

March 23, 1999

Re:
Utility Tax
FLR-984732-011

Dear :

This letter is in response to your request, dated , for a ruling regarding the application of the New York City Utility Tax (the "UTX") to the transaction described below.

FACTS

The facts presented are as follows:

(the "Taxpayer") is a utility company subject to the supervision of the Public Service Commission. Prior to the enactment of chapter 536 of the laws of 1998, the Taxpayer excluded from its gross income subject to the UTX receipts from landlords who were subject to the UTX as "vendors of utility services," as defined in section 11-1101.7 of the Administrative Code of the City of New York (the "Code"). That exclusion was based upon the receipt from such landlords on a monthly basis of a resale remission certificate (the "Certificate") a copy of which was submitted with the request. In the Certificate, the landlord certified that the specified number of kilowatt hours of electricity purchased from the Taxpayer during the month was not purchased by the landlord for its own ultimate consumption or use but was purchased for resale. The Certificate included a calculation of the purchase price for those kilowatt hours and specified the dates of the Taxpayer's bills at issue. Certain landlords excluded the tax calculated on that amount from their remittance under the bills at issue. Other landlords paid the full amount of the bill or bills at issue and the Taxpayer allowed those landlords a credit for that tax against the next bill. The credit was designated on the bill as an "additional adjustment." The Taxpayer has represented that, in each case, the amount of the exclusion or credit represented the amount of tax on the specific amount of receipts from each customer identified by the customer as not for its ultimate consumption. Chapter 536 of the Laws of 1998 amended Code section 11-1102(b), effective January 1, 1998, to preclude regulated utilities such as the Taxpayer from excluding from gross income receipts from sales of electricity, gas, refrigeration, and water to vendors of utility services for resale to tenants as an incident to renting premises to tenants.

Certain customers of the Taxpayer are nonprofit entities described in section 186-a of the Tax Law as in effect in 1959 as follows:

....[The] state, municipalities, political and civil subdivisions and associations organized and operated exclusively for religious, charitable or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual....

Where such customers purchased electricity or gas not for their ultimate consumption or use, the Taxpayer also accepted a Certificate and allowed an exclusion or credit as described above. The Taxpayer ascertained the exempt status of a customer based on the receipt from a customer of a New York State Sales Tax Form ST 119.1-Exempt Organization Certification or similar documentation.

ISSUES

You have requested a ruling that notwithstanding the amendments to the UTX made by Chapter 536 of the Laws of 1998, the Taxpayer can continue to accept Certificates from nonprofit entities described above with respect to receipts for sales not for such customers' ultimate consumption or use on and after January 1, 1998.

CONCLUSION

Based upon the facts presented and representations submitted, we have determined that the Taxpayer can continue to accept Certificates from nonprofit entities described above with respect to receipts for sales not for such customers' ultimate consumption or use on and after January 1, 1998, based upon submission to the Taxpayer of proof of exempt status as described above.

DISCUSSION

Code section 11-1102, as amended by chapter 536 of the Laws of 1998, permits a regulated utility to exclude from gross income receipts from a vendor of utility services derived from sales for resale to vendors of utility services subject to the UTX, other than receipts from sales to vendors of utility services for resale to tenants as an incident to renting premises to tenants.

The City of New York (the "City") is authorized to impose the UTX by section 1201 of the New York State Tax Law (the "Tax Law"). Tax Law section 1201 provides that any tax imposed under its authority is "subject to the applicable limitations and exemptions in Part II of" Article 29 of the Tax Law. Tax Law section 1221(a)(3), part of Part II of Article 29, provides that the City cannot impose a tax upon persons subject to tax under Tax Law section 186-a "except in accordance with the provisions of section twenty-b of the general city law." The Taxpayer is an entity subject to tax under Tax Law section 186-a as a regulated utility company.

General City Law section 20-b provides that:

Notwithstanding any other provisions of law to the contrary, any city of this state, acting through its local legislative body, is hereby authorized and empowered to adopt and amend local laws imposing in any such city a tax such as was imposed by section one hundred eighty-six-a of the tax law, in effect on January first, nineteen hundred fifty-nine....

...

All of the provisions of section one hundred eighty-six-a of the tax law, so far as the same are or can be made applicable, with such limitations as are set forth in this section, and such modifications as may be necessary in order to adapt such taxes to local conditions shall apply to the taxes authorized by this section.

Subdivision 2 of section 186-a as in effect on January 1, 1959 provided in pertinent part

(a) the word 'utility' includes every person subject to the supervision of the state department of public service... and includes every person ... who sells gas, electricity, steam, water, refrigeration...; (b) the word 'person'... [does not include] the state, municipalities, political and civil subdivisions of the state ... and associations organized and operated exclusively for

religious, charitable or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual; (c)the words "gross income" mean and include receipts received in or by reason of any sales, conditional or otherwise, ... made or service rendered for ultimate consumption or use by the purchaser in this state....

Based upon the foregoing, nonprofit entities described in Tax Law section 186-a(2)(b) above are not subject to the UTX even if they are engaged in the sale of electricity, gas, water, or refrigeration. The 1998 amendments to Code section 11-1102.b by the New York State Legislature supercede any prior provision of Tax Law section 186-a as incorporated by General City Law section 20-b insofar as they affect the exclusion of receipts from vendors of utility services for resale to tenants. However, in our opinion, because Code section 11-1102.b is silent with regard to receipts from purchasers other than vendors of utility services subject to the UTX, a regulated utility, such as the Taxpayer, may exclude from its gross income receipts from sales not for ultimate consumption or use by the purchaser where the purchaser is not a vendor of utility services subject to the UTX.

Code section 11-1102.c provides that the gross income of any person subject to the UTX, such as a regulated utility, is presumed to be taxable. Based upon the facts presented and representations submitted, we have determined that the Taxpayer can continue to accept Certificates from nonprofit entities with respect to receipts for sales not for such customers' ultimate consumption or use on and after January 1, 1998, after submission to the Taxpayer of proof of such customers' exempt status as described above. We particularly rely on the Taxpayer's representation that the amount of the additional adjustment shown on a customer's bill described above (and the corresponding amount certain customers exclude from their remittances) represents the tax calculated on sales to that specific customer that the customer asserts are not for its ultimate consumption.

The Department of Finance reserves the right to verify the information submitted.

Sincerely,

Devora B. Cohn
Assistant Commissioner for Legal Affairs