of fact," adopted by the majority, which belie their position. Most notable among these are the following:

> Since the opening of its first building in 1960, petitioner has furnished electricity to its tenant-shareholders pursuant to their occupancy agreements with petitioner (Determination, finding of fact "10");
>
> Since its inception, petitioner has also provided electricity to most of its commercial tenants pursuant to their leases (Determination, finding of fact "12");
>
> Petitioner hoped to achieve two goals through its conversion to submetering - - to encourage conservation of electricity and to provide a fairer system of allocating the cost of electricity consumed in the tenant-shareholders' apartments. It did not convert to submetering to make a profit and petitioner makes no profit on submetering (Determination, finding of fact "15"); and
>
> Petitioner does not provide electricity to any persons or entities other than its residential tenant-shareholders and its commercial tenants, all of whom are entitled to obtain electricity from petitioner pursuant to their occupancy agreements or leases with petitioner (Determination, finding of fact "20").

I note that the Division does not dispute that electric service furnished by a landlord which is measured on a square foot basis is not subject to tax. However, the Division argues, and the majority agrees, that by measuring the individual consumption of such service through the use of a meter, the service becomes taxable. This implies that because the landlord has more precisely measured and allocated such electric service among its tenants, the nature of such service has changed. I disagree. I see no distinction in the nature of the services furnished nor in the origin of such services, i.e., arising from the lease or occupancy agreement. I do not believe that by installing meters the landlord has suddenly caused such services "to be sold separately or to be furnished in any transaction independent of the lease" (***Debevoise & Plimpton v. New York State Dept. of Taxation & Fin.***, ***supra***, 593 NYS2d, at 977) as would be required to find them taxable under ***Debevoise***. Such services were furnished by petitioner herein on a non-metered basis until 1982. After that time, such services were furnished on a metered basis for the sake of energy conservation as well as economy. Except for the possibility of a difference in cost on a tenant-by-tenant basis, the electric service was provided by the landlord solely to its tenants and pursuant to occupancy agreements which remained the same both before and after the installation and use of meters. As the Court stated in ***Debevoise***:

> Daytime and overtime HVAC are indistinguishable; they involve the same services; both are provided as an incident of the lease agreement. That a separate additional rent is charged for it does not alter the fact that the overtime HVAC is furnished as a part of the rental of the premises and provides no rational basis for treating it differently from business hour HVAC under section 1105(b) (***Debevoise & Plimpton v. New York State Dept. of Taxation & Fin., supra***, 593 NYS2d, at 977).

So long as the landlord supplies electricity only to its tenants, the electric service is only provided as an incident of the lease agreement and not as part of transactions separate from the

lease which have as their primary purpose the furnishing of utilities or utility services, I agree with petitioner that its transactions fall squarely within ***Debevoise*** and ***Empire State Building*** and are not subject to sales tax, despite the fact that electricity is metered to each tenant-recipient and not provided on a less precise means of measuring individual tenant liability for such services, such as pursuant to square footage.

I am not distracted by the Division's argument that these transactions are taxable because it is necessary to equalize tax liability between a landlord that generates electricity for its tenants and a public utility. If the provision of electricity escapes sales taxation here, it is because the transaction between the landlord and the tenants itself is not a taxable sale, not because of favoritism shown to this petitioner at the expense of a public utility which charges sales tax to its customers. Additionally, even though petitioner separately bills the electricity charges on its tenants' monthly rent bills and identifies them separately from rental income on its annual financial statements, this does not convert the furnishing of electricity into a taxable sale.

Thus, I would reverse the determination of the Administrative Law Judge and find that petitioner's provision of electricity to its tenants is not subject to sales tax. Based on my conclusion, I need not consider petitioner's alternative argument that only payments made by its commercial tenants are subject to sales tax, since payments by its residential tenant-shareholders do not constitute sales.

DATED: Troy, New York
June 6, 2002

/s/Donald C. DeWitt
Donald C. DeWitt
President