STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
XO NEW YORK, INC.	:	DECISION DTA NO. 820005
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Years 2000 through 2003.	:	

Petitioner XO New York, Inc., c/o Michael O'Day, 11111 Sunset Hills Road, Reston, Virginia 20190, filed an exception to the determination of the Administrative Law Judge issued on September 29, 2005. Petitioner appeared by Anderson & Gulotta, P.C. (Anthony C. Gulotta, Esq., of counsel). The Division of Taxation appeared by Mark F. Volk, Esq. (Lori P. Antolick, Esq., of counsel).[1]

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 May 15, 2006 in New York, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner's purchases of electricity used to provide power to its telecommunications equipment are subject to sales tax.

[1]The parties waived a hearing before the Administrative Law Judge and agreed to proceed upon submission of documents and briefs.

FINDINGS OF FACT

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

Petitioner, XO Communications, Inc. ("XO"), is a nationwide provider of telecommunications services. It is a New York public utility with offices and equipment throughout New York State.

XO leased several properties from various real estate companies. The real estate companies held the leases on the properties that housed petitioner's office equipment.

During the period in issue, XO purchased electricity from Con Edison through the real estate companies. In most instances, the monthly rent and utility charges were listed on the same invoice. Petitioner used the electricity to provide power to its telecommunications equipment.

On or about May 28, 2003, petitioner applied for a refund of the sales tax it paid on the purchases of electricity which was used to provide power to its telecommunications equipment.

In a letter dated September 5, 2003, the Division of Taxation ("Division") advised petitioner that its claim for refund was denied because:

> Section 528.22 [of Article 22 of the Code of Rules and Regulations of the State of New York] exempts purchases of utilities used directly and exclusively in the production of tangible personal property for sale. Since the services provided by XO New York Inc. are not considered tangible personal property, the purchases of utilities would not qualify for the exemption.

The telecommunications switches in XO's New York facilities consisted of network links, interface modules, input/output controllers and peripheral equipment.

The telecommunications switches utilized by petitioner operated on direct current. In order to convert alternating current to direct current petitioner used several pieces of equipment including power plants, rectifiers, valve regulated lead acid batteries and cables. The rectifiers

converted the alternating current to direct current. The power plant controlled the amount of electricity flowing to the valve regulated lead acid (VRLA) batteries and ensured that the electricity flowing into the switching equipment was constant by distributing the release of current from the rectifiers and VRLA batteries. The VRLA batteries provided the float charge necessary to equalize the release of direct current to the switch equipment.

The switches operated 24 hours a day throughout the year.

Petitioner operated switches at the following locations in Manhattan: 111 Eighth Avenue, Room 525-535; 15 West 37th Street, 3rd Floor; 60 Hudson Street, 13th Floor, and 75 Broad Street.

With the exception of the 111 Eighth Avenue, Room 525-535 location, all of the switches were separately metered. Consequently, all of the electricity was used to power the telephone switch equipment.

The 111 Eighth Avenue electricity meter powered the telecommunication switch and administrative space. Petitioner determined the refund request amount by using a square footage utility survey. During the refund period, petitioner leased 118,905 feet of real estate at 111 Eighth Avenue, of which 115,680 or 97.29 percent of the total leased space, was used to house telecommunications equipment. Petitioner applied the forgoing percentage to the total New York sales tax paid on electricity to arrive at the requested refund amount.

Petitioner filed a Request for Conciliation Conference and, in a Conciliation Order dated April 2, 2004, the request was denied.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In this proceeding, petitioner relies upon three provisions of the Tax Law which provide for exemptions from sales tax in order to support its position that it is entitled to a refund of the sales tax it paid on its purchases of electricity. To qualify for an exemption from tax, petitioner bears the burden of proving its entitlement to the exemption sought (***citing***, ***Matter of Grace v. New York State Tax Commn.***, 37 NY2d 193, 371 NYS2d 715, ***lv denied*** 37 NY2d 708, 375 NYS2d 1027).

The Administrative Law Judge noted first that Tax Law § 1105(b)(1)(A) imposes tax on, among other things, the sale of electricity. Initially, petitioner maintained that its purchases of electricity which were used in the production, delivery or rendering of telecommunications services are not subject to sales tax. Petitioner relied upon Tax Law § 1101(b)(6), which defines tangible personal property, and Tax Law § 1115(a)(12-a) arguing that electricity is tangible personal property for purposes of the tax imposed by Tax Law § 1105(b)(1). Petitioner urged that since Tax Law § 1105(b)(1) imposes a tax on the receipts of every sale of electricity and telephony and since both the receipt from the sale and the exemption from the retail sale each occur at the time of the sale, the purchase of electricity by a telephone company is an exempt purchase when used directly and predominantly to provide telephony.

Section 1115(a)(12-a) of the Tax Law provides that certain tangible personal property shall be exempt from the sales tax imposed by section 1105(a) and the use tax imposed by section 1110 of the Tax Law, when used predominantly to provide a telecommunications service.

The Administrative Law Judge noted that petitioner's argument failed to take into account the clear language of Tax Law § 1115(a)(12-a) which expressly pertains to the sales tax imposed by Tax Law § 1105(a) or the compensating use tax imposed by Tax Law § 1110. The

Administrative Law Judge noted that the tax at issue here is imposed by Tax Law § 1105(b)(1). Since the exemption set forth in Tax Law § 1115(a)(12-a) does not apply to petitioner's purchases of electricity, the Administrative Law Judge found the extensive arguments presented by petitioner regarding whether electricity is tangible personal property to be irrelevant.

Petitioner next argued, based on ***Matter of Niagara Mohawk v. Wanamaker*** (286 App Div 446, 144 NYS2d 458, ***affd*** 2 NY2d 764, 157 NYS2d 972), that if the electricity which it purchased should be found subject to tax, then it would result in multiple taxation. That case acknowledges that the economic burden would be excessive if purchases for resale were repeatedly taxed before reaching the ultimate consumer. However, the Administrative Law Judge pointed out that ***Niagara Mohawk*** reflects that a balance must be struck between the forgoing consideration and the need for raising revenue. In this instance, the Administrative Law Judge found that the clear language of the pertinent provision shows that the Legislature struck a balance between the competing concerns which must be honored.

Petitioner next claimed an exemption from sales tax on its purchases of electricity based upon Tax Law § 1115(a)(12), which provides that certain machinery and equipment used in the production of tangible personal property, gas or electricity, *inter alia*, for sale, shall be exempt from the tax on retail sales imposed by Tax Law § 1105(a).

The Administrative Law Judge also rejected this claim. The Administrative Law Judge pointed out that this section provides for an exemption for "machinery and equipment" which is used directly to manufacture tangible personal property for sale. The Administrative Law Judge found that the term "machinery and equipment" does not include electricity which petitioner purchases. Further, the electricity purchased by petitioner was not used in the production of "tangible personal property, gas, electricity, refrigeration or steam for sale" (Tax Law

§ 115[a][12]). It was used, the Administrative Law Judge observed, to produce a telecommunications service. Accordingly, the Administrative Law Judge found that petitioner was not entitled to an exemption under this section of the Tax Law.

Petitioner next argued that its purchases of electricity were exempt under Tax Law § 1115(c)(1), which provides an exemption for electricity used in a certain manner in the production of tangible personal property, gas, electricity, *inter alia*, for sale, by manufacturing or processing. This provision provides an exemption from the tax asserted by § 1105(a) and (b) and the compensating use tax under § 1110. Here, petitioner argues that this exemption applies because it is "producing" telecommunications, which petitioner claimed constitutes tangible personal property.

The Administrative Law Judge rejected this argument completely without merit. Petitioner noted that Tax Law § 1106(b)(6) defines tangible personal property as "corporeal property of any nature." The Administrative Law Judge found that telecommunications services are not corporeal property because they cannot be seen or handled.

The Administrative Law Judge found that a second difficulty with the forgoing argument is that telecommunications are not taxed as tangible personal property under Tax Law § 1105(a) but as a service under Tax Law § 1105(b). The Administrative Law Judge observed that if telecommunications were regarded as tangible personal property and taxable under Tax Law § 1105(a), the separate provisions of Tax Law § 1105(b) would be unnecessary. A statutory construction which renders a provision unnecessary should be avoided (***see,*** McKinney's Cons Laws of NY, Book 1, Statutes, § 98[a]). Petitioner does not use electricity in manufacturing.

The Administrative Law Judge next addressed petitioner's second argument under Tax Law §1115(c)(1), i.e., that the alternating current which it purchased was a raw material which

was converted to a direct current through the use of various equipment. According to petitioner, this equipment, along with the "raw material" of the alternating current was directly used in providing direct current for the telecommunications equipment. Petitioner asserted that even if electricity did not constitute tangible personal property, the Division should have agreed to refund the sales tax paid on its purchase of alternating current, since it "processed" the alternating current to make direct current which was needed to provide power to the telecommunications network.

The Administrative Law Judge acknowledged that Tax Law § 1115(c)(1) exempts the purchase of electricity that is used to produce tangible personal property, gas, electricity, refrigeration or steam. In this matter, however, the Administrative Law Judge found that the processing of the alternating current to direct current was not processing, but merely an intermediate step in selling petitioner's telecommunications services. The Administrative Law Judge held that telecommunications services are not within the scope of this exemption and therefore petitioner's reliance upon this exemption was again misplaced.

Finally, petitioner claimed that it was entitled to exemption under Tax Law § 1105-B(b). That provision provides, in relevant part, that the receipts from every sale of services of installing, repairing or maintaining tangible personal property described in Tax Law § 1115(a)(12),[2] supra, shall be exempt from tax imposed on sales by Tax Law § 1105(c). Petitioner reasoned, relying on the foregoing language, that it was error for the Division to deny a refund of the sales tax paid on its purchases of electricity, because the electricity was necessary to maintain its communications network. Petitioner claimed that without the purchases of

[2]Machinery and equipment used to manufacture tangible personal property.

electricity the network would fail and no longer exist. According to petitioner, the telecommunications system used to provide telephony would not exist without electricity.

The Administrative Law Judge noted that the Commissioner's regulations define "maintaining, servicing and repairing" to mean, "activities that relate to keeping tangible personal property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition" (20 NYCRR 527.5[a][3]).

The Administrative Law Judge stated first that petitioner purchased the electricity in order to operate the telecommunications equipment, not to repair it. Second, the exemption in Tax Law § 1105-B(b) applies only to repair and maintenance services to tangible personal property described in Tax Law § 1115(a)(12). The tangible personal property described in Tax Law § 1115(a)(12) is limited to "[m]achinery or equipment for use or consumption . . . in the production of tangible personal property, gas, electricity, refrigeration or steam for sale . . . ." Inasmuch as petitioner is not producing any of the enumerated items for sale, the Administrative Law Judge found that petitioner was also not entitled to exemption under Tax Law § 1105-B(b).

Therefore, the Administrative Law Judge denied the petition of XO New York, Inc.

ARGUMENTS ON EXCEPTION

Petitioner, on exception, urges, as it did below, that electricity is corporeal tangible personal property. Accordingly, petitioner urges that electricity (i.e., tangible personal property) used to power its equipment is used directly and predominantly in providing its telecommunications services and exempt from sales tax under Tax Law § 1115(a)(12-a).

The Division counters that this argument is fallacious since Tax Law § 1115(a)(12-a) provides an exemption from tax imposed by Tax Law § 1105(a) or the compensating use tax

imposed by Tax Law § 1110. The tax imposed upon petitioner, the Division urges, is under Tax Law § 1105(b)(1).

Petitioner also claims that holding that electricity is not tangible personal property for purposes of Tax Law § 1115(a)(12-a) would result in double taxation and would be contrary to the intent of the Legislature.

Next, petitioner asserts that it is entitled to an exemption from tax under Tax Law § 1115(a)(12), since it provides an exemption for machinery and equipment used or consumed in the production of tangible personal property for sale.

The Division counters that this "machinery and equipment" exemption does not include "electricity." In addition, the electricity purchased by petitioner, the Division argues, is used to produce telecommunications services not tangible personal property.

Petitioner also argues that it is entitled to have its purchases of electricity held exempt under Tax Law § 1115(c)(1) which exempts the purchase of electricity that is used to produce tangible personal property, gas, electricity, refrigeration or steam for sale. Petitioner claims that the alternating current which it purchased was converted into direct current by petitioner's equipment and used to provide telecommunications. Petitioner urges first, that it is using alternating electrical current and processing it into direct electrical current, which it uses in providing its telecommunications. Further, petitioner urges that in using the direct current, which it states is tangible personal property, it is exempt as a telecommunications provider. Even if electricity is not found to be tangible personal property, petitioner urges it should be entitled to a refund of sales tax paid on its purchase of electricity used in the manufacture of telecommunications which itself is corporeal tangible personal property (Tax Law

§ 1115[a][12-a]). Petitioner takes exception to the Administrative Law Judge's finding that telecommunications cannot be classified as corporeal tangible personal property.

Finally, petitioner claims, based on Tax Law § 1105-B(b) that it is entitled to a refund of sales tax paid on its purchases of electricity because electricity is necessary to maintain its communications network. The Division counters that the electricity purchased by petitioner is to operate its telecommunications business not to repair it. Further, Tax Law § 1105-B(b) provides an exemption only for repair and maintenance services to tangible personal property described in Tax law § 1115(a)(12), which is limited to machinery and equipment used or consumed in the production of certain enumerated items none of which are produced by petitioner.

OPINION

Statutes and regulations authorizing exemptions from taxation are to be strictly and narrowly construed (***Matter of International Bar Assn. v. Tax Appeals Tribunal***, 210 AD2d 819, 620 NYS2d 582, ***lv denied*** 85 NY2d 806, 627 NYS2d 323). When the issue to be decided is whether the taxpayer is entitled to an exemption from tax, the taxpayer must prove not just its interpretation of the statute is reasonable, but that its interpretation is the only reasonable interpretation or, in the alternative, that the Division's interpretation is unreasonable (***Matter of Grace v. New York State Tax Commn.***, ***supra***; ***Matter of Blue Spruce Farms v. New York State Tax Commn.***, 99 AD2d 867, 472 NYS2d 744, ***affd*** 64 NY2d 682, 485 NYS2d 526). Petitioner has failed to carry its burden in this regard.

We affirm the determination of the Administrative Law Judge for the reasons stated therein. One could easily be beguiled by the persistence, creativity and variety of petitioner's arguments, but ultimately, there is less here than meets the eye. We find that the Administrative Law Judge fully and completely addressed each of the arguments raised by petitioner. Petitioner

on exception has offered no evidence below or arguments on exception that would justify our modifying the determination in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of XO New York, Inc. is denied;

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

3. The petition of XO New York, Inc. is denied; and

4. The denial of refund letter dated September 5, 2003 is sustained;

DATED: Troy, New York
November 9, 2006

/s/Charles H. Nesbitt
Charles H. Nesbitt
President

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

/s/Robert J. McDermott
Robert J. McDermott
Commissioner