STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
XO NEW YORK, INC.	:	DETERMINATION DTA NO. 820005
for Revision of a Determination or for Refund of Sales 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 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 years 2000 through 2003.

On December 16, 2004 and December 23, 2004, respectively, petitioner by its representative, Anderson, Gulotta & Hicks, P.C. (Michael A. Warnagiris, Esq., of counsel) and the Division of Taxation by Christopher C. O'Brien, Esq. (Lori P. Antolick, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by May 23, 2005, which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

1. 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.

2. 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.

3. 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.

4. 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.

5. 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.

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

7. 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.

8. The switches operated 24 hours a day throughout the year.

9. 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.

10. 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.

11. 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.

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

13. In accordance with New York State Administrative Procedure Act § 307(1), petitioner's proposed findings of fact have been substantially accepted and incorporated into this determination. Proposed finding of fact "1" was modified to reflect the record. Proposed finding of fact "3" and a portion of proposed finding of fact "4" were rejected as irrelevant. Additional findings of fact were also made.

CONCLUSIONS OF LAW

A. 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. An analysis of these arguments begins with the well-settled proposition that statutes and regulations authorizing exemptions from taxation are to be strictly and narrowly construed (***see***, ***Matter of International Bar Assn. v. Tax Appeals Tribunal***, 210 AD2d 819, 620 NYS2d 582, ***lv denied*** 85 NY2d 806, 627 NYS2d 323; ***Matter of Lever v. New York State Tax Commn.***, 144 AD2d 751, 535 NYS2d 158). In order to qualify for the exemption, petitioner bears the burden of clearly proving its entitlement to the exemption sought (***see***, ***Matter of Grace v. New York State Tax Commn.***, 37 NY2d 193, 371 NYS2d 715, ***lv denied*** 37 NY2d 708, 375 NYS2d 1027).

B. Tax Law § 1105(b)(1)(A) imposes tax on, among other things, the sale of electricity. Initially, petitioner maintains that its purchases of electricity which were used in the production, delivery or rendering of telecommunications services are not subject to sales tax. Relying upon Tax Law § 1101(b)(6) and § 1115(a)(12-a), petitioner argues that electricity is tangible personal property for purposes of the tax imposed by Tax Law § 1105(b)(1). Petitioner posits 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.

C. Section 1115(a)(12-a) of the Tax Law provides, in pertinent part, that:

> Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten . . . [t]angible personal property for use

> or consumption directly and predominantly in the receiving, initiating, amplifying, processing, transmitting, retransmitting, switching or monitoring of switching of telecommunications services for sale or internet access services for sale or any combination thereof.

D. As pointed out by the Division, petitioner's argument fails to take into account the clear language of the exemption. On its face, the exemption set forth in Tax Law § 1115(a)(12-a) expressly pertains to the sales tax imposed by Tax Law § 1105(a) or the compensating use tax imposed by Tax Law § 1110. The exemption set forth in Tax Law § 1115(a)(12-a) does not make any reference to or have any impact upon the tax at issue in this matter which is imposed by Tax Law § 1105(b)(1). Since it is clear that the exemption set forth in Tax Law § 1115(a)(12-a) does not apply to petitioner's purchases of electricity, the extensive arguments presented by petitioner regarding whether electricity is tangible personal property are irrelevant.

E. Petitioner has cited ***Matter of Niagara Mohawk v. Wanamaker*** (286 App Div 446, 144 NYS2d 458, ***affd*** 2 NY2d 764, 157 NYS2d 972) for the proposition that if the electricity which it purchased should be found subject to tax, then it will result in multiple taxation which should be avoided.

Unquestionably, the ***Niagara Mohawk*** case points out that the economic burden would be excessive if purchases for resale were repeatedly taxed before reaching the ultimate consumer. The ***Niagara Mohawk*** case further notes, however, that one must balance the forgoing consideration with the need for raising revenue. In this instance, the clear language of the pertinent provision shows that the Legislature struck a balance between the competing concerns which must be honored.

F. Petitioner next relies upon Tax Law § 1115(a)(12) to support the claimed exemption from sales tax. This section provides, in part, that the receipts from the following shall be exempt from the tax on retail sales imposed by Tax Law § 1105(a):

> Machinery and equipment for use or consumption directly and predominately in the production of tangible personal property, gas, electricity, refrigeration or steam for sale, by manufacturing, processing, generating, assembling, refining, mining or extracting, but not including parts with a useful life of one year or less or tools or supplies used in connection with such machinery or equipment . . . .

G. Petitioner's reliance upon this section is similarly flawed. This section provides for an exemption for "machinery and equipment" which is used in a particular manner. It is readily evident that the term "machinery and equipment" does not include electricity. Further, the electricity purchased by petitioner was not used to produce "tangible personal property, gas, electricity, refrigeration or steam for sale." It was used to produce telecommunications service. It follows that petitioner is not entitled to an exemption under this section of the Tax Law.[1] In this regard, it is noted that petitioner's reliance upon ***Matter of Newton Falls Paper Mill, Inc.*** (Tax Appeals Tribunal, May 9, 1991) is misplaced. In ***Newton Falls*** the taxpayer generated electricity that was used to produce paper for sale. Here, as part of the process of providing telecommunications services for sale, petitioner used the electricity to operate its telecommunications equipment. Unlike the taxpayer in ***Newton Falls***, petitioner did not produce tangible personal property for sale. Since this section is also inapplicable, petitioner's arguments regarding whether electricity is tangible personal property remain irrelevant.

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[1] Contrary to petitioner's argument, the legislative history of Tax Law § 1115(a)(12-a) does not support the position that the Legislature intended to create a parallel exemption to the production exemption. A Technical Analysis in the Legislative Bill Jacket shows that the purpose of this section was to create a new sales and use tax exemption for "tangible personal property for use or consumption directly and predominantly in the receiving, initiating, amplifying, processing, transmitting, retransmitting, switching, or monitoring of switching of telecommunications services for sale or Internet access services for sale (or both)" (A. 11006 Technical Analysis, May 8, 2000, Legislative Bill Jacket, L 2000, ch 63).

H. Petitioner submits that its purchases of electricity are exempt under Tax Law § 1115(c)(1). This section provides, in part, that:

> Fuel, gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature for use or consumption directly and exclusively in the production of tangible personal property, gas, electricity, refrigeration or steam for sale, by manufacturing, processing, assembling, generating, refining, or extracting shall be exempt from the taxes imposed under subdivisions (a) and (b) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten of this article.

I. In order to satisfy the forgoing exemption, petitioner has advanced two arguments. First, petitioner maintains that the foregoing exemption applies because it is producing telecommunications. In order to further conform to this section, petitioner has characterized telecommunications as tangible personal property.

This argument is also completely unconvincing. Petitioner has accurately noted that Tax Law § 1106(b)(6) defines tangible personal property as “corporeal property of any nature.” The term “corporeal property” is not defined in the Tax Law. However, the definition of “corporeal property” set forth in Black’s Law Dictionary (5th Edition) states, in pertinent part, “[s]uch as affects the senses, and may be seen and handled, as opposed to incorporeal property, which cannot be seen or handled, and exists only in contemplation.” Obviously, telecommunications is not corporeal property because it cannot be seen or handled.

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). 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]).

J. Petitioner's second argument under the last section quoted is that the alternating current which it purchased was a raw material which was converted to a direct current through the use of power plants, rectifiers and valve regulated lead acid batteries. 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 submits that even if its purchases of electricity were not the purchase of tangible personal property, the Division should have agreed to a refund of 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.

On its face, Tax Law § 1115(c)(1) exempts the purchase of electricity that is used to produce tangible personal property, gas, electricity, refrigeration or steam. Here, the processing of the alternating current to direct current was merely an intermediate step in order to sell its telecommunications services. Such services are not within the scope of this exemption and therefore petitioner's reliance upon this exemption is similarly misplaced.

K. Lastly, relying upon Tax Law § 1105-B(b), petitioner contends 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. In its brief, petitioner submits that without the purchases of electricity the network would fail and no longer exist. Thus, the purchases were allegedly necessary to preserve and maintain the telecommunications network. According to petitioner, the telecommunications system used to provide telephony would not exist without electricity.

L. Tax Law § 1105-B(b) provides:

> Receipts from every sale of the services of installing, repairing, maintaining or servicing the tangible personal property described in paragraph twelve of subdivision (a) of section eleven hundred fifteen of this article, including the parts with a useful life of one year or less, tools and supplies described in subdivision (a) of this section, to the extent subject to such tax, shall be exempt from the tax on sales imposed under subdivision (c) of section eleven hundred five of this article.

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

M. On its face, petitioner's argument is spurious. First, 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 and 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 last section quoted above is equally inapplicable.

N. Arguments based on citations to determinations of administrative law judges have not been addressed because such determinations may not be considered as precedent (Tax Law § 2010[5]). Further, in view of the clear and unambiguous language of the exemptions as applied to the facts of this case, petitioner's reference to cases from other jurisdictions was of little value (***cf.***, ***Matter of Clark***, Tax Appeals Tribunal, September 14, 1992 [where the absence of statutory definition necessitated the use of various sources to interpret the meaning of a term used in a statute]).

O. The petition of XO New York, Inc. is denied.

DATED: Troy, New York
September 29, 2005

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE