STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MUTUAL REDEVELOPMENT HOUSES, INC.	:	DETERMINATION 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 a petition 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.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on January 27, 2000 at 9:30 A.M., with all briefs to be submitted by June 8, 2000 which date began the six-month period for the issuance of this determination. Petitioner appeared by Szold & Brandwen, P.C. (Alan G. Blumberg, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Robert A. Maslyn, Esq., of counsel).

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

1. Petitioner, Mutual Redevelopment Houses, Inc., and the Division of Taxation (the "Division") entered into a stipulation of facts which has been incorporated into this determination.

2. 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.

3. 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.

4. 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.

5. 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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]

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

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

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. . . ."

11. 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.

12. 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.

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

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[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.

> 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.
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> (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. . . .
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> * * *
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> (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. . . .

13. 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.

14. 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.

15. 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.

16. 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.

17. 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.

18. 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.

19. 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.

20. 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.

21. 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.

22. 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.

23. In September 1993, 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.

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

25. 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.

26. 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

[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).

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.

27. 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.

SUMMARY OF THE PARTIES' POSITIONS

28. Petitioner asserts that the Division erroneously determined that its provision of electricity to its residential and commercial tenants pursuant to their occupancy agreements or leases is subject to sales tax. Relying on the ruling in ***Debevoise & Plimpton v. New York State Department of Taxation and Finance*** (80 NY2d 657, 593 NYS2d 974), petitioner contends that the payments for electricity charges that it receives from its tenants are not subject to sales tax. Petitioner avers that its provision of electricity to its residential and commercial tenants is not a separate and independent transaction. Rather, as the landlord and owner of the premises, petitioner "furnishes electricity to its residential tenants for use in their apartments pursuant to their occupancy agreements and furnishes electricity to its commercial tenants for use in their leased premises pursuant to their leases" (Petitioner's brief, pp. 13-14.) It points out that the parties stipulated that "Mutual 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 Mutual pursuant to their occupancy agreements or leases with Mutual" (Petitioner's brief, p. 14 and Division's Exhibit "G.") Petitioner also argues that the payments that its residential and commercial tenants make to it for electricity used in their leased premises constitute additional rent under the express terms of the leases and are treated as rent in court proceedings.

Alternatively, petitioner contends that only the payments for electricity made to it by its commercial tenants are subject to sales tax. Petitioner argues that the payments for electricity made to it by its residential tenant-shareholders would not be subject to sales tax because reimbursements made to petitioner by its members for the costs of electricity provided to those members do not constitute sales. It asserts that the facts clearly establish that the payments for electricity made by petitioner's residents were not made in purchase and sale transactions between a seller and buyers. Rather, it contends that

> [t]he payments were made as part of a cost-sharing arrangement between a cooperative and its members, who controlled the cooperative, who were the beneficial owners of the cooperative's assets, who had the legal power to determine how the costs of electricity would be allocated among themselves and who exercised that power in 1982 by voting to use submetering as the method of allocation from that point forward. (Petitioner's brief, p. 31.)

29. The Division contends that petitioner's sale of electricity to its residential and commercial tenants is not incidental to the rent charge as petitioner claims, but is a separate and independent transaction subject to the imposition of sales tax. It asserts that electricity is indisputably an article of commerce. The Division claims that the uncontroverted facts clearly establish that the sale of electricity at issue here is an identifiable sales transaction. It points out that: 1) the consumption of electricity by each tenant is separately measured and the tenants are billed a separate charge for electricity based upon actual usage; 2) the charge for electricity is

separate from, and in addition to the monthly rental charge; and 3) petitioner receives the payments for electricity and records them in an account separate and distinct from the rental income account. The Division also notes that petitioner failed to present any evidence that its commercial tenants were paying New York City's commercial rent and occupancy tax on the amounts they paid for electricity. It argues that had petitioner presented such evidence it would support petitioner's contention that the payments for electricity by its commercial tenants were part of the rent and were not in fact receipts from an independent sale of a utility.

As for petitioner's alternative argument, the Division asserts that it is a novel theory without basis in law. Citing relevant case law, it argues that, although petitioner is a corporation organized and existing under Article 5 of the Private Housing Finance Law, petitioner remains a distinct entity which has an existence separate and apart from its shareholders who collectively own it. The Division also avers that the record clearly establishes that petitioner, by its conduct and by written agreement, considered itself distinct from its shareholders. The tenant-shareholders were required to enter into written leases, i.e., the occupancy agreements, with petitioner, and were subject to the terms of the occupancy agreements, as enforced by petitioner.

30. In reply, petitioner argues that the position that the Division has taken in this matter is inconsistent with and directly contrary to the ruling issued by the Court of Appeals in the ***Debevoise*** case. It also claims that the Division's argument based on New York City's commercial rent and occupancy tax is misleading. Petitioner avers that its electricity billings to its 2,820 residential tenants make up the great bulk of the tax at issue in this matter. It notes that residential tenants are not subject to the commercial rent and occupancy tax. Petitioner also notes that even though its 30 commercial tenants are subject to this tax, it is unaware of whether

or not those tenants included the electricity charges as part of the rent subject to the tax, inasmuch as each individual tenant files his respective return and calculates the tax.

With respect to its alternative argument, petitioner contends that the cases holding that a corporation is a separate entity from its shareholders for sales tax purposes are not relevant. It contends that the relevant authority is Tax Law § 1105(c)(6), which exempts from sales tax the parking charges imposed by the cooperative, condominium or other form of homeowners association on its tenant-shareholders, unit owners or homeowners who reside in the development. Petitioner asserts that while Tax Law § 1105(c)(6) is not directed at electricity charges, it does constitute "legislative recognition of the principle on which Mutual's contention is based - i.e., that transactions of this nature between an organized group of homeowners and the homeowners themselves are really not the same as the traditional form of sales to which the sales tax applies" (Petitioner's reply brief, p. 14.)

CONCLUSIONS OF LAW

A. Tax Law § 1105(b) provides that a 4% tax shall be imposed on the receipts from every sale, other than sales for resale, of, among other things, electricity and electric service of whatever nature.

Tax Law § 1107(a) states, in pertinent part, "for a city of one million or more, in addition to the taxes imposed by sections eleven hundred five and eleven hundred ten, there is hereby imposed . . . and there shall be paid, additional taxes, at the rate of four percent. . . ."

Tax Law § 1109 provides, in pertinent part:

> In addition to the taxes imposed by sections eleven hundred five and eleven hundred ten of this article, there is hereby imposed within the territorial limits of the metropolitan commuter transportation district . . . and there shall be paid, additional taxes, at the rate of one-quarter of one percent. . . ."

B. 20 NYCRR 527.2(a)(2), which elaborates on Tax Law § 1105(b) provides:

> Although this tax is generally known as the 'consumer's utility tax,' the intention of the statute is to tax the enumerated sales and services whether or not rendered by a company subject to regulation as a utility company. The words 'of whatever nature' indicate that a broad construction is to be given the terms describing the items taxed. The inclusion of the word 'service' indicates an intent to tax, under this provision, items that are furnished as a continuous supply while the vendor-vendee relationship exists.

C. Under Article 28 of the Tax Law, a "person" includes, among others, "an individual, partnership, limited liability company, society, association, joint stock company, corporation, . . . and any combination of the foregoing" (Tax Law § 1101[a]).

For the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, a purchaser is "a person who purchases property, or to whom are rendered services, the receipts from which are taxable under [Article 28]" (Tax Law § 1101[b][2]).

Tax Law § 1101(b)(8)(i)(A) defines a "vendor" as "a person making sales of tangible personal property or services, the receipts from which are taxed by this article."

A person required to collect tax is defined "as every vendor of tangible personal property or services" (Tax Law 1131[1]). 20 NYCRR 526.11(a)(2) defines a person required to collect tax under Tax Law 1131(1) as "every person who makes sales or services which are taxed under sections 1105(b), (c) or (d) of the Tax Law."

D. In the instant matter, petitioner provided electricity to its residential and commercial tenants pursuant to their occupancy agreements or leases, and on each month's rent bill separately charged those tenants for the electricity consumed in their premises based on submetering. The Division determined that petitioner's provision of electricity to its residential and commercial tenants constituted a separate and independent transaction - - the sale of electricity or electric service, subject to tax under Tax Law § 1105(b). Petitioner argues that its

provision of electricity to its residential and commercial tenants is not a separate and independent transaction. Rather, petitioner asserts that it provided the electricity to its residential and commercial tenants as an incident to their occupancy agreements or leases, and the tenants' payment for the electricity constituted additional rent. The issue in this matter is whether the Division may tax petitioner's provision of electricity to its residential and commercial tenants as a sale of "electricity or electric service" under Tax Law § 1105(b).

E. As a rule of statutory construction, a statute which levies a tax is to be construed most strongly against the taxing authority and in favor of the taxpayer (***SIN, Inc. v. Dept. of Finance of the City of New York***, 126 AD2d 339, 343, 513 NYS2d 430, 433, ***affd*** 71 NY2d 616, 528 NYS2d 524; ***American Locker Co. v. City of New York***, 308 NY 264, 269). "A tax law should be interpreted as the ordinary person reading it would interpret it" (***Holmes Electric Protective Co. v. McGoldrick***, 262 App Div 514, 518, 30 NYS2d 589, 594, ***affd*** 288 NY 635). In construing Tax Law § 1105(b), the basic rule is applied that words "of ordinary import in a statute are to be given their usual and commonly understood meaning, unless it is clear from the statutory language that a different meaning was intended" (***Debevoise & Plimpton v. New York State Department of Taxation and Finance***, ***supra***, 593 NYS2d, at 975; McKinney's Cons Laws of NY, Book 1, Statutes § 94). When the particular statute is one which levies a tax, it is well established that it must be narrowly construed and that any doubts concerning its scope and application are to be resolved in favor of the taxpayer (***see, Matter of Bloomingdale Bros. v. Chu***, 70 NY2d 218, 519 NYS2d 347). Thus, a taxing agency may not extend the meaning of legislation so as to permit the imposition of a tax in situations not embraced within the statute (***see, Matter of Bloomingdale Bros. v. Chu, supra***).

F. The Court of Appeals, in ***Debevoise & Plimpton v. New York State Dept. of Taxation and Finance*** (***supra***), was asked to rule on 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). The Court concluded that when 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. The Court stated that "by its plain import, the statute 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 and Finance, supra***, 593 NYS2d, at 976). After construing the statute, the Court reviewed the following relevant sections of the lease agreement for the rental of office space and observed that:

> [I]n section 12.01 of the lease, the landlord agrees to furnish to the premises 'sufficient chilled or hot water as may be necessary to maintain a reasonably comfortable occupancy of the Premises' during business hours on business days.' Section 12.02 simply provides that if the tenant requires HVAC services at times other than business hours on business days, then 'as long as this Lease is in full force and effect, Landlord shall furnish the same upon advance notice from Tenant given prior to 2:30 P.M. on any business day, and Tenant shall pay Landlord's then established charges therefor as Additional Rent on demand.' (***Debevoise & Plimpton v. New York State Department of Taxation and Finance***, ***supra***, 593 NYS2d, at 976 - 977).

The Court held that the landlord's charges to its tenant, Debevoise and Plimpton, for providing after-hours HVAC services were furnished solely as an incident of the rental of the premises and thus were not taxable sales of refrigeration services under Tax Law § 1105(b).

Shortly after the Court of Appeals issued its decision in ***Debevoise***, it reviewed the issue of the taxability of rent inclusion charges for nonmetered electricity services provided by a landlord to a tenant in ***Empire State Building Company v. New York State Department of Taxation and***

Finance (81 NY2d 1002, 599 NYS2d 536). In a short memorandum opinion, affirming the order of the Appellate Division, the Court of Appeals held that a landlord's tenants' payment of an electricity rent inclusion factor was for electric service provided 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. The Court determined that the imposition of sales tax on tenants' payment to the commercial landlord of the electricity rent inclusion factor as a sale of utility services under Tax Law § 1105(b) was improper. In ***Empire State Building Company v. New York State Department of Taxation and Finance*** **(**185 AD2d 597, 586 NYS2d 597), the Appellate Division had determined that nonmetered 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). The Appellate Division had stated that "although prorated per square foot for each lease, such charges are for use and occupancy and are not indicative of the amount of electricity consumed by each tenant" (***Empire State Building Company v. New York State Department of Taxation and Finance*****,** ***supra***, 586 NYS2d, at 598).

G. 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 and Finance*** (***supra***), the payments for electricity charges made to it by its tenants are not subject to sales tax under Tax Law § 1105(b).

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, ***reh and app den*** 258 App Div 1031, 17 NYS2d 1002; ***see also***, 74 NY Jur 2d, Landlord and Tenant, § 330).

The relevant electricity clauses from the occupancy agreement and the commercial leases, in use during the period in issue, are set forth in Findings of Fact "11" and "12." It is clear from a review of those electricity clauses that petitioner's residential and commercial tenants are buying electricity from petitioner. Under the terms of paragraph Fifth(13) of the occupancy agreement, the tenant-shareholder agrees to purchase the electric current supplied by petitioner through a meter at "the terms, classification and rates not in excess of those charges to such consumers by the public utilities corporation" servicing the area in which the building is located. Pursuant to the terms of the "typical" electricity clause from petitioner's commercial leases, the tenant agreed to pay the sum of petitioner's "cost of the kilowatt - hours of electricity" used by the tenant during the preceding month, "plus an administrative surcharge of two cents ($.02) per kilowatt hour" used by the tenant during the preceding month. Under the terms of the "atypical" electricity clause, the commercial tenant agreed to pay a "monthly electricity charge," computed "by multiplying the monthly rate per kilowatt hour of electrical consumption paid for electricity usage by the residential tenant-cooperators" of petitioner "times the number of kilowatt hours of electricity actually consumed" by the tenant during each month. In addition, the tenant agreed to "pay an administrative surcharge equal to the lesser of (i) ten (10%) percent" of the monthly

electric charge "for kilowatt hours of electricity actually consumed, . . . exclusive of all sales or other taxes or charges; or (ii) one ($.01) cent per kilowatt hour of electricity actually consumed." Clearly, the monthly electricity charges computed pursuant to the electricity clauses under the leases, i.e., the occupancy agreements and the commercial leases, represent petitioner's economic cost of the electrical services that it supplied to its residential and commercial tenants, not an element of rent. Furthermore, since each residential and commercial tenant's monthly electricity charge is based on his actual consumption of electricity measured by submetering, that charge is indicative of the amount of electricity consumed by each tenant. The charges that petitioner imposed on its residential and commercial tenants for electricity provided pursuant to their occupancy agreements or leases, based on submetering, are independent sales of electricity, not incidents of the leases. Accordingly, those electricity charges are properly subject to sales tax.

H. Tax Law § 1105-A provides, in part:

> (a) Notwithstanding any other provisions of this article, but not for purposes of the taxes imposed by section eleven hundred seven or eleven hundred eight or authorized pursuant to the authority of article twenty-nine of this chapter, the taxes imposed by subdivision (a) or (b) of section eleven hundred five on the . . . receipts from every other sale, other than for resale, of propane (except when sold in containers of less than one hundred pounds), natural gas, electricity, steam and gas, electric and steam services used for residential purposes shall be paid at the rate of three percent for the period commencing January first, nineteen hundred seventy-nine and ending December thirty-first, nineteen hundred seventy-nine; at the rate of two and one-half percent for the period commencing January first, nineteen hundred eighty and ending September thirtieth, nineteen hundred eighty, and at the rate of zero percent on or after October first, nineteen hundred eighty.

20 NYCRR 527.13 provides, in part, as follows:

> (a) *Reduction in rate*. (1) Section 1105-A of the Tax Law provides for a reduction in the four percent statewide sales tax rate imposed under sections 1105(a) and 1105(b) of the Tax Law and in the four percent statewide compensating use tax rate imposed under section 1110(A) of the Tax Law, as set

forth in subdivision (c) of this section, on the receipts from every sale, other than for resale, used for residential purposes of:

(i) fuel oil (except diesel motor fuel),
(ii) coal,
(iii) wood (for heating purposes only)
(iv) propane (except when sold in containers of less than 100 pounds),
(v) natural gas,
(vi) steam, and
(vii) gas, electric and steam services.

For purposes of this regulation, the term 'energy sources' is used to describe the above mentioned tangible personal property and services.

(2) The reduction in the sales and compensating use tax rates does not apply to those tax rates imposed by localities, pursuant to Article twenty-nine of the Tax Law, nor to the four percent sales and compensating use tax rate in New York City which is imposed by section 1107 of the Tax Law. . . .

* * *

(d). *Definition*. (1) The term *residential purposes* means any use of a structure or part of a structure as a place of abode, maintained by or for a person, whether or not owned by such person, on other than a temporary or transient basis with the exclusion of accommodations subject to tax under subdivision (e) of section 1105 of the Tax Law.

(2) The tem *nonresidential purposes* means any use other than for residential purposes, as defined in paragraph (1) of this subdivision, including any use in the conduct of a trade, business or profession, whether such trade, business or profession is carried on by the owner of the structure or some other person.

(3) The term *common area* means any area of the premises of a structure used without distinction for both residential and nonresidential purposes.

(e) *Certification and allocation*. (1) Purchases of energy sources used exclusively for residential purposes shall receive the reduced tax rate without the necessity of certification.

* * *

(g) *Collection of tax*. (1) Every vendor, making a sale of energy sources to a customer who is classified as a residential customer, shall collect the sales tax at the reduced sales tax rate on such customer's total purchase.

I. Alternatively, petitioner asserts that only the payments for electricity made to it by its commercial tenants are subject to sales tax. It contends that the payments for electricity made to it by its residential tenant-shareholders would not be subject to sales tax because reimbursements made to petitioner by its tenant-shareholders for the cost of electricity to those tenant-shareholders do not constitute sales. Petitioner points to the following facts which it asserts supports its contention: (1) Mutual is a housing cooperative, whose residents are its shareholders and members of the cooperative. (2) Collectively, petitioner's tenant-shareholders are the beneficial owners of all of petitioner's assets and property. (3) Pursuant to their occupancy agreements with petitioner, the tenant-shareholders were personally responsible for paying all of petitioner's operating costs, less whatever income petitioner received from non-shareholder sources. (4) The tenant-shareholders had the legal power to determine how the costs of electricity would be allocated among themselves, which they exercised in 1982 by voting to use submetering as the method of allocation from that point forward. (5) Prior to submetering, petitioner's tenant-shareholders paid the costs of electricity consumed in their apartments as part of their monthly maintenance (rent) payments. (6) The change to submetering was simply a way to reallocate the existing charges to the tenant-shareholders for the costs of electricity in a more equitable manner.

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, is 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. The tenant-shareholders' ownership of shares in petitioner does not alter the fact that petitioner is a

corporation. Legal title to petitioner's assets and real property is vested in petitioner, not in its tenant-shareholders. A corporation is a distinct legal entity, independent of its shareholders (***see, Matter of 107 Delaware Assocs. v. New York State Tax Commn.***, 99 AD2d 29, 472 NYS2d 467, ***revd on dissenting opn below*** 64 NY2d 635, 488 NYS2d 634; ***Matter of Motion Marketing Associates, Inc.***, Tax Appeals Tribunal, July 23, 1992). Each tenant-shareholder's ownership of shares entitles that shareholder to occupy an apartment in the cooperative pursuant to an occupancy agreement, i.e., a written lease, which sets forth the terms and conditions of the shareholder's rights of occupancy. Petitioner, as landlord, enforces the provisions of the occupancy agreement when a tenant-shareholder breaches one of the agreement's provisions. The tenant-shareholders, in addition to purchasing shares in petitioner, pay a monthly carrying charge, i.e., base rent, and a monthly electricity charge to petitioner. It is clear that petitioner and its tenant-shareholders are separate entities, and, as such, transactions between them are subject to sales tax (***see, Matter of 107 Delaware Assocs. v. New York State Tax Commn., supra***).

Petitioner's tenant-shareholders purchase the electrical service that petitioner provides to them pursuant to their occupancy agreements. I have found that petitioner's provision of electricity to its residential and commercial tenants pursuant to their occupancy agreements or their leases is an independent sale of a utility. Since petitioner and its tenant-shareholders are separate entities, the receipts from petitioner's sales of electricity to its residential tenant-shareholders are subject to sales tax pursuant to Tax Law § 1105(b).

J. It is noted that the Legislature has provided some relief from the sales tax imposed under Tax Law § 1105(b). Tax Law § 1105-A(a), set forth in Conclusion of Law "H", provides for a reduction in the four percent statewide sales tax rate imposed under Tax Law § 1105(b) on

receipts from the sale of electricity for residential purposes. However, it does not apply to the sales and compensating use tax imposed by Tax Law § 1107 on the receipts from the sale of electricity for residential purposes. The Division calculated the sales tax due on the receipts from petitioner's sales of electricity to its residential tenant-shareholders, at a reduced rate of tax pursuant to Tax Law § 1105-A(a). Unfortunately, even at the reduced tax rate, the sales tax due on petitioner's receipts from the sale of electricity for residential purposes constituted the great bulk of the additional sales tax due in this matter because petitioner has 2,820 residential tenants.

K. The petition of Mutual Redevelopment Houses, Inc. is denied, and the Notice of Deficiency, dated January 23, 1998, is sustained.

DATED: Troy, New York
December 7, 2000

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE