

AUDIT OF LANDLORDS WHO PROVIDE THE UTILITY SERVICES TO THEIR TENANTS

I. BACKGROUND

Section 11-1102 of the New York City Administrative Code imposes a Utility Tax on every “Vendor of Utility Services” (“Vendor”) in the City. The tax is imposed on the “Gross Operating Income” of the Vendor. “Utility Services” include, in pertinent part, the furnishing or sale of gas, electricity, steam, water, refrigeration or the furnishing or sale of gas, electricity, steam, water, refrigeration or telecommunications services. A landlord furnishing or selling such items or services to tenants is within the definition of a Vendor of Utility Services.

The Utility Tax was amended in 1998 to simplify Utility Tax compliance for a landlord selling or furnishing Utility Services. The amendment was effective for periods beginning on and after January 1, 1998. Under this change, the Gross Operating Income of a landlord derived from furnishing or selling gas, electricity, steam, water or refrigeration to tenants or selling or rendering gas, electricity, steam, water or refrigeration services to tenants as an incident to the landlord’s activity of renting premises to tenants is excluded from the tax base. In the case of gas, electricity or steam, the Gross Operating Income is excludable only if the Utility Tax was paid for such Utility Services on a prior sale.

For periods prior to the effective date of the amendment, landlords must include receipts from such services or sales in the tax base. In computing Gross Operating Income for periods beginning prior to January 1, 1998, electricity furnished by a landlord on a rent inclusion basis is computed using the methodology sanctioned in Sage Realty Corp. v. O’Cleireacain (1996). Under this precedent, a landlord is able to deduct its cost for redistributed electricity, upon which the landlord’s supplier has already paid a Utility Tax. The deductible costs include the full amount for redistributed electricity attributable to the demised premises of the tenants as well as the common areas.

While the Sage case was being litigated, a number of pending matters were, with the agreement of affected taxpayers, placed in “on hold” status. In addition, although a number of landlords were identified as Utility Tax nonfilers, they were not contacted concerning possible Utility Tax liability while the issues associated with redistribution of electricity to tenants were being resolved. With the Sage case and the revision of the Utility Tax now concluded, liability for periods prior to January 1, 1998 can be addressed.

II. SCOPE

This Statement of Audit Procedure (SAP) provides guidance to Utility Tax auditors in auditing and resolving the Utility Tax liability of landlords arising from the sale of unmetered electricity for periods beginning before January 1, 1998 (“Outstanding Liabilities”) using an Accelerated Audit Procedure (“AAP”). The AAP is available for all audits or reaudits initiated on or before March 31, 2000 and concluded by June 30, 2000. Reaudits include matters referred back for further audit examination after an initial audit was completed. For example, matters on appeal to the Conciliation Bureau or the City Tax Appeals tribunal may be referred back for reaudit.

This procedure will not be available for resolution of any refund claims.

III. ACCELERATED AUDIT PROCEDURE

As an alternative to existing audit procedures, landlords with Outstanding Liabilities will be given the option of requesting an Accelerated Audit. The landlord requests the Accelerated Audit by consenting to an accelerated audit. The Accelerated Audit consent form is attached, as Exhibit A. Taxpayers under audit as of the effective date of this SAP will be contacted by the auditor to explain the options described in this SAP. For audits initiated after the effective date, the appointment letter initiating the audit will include information describing the Accelerated Audit.

A. Accelerated Audit

The scope of an Accelerated Audit will be limited. Only the tax periods included within the period January 1, 1997 through December 31, 1997 ("Audit Period") will be subject to a detailed audit.

Under the AAP, taxpayers that have not filed returns and taxpayers that have filed but have not correctly computed the tax will be required to compute the correct tax liability under a self-audit procedure. The auditor will prepare a self-assessment audit plan for the taxpayer to follow. The audit plan may include a sample worksheet to guide the taxpayer in the computation of its correct Utility Tax liability as well as an information document request outlining any additional information that the taxpayer is expected to supply. The taxpayer will be given a fixed period of time within which to complete the audit.

Once the auditor receives the completed self-audit, the auditor will review it for accuracy and completeness and submit the audit for review by his or her supervisor. Any issues concerning the audit should be resolved through correspondence or field visits. If the self-assessment audit is not completed within the time limits due to the taxpayer's failure to fulfill its responsibilities under the audit plan, the taxpayer will no longer be eligible for this expedited process.

B. Conclusion of the Audit

The Accelerated Audit is concluded by an Accelerated Audit Closing Agreement ("AACA.") under which the taxpayer agrees to a final liability for the Audit Period ("Proposed Final Liability") and the Department agrees to accept the Proposed Final Liability as final payment for all Outstanding Liabilities. The AACA form is attached as Exhibit B. If the taxpayer does not agree with the terms of the AACA, the Accelerated Audit will be discontinued and the auditor will audit all open periods other than the Audit Period and conclude the audit as a traditional audit.

C. Sale of Chilled Water

The AAP may also be used to resolve any tax liability arising from the sale of chilled water by a landlord to a tenant. Such resolution shall be on terms appropriate to the facts and circumstances.

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EXHIBIT B

ACCELERATED AUDIT CLOSING AGREEMENT

WHEREAS, _____, having E.I.N. _____ (hereafter identified as "Taxpayer") has consented to an Accelerated Audit of Utility Tax to determine the amount of such tax, if any, that it may owe for periods beginning prior to January 1, 1998 ("Outstanding Liabilities"); and

WHEREAS, such an Accelerated Audit has been completed; and

WHEREAS, the Audit Division of the New York City Department of Finance (hereafter identified as the "City") and the Taxpayer now wish to determine the amount of Outstanding Liabilities.

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and between the City and the Taxpayer (or the Taxpayer's authorized representative), that

1. That the Taxpayer's Outstanding Liabilities is \$_____.

This total amount consists of:

PERIOD	PRINCIPAL	INTEREST TO	TOTAL

2. The Taxpayer agrees that the liability shown in Paragraph 1 is correct and, pursuant to the Administrative Code of the City of New York, final and irrevocable. The Taxpayer agrees that said liability is currently due and owing and will pay the said liability pursuant to the terms stated in Paragraph 3 without protest. The Taxpayer hereby waives any and all right to or claim for credit/refund of all or any part of any payment of Utility Tax for the periods listed in Paragraph 1 whether heretofore paid or to be paid hereunder. Taxpayer waives all appeal rights. The Taxpayer will deliver to the City a check made payable to the "New York City Department of Finance" for the Total amount shown in Paragraph 1.
3. If payment of the Outstanding Liabilities is received by the City after the "Interest To" date of Paragraph 1, additional interest

**** SAMPLE ****

(compounded) will be due. Should Taxpayer fail to make payment as indicated in this paragraph, the Commissioner of Finance may institute those collection proceedings set forth in the New York City Administrative Code and other relevant statutes. The Taxpayer hereby waives all defenses to such collection proceedings.

4. This Agreement shall not be binding on either the Taxpayer or the City until signed by both the Taxpayer (or its authorized representative) and the Commissioner of Finance (or his authorized representative). The Taxpayer and the City represent that the persons signing below are duly authorized to sign on behalf of their respective parties.

COMMISSIONER OF FINANCE

By _____ DATE _____

TAXPAYER

By _____ DATE _____

**** SAMPLE ****

EXHIBIT A

UTILITY TAX
CONSENT TO ACCELERATED AUDIT PROCEDURE

NAME _____ I.D. NO _____

ADDRESS _____

CASE NO. _____ AUDIT PERIOD: FROM _____ TO _____

I, _____, have been advised by the New York City Department of Finance Representative, _____, that as an alternative to the existing audit procedures of the New York City Department of Finance, I may request an Accelerated Audit. Under an Accelerated Audit, the Taxpayer follows a self-audit procedure for the Audit Period in accordance with a self-assessment plan prepared by the auditor. The plan may include a worksheet for the taxpayer to follow and an information document request outlining additional documentation that the taxpayer is expected to supply. A fixed amount of time will be set in which to complete this audit.

I hereby consent that the audit may be conducted using the Accelerated Audit Procedure. This does not preclude my protest of the audit results. I understand that under this method my books and records, including computer files, must be complete and adequate for the Audit Period. I further understand that should I fail to complete my obligations under this method, or, if I disagree with the final proposed adjustment resulting from the Accelerated Audit Procedure, the Department of Finance may complete the audit using other existing audit procedures and the Accelerated Audit Procedure will no longer be available to me to resolve this matter.

This procedure will be used in the UTX audit of: (check all that apply)

- Unmetered Electricity Chilled Water

Signature Title Date Attested Finance Dept. Rep.