

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
XO COMMUNICATIONS SERVICES, LLC	:	DECISION
for Revision of Determinations or for Refund of Sales and	:	DTA NOS. 826686
Use Taxes under Articles 28 and 29 of the Tax Law for	:	AND 827014
the period September 1, 2011 through May 31, 2014.	:	

Petitioner, XO Communications Services, LLC, filed an exception to the determination of the Administrative Law Judge issued on March 9, 2017. Petitioner appeared by Van Allen, LLC (John E. Van Allen, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Robert A. Maslyn, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner filed a brief in reply. Oral argument was heard in New York, New York on November 9, 2017, which date began the six-month period for the issuance of this decision.

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 telecommunications services are subject to sales tax.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except findings of fact 15 and 30, which we have modified for clarity. The findings of fact, so modified, are set forth below.

1. Petitioner, XO Communications Services, LLC, is a national provider of telecommunication services.¹

2. Petitioner provides telecommunications services to small, medium and large businesses, as well as wholesalers and governmental entities such as public schools.

3. Petitioner provides intrastate, interstate, and international telecommunication services. Petitioner used geocoding and service categories to determine and track the various categories of telecommunication services provided.

4. Petitioner filed two separate claims for refund of the sales tax it paid on its purchases of electricity. The first claim, assigned claim number 2013-11-0387 and dated November 11, 2013, requested a refund in the amount of \$15,023.75, and pertained to petitioner's purchases of electricity at its premises located at 32 Sixth Avenue, New York, New York, for the period May 21, 2012 through July 5, 2013. The second claim, assigned claim number 2014-08-0255 and dated August 7, 2014, requested a refund in the amount of \$1,108,350.21, and pertained to petitioner's purchases of electricity at its premises located at 111 Eighth Avenue, 60 Hudson Street, and 75 Broad Street, New York, New York, for the period September 1, 2011 through May 31, 2014.

5. By letter dated January 6, 2014, the Division of Taxation (Division) denied the refund sought on claim number 2013-11-0387. By letter dated September 3, 2014, the Division denied the refund sought on claim number 2014-08-0255. The basis for the Division's denials was that

¹ Petitioner was formed as a result of the following transactions: on July 29, 1998, Nextlink New York, LLC merged and changed its name to Nextlink New York, Inc.; on September 27, 2000, Nextlink New York, Inc., changed its name to XO New York, Inc.; on January 14, 2005, XO New York, Inc., merged into XO Communications Services, Inc.; and on August 30, 2011, XO Communications Services, Inc., converted and changed its name to XO Communications Services, LLC. XO Communications, LLC is the sole member of XO Communications Services, LLC.

the electricity purchased was used by petitioner to provide telecommunication services, was not purchased for resale and was not resold as such.

6. Petitioner used the eighth floor of the building located at 32 Sixth Avenue, also known as 32 Avenue of Americas, to house a “Central Office.” That Central Office is the subject of DTA number 826686. Petitioner used the fifth and twelfth floors of the building located at 111 Eighth Avenue, the ninth and thirteenth floors of the building located at 60 Hudson Street, and the seventh floor of the building located at 75 Broad Street to house “Central Offices.” Those Central Offices are the subject of DTA number 827014.

7. Petitioner’s Central Offices house equipment used to provide interstate and intrastate telecommunication services, including voice services, internet services, optical services and private data networks. Specifically, petitioner’s Central Offices contain voice switches that provide basic voice services, routers for voice and internet services, and long haul optical transport equipment to provide connectivity over a fiber optic network.

8. The Central Office equipment is used to deliver services to the demarcation point. At the demarcation point, the service transfers to customer premise equipment (CPE). A common example of CPE is a router that can be purchased at a retail store.

9. At the demarcation point, the electrical voltage flowing through the line can be measured. However, petitioner does not measure the voltage and current received at the customer location. Petitioner does not have a measurement of how much electricity each customer used for each of the communication services.

10. Petitioner also provides colocation services, whereby petitioner’s customers install their own equipment in petitioner’s facility. Under such arrangements, petitioner provides the physical environment for the colocation customer’s equipment, including cooling and power to maintain the equipment. Colocation services do not traverse over petitioner’s network.

11. The electricity purchased by petitioner originates from power companies as alternating current (AC).

12. The electricity then travels to meters located at petitioner's Central Offices that measure the total consumption of electricity. The electricity purchased in the form of AC was used in petitioner's Central Offices for purposes such as powering office systems and support systems, including providing cooling for equipment, powering the lights, computers, coffee makers and other office equipment.

13. Electricity flows from the meter to an automatic transfer switch, which senses electricity flowing through it. If there is an interruption in the flow of electricity, the automatic transfer switch switches to a backup generator to provide electricity. Because there is a time lag from the interruption until the generators can produce adequate power, battery strings are used to provide immediate, interim electricity.

14. From the automatic transfer switch, electricity flows to the DC Power Plants, which convert AC to direct current (DC). As is the industry standard, petitioner's Central Office network electronics equipment operates off DC, and electricity from the DC Power Plants flows to Central Office network electronics equipment and battery strings so that they remain charged.

15. Administrative and colocation facilities located within the Central Offices operate off AC; therefore, electricity from the DC Power Plants does not flow to them, except when power from the DC Power Plants stored in the battery strings is used for interim power to petitioner's network equipment.

16. The DC Power Plants are metered so that petitioner can determine how much electricity flows through them. Petitioner reads the meter readings on a monthly basis. Those readings indicate that there is little variance in the amount of electricity flowing through the DC Power Plants from month to month.

17. During the hearing, petitioner stipulated to a reduction of the amount of refund claimed based on a calculation of the percentage of electricity passing through its DC Power Plants. Petitioner calculated the percentage of electricity passing through the DC Power Plants based on the amount of electricity entering each facility and the amount of electricity flowing through each DC Power Plant. The electricity passing through the DC Power Plants was used to power petitioner's network electronics that transmit telecommunication signals and keep the battery strings charged for backup power.

18. For the period at issue, petitioner calculated the percentage of electricity measured at the DC Power Plants in the Central Offices compared to the total amount of electricity purchased at the Central Offices as follows:

Site Location	DC Power Plants' Load Share of Total Electricity
32 Sixth Avenue, New York, NY	18.00%
111 Eighth Avenue, 5 th Floor, New York, NY	37.60%
111 Eighth Avenue, 12th Floor, New York, NY	21.30%
60 Hudson Street, New York, NY	36.10%
75 Broad Street, New York, NY	22.80%

During the hearing, petitioner stipulated to reduce the refund amount claimed to \$303,667.09 based on the percentage of the electricity metered at the DC Power Plants.²

19. The automatic transfer switches, generators, and battery strings are used in the event of power failure because the network equipment instantaneously stops operating and telecommunication services are immediately interrupted if the flow of electricity is disturbed.

² Petitioner further reduced the refund claim in its post-hearing brief to \$143,664.90 based on other factors discussed below.

20. In order to deliver end-to-end, or origination-to-destination, telecommunication services, petitioner's telecommunication network interacts with the network of other carriers. For example, a customer of petitioner located in New York City may place a call to Albany. If petitioner's local network in New York City does not extend to Albany, petitioner will lease the use of another carrier's network that services Albany, an incumbent local exchange carrier (ILEC). Likewise, petitioner also leases the use of its network to other carriers.

21. Throughout the entire path of the transmitted signal, including petitioner's network and the networks of other carriers, electricity is applied to keep the signal transmitting and receiving. The signal will be lost if the flow of electricity is interrupted anywhere along the end-to-end signal path.

22. Central Offices, whether owned by petitioner or leased facilities, need to connect with end-user CPE. The portion of the network that makes the connection from the Central Office to the CPE is known as the "Last Mile." In New York City, two-thirds of the Last Mile solutions are ethernet over copper and one-third of petitioner's Last Mile solutions are fiber to building. Both of these solutions provide a two-way transmission path that allows (i) the transmission of the telecommunication signal and (ii) the reception of the telecommunication signal.

23. For ethernet over copper, copper is the physical layer, or actual medium, that the signal runs through, referred to as "layer one." Ethernet is a signaling protocol that runs over layer one. Such signaling protocols are referred to as "layer two."

24. Ethernet over copper solutions use digital signal processors to turn audio streams into a coded series of ones and zeros. The coded stream of ones and zeroes is represented by different voltage levels of electricity running through the copper line (i.e., ones measure a certain voltage level and zeros measure a different level). Electricity continues to run back and forth through the

line, even when there is no one talking into the telephone or there is no message being transported.

25. The electricity is an embedded part of the signal that acts as a two-way conveyor belt. The electricity, or conveyor belt, carries the customer's information on top of it, both to and from the customer's CPE. The Central Offices act as hubs where multiple conveyor belts come together.

26. For fiber to building, information from petitioner's network to the customer's equipment (i.e., a telephone or computer), is decoded by equipment such as an "Ethernet NID" (a device that terminates the optical signal from the XO network, and decodes the information riding over that signal and presents it to the customer). Electricity powers lasers within the equipment, and the lasers generate light pulses of varying intensity and frequency. Specifically, the light pulses consist of photons, or photonic energy. A metro optical receiver node receives optical light from another metro optical receiver node and converts the laser light to electrical pulses of ones and zeros, and also sends out a certain frequency to the customer location.

27. For both ethernet over copper and fiber to building, if there is an electricity failure, the transmission path is lost for the section where the power is lost.

28. When electricity flows uninterrupted through the network, customers hear a dial tone when they pick up the telephone because the electricity is constantly and consistently powering the equipment providing the dial tone. However, petitioner does not provide power for all of a customer's telecommunications. A customer uses his own electricity, purchased separately from a utility, to send the signal to petitioner for a telephone call or internet search that the customer is sending out. Petitioner provides power for the communications *to* the customer, or at some point assists with the rest of the customer's communications once the customer powers to petitioner.

29. At the customer end of the network, the electricity is in the form of DC. The DC powered equipment in petitioner's network sends a signal to the customers' locations and the DC is associated with a certain constant level of voltage and current. Petitioner's customers cannot use the DC power for anything else; it can only be used for receiving or transmitting the telecommunication signal.

30. A portion of electricity is lost during transmission over the network. Depending on a variety of factors, the amount lost could be more than 50%.

31. Petitioner does not have a measurement of how much electricity each customer uses for each of the communications.

32. Petitioner sells, and its customers purchase, telecommunication services from petitioner. Petitioner does not advertise anything other than telecommunications.

33. Petitioner's customers are billed, and pay, for telecommunications. There is no separate charge on the customers' bills for electricity. There is no delineation on the bill for electricity. On cross-examination, petitioner's witness admitted that customers are not paying for electricity.

34. Petitioner did not provide resale certificates to its vendors for the purchase of electricity. Petitioner provided no evidence that it received resale certificates from any of its customers.

35. On petitioner's tax returns, petitioner reported its electricity purchases as a business expense and deducted the expense. Petitioner did not include its electricity purchases as inventory.

36. At the hearing, petitioner provided copies of invoices for its purchases of electricity at the Central Offices. Invoices for the Central Office at 75 Broad Street list a landlord fee and

charge sales tax on that fee. Petitioner has included the tax on the landlord fee in its computation of the refund sought.

37. During the hearing, petitioner submitted a one-page chart that listed sales revenue percentages broken down by category as follows: 16.6% for interstate and international telecommunication services; 27.5% for internet services; 22.6% for intrastate telecommunication services; 17% for “reseller revenue;” and 16.3% for “colocation and other services.” Petitioner provided no back-up documentation to support the claimed percentages for sales revenue categories.³

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began her determination in this matter by referencing the section of the Tax Law that imposes tax on sales of electricity, among other things, other than sales for resale. She noted that statutes and regulations authorizing exemptions from taxation are strictly and narrowly construed. According to the Administrative Law Judge, all sales described under Tax Law § 1105 (b) are subject to sales tax unless a taxpayer clearly establishes the contrary by proving its entitlement to the exemption sought.

Next, the Administrative Law Judge cited to the Division’s regulation regarding the imposition of sales tax on the purchase of electricity and certain other utilities. The regulation provides that all sales of electricity, except sales for resale or otherwise exempt sales under Tax Law § 1115, are subject to sales tax and that any purchaser for resale must present a resale certificate to the supplier. Furthermore, according to the Administrative Law Judge, the regulation provides that a utility that is not resold is subject to tax as a purchase at retail.

³ Petitioner attached to its brief below an Appendix A, which was not submitted into the hearing record. Appendix A appears to be based on the information contained in Exhibit 4 of the hearing record and contains calculations based on the percentages indicated in Exhibit 4 and petitioner’s arguments based thereon. As such, we agree with the Administrative Law Judge and deem Appendix A to set forth legal argument and not consist of new additional evidence.

The Administrative Law Judge then observed that petitioner's corporate predecessor made the same argument before the Appellate Division on appeal of this Tribunal's decision in a prior case (*see Matter of XO New York, Inc.*, Tax Appeals Tribunal, November 9, 2006, *confirmed Matter of XO N.Y., Inc. v Commissioner of Taxation & Fin.*, 51 AD3d 1154 [3d Dept 2008]). The Administrative Law Judge noted that one of petitioner's arguments on appeal was that the electricity it purchased should not be subject to sales tax as it was a component part of the telecommunications it sold to its customers, and as such, was a resale of electricity qualifying for the resale exclusion. The Administrative Law Judge found that the Appellate Division held that this argument was not made in the course of the administrative hearings and thus was not preserved for appeal. According to the Administrative Law Judge, the Appellate Division addressed the issue nonetheless, holding that petitioner did not purchase the electricity for resale as such, but rather to provide telecommunications services to its customers. The Administrative Law Judge also found that the Appellate Division rejected petitioner's predecessor's arguments that petitioner asserts in this case: namely, that electricity qualifies as tangible personal property and that failure to provide a resale exclusion would result in multiple taxation.

The Administrative Law Judge addressed the first argument by setting forth the regulation describing the exclusion from sales tax provided for resale of tangible personal property. The Administrative Law Judge rejected petitioner's contention that electricity qualified as tangible personal property and thus was a component part of services petitioner sold, stating that tangible personal property is defined under the Tax Law as "corporeal property of any nature." According to the Administrative Law Judge, in making this argument, petitioner relied on a regulation that did not relate back to the section of the Tax Law governing sales tax exclusions for purchases of electricity, but rather exclusions of sales of tangible personal property. The Administrative Law Judge observed that the Appellate Division had already held that electricity was not tangible

personal property in *Matter of XO N.Y., Inc.* and concluded that as a provider of telecommunication services, petitioner was not reselling electricity as such.

The Administrative Law Judge then addressed petitioner's multiple taxation argument. She similarly found that the Appellate Division rejected petitioner's argument in *Matter of XO N.Y., Inc.* The Administrative Law Judge observed that the Appellate Division held that there is nothing improper in multiple taxation per se and merely because a product or service is purchased to produce a product or service for sale, it does not follow that all such purchases are automatically exempt from sales tax. The Administrative Law Judge thus rejected petitioner's multiple taxation argument.

The Administrative Law Judge then considered the Division's argument that petitioner had not provided evidence sufficient to support the amount of its refund claim. Citing case law on the subject, the Administrative Law Judge observed that a taxpayer bears the burden of showing that any purchases purportedly qualifying for the resale exclusion were only made for the purpose of resale. The Administrative Law Judge noted that petitioner conceded that not all of the services it provides are subject to sales tax and stipulated to a lower refund amount based on that concession. Notwithstanding that concession, according to the Administrative Law Judge, petitioner failed to show that its purchases were used solely for purpose of resale and thus it did not sustain its burden of proving its entitlement to the exclusion from sales tax of its purchases of electricity. The Administrative Law Judge consequently concluded that the Division properly denied petitioner's refund claim.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner submitted six exceptions to the Administrative Law Judge's findings of fact. For its legal arguments, petitioner posits that the Administrative Law Judge incorrectly concluded that the Division properly denied its refund claim. In furtherance thereof, it argues

that a sale for resale is an exclusion from sales tax rather than an exemption, and as such, any ambiguities in the statute must be construed in favor of the taxpayer. It also argues that the electricity it purchased qualified for the resale exclusion because the electricity it purchased was resold as a component part of the telecommunications services it sold to its customers. It contends that the Appellate Division's dicta should not have been relied on by the Administrative Law Judge in her determination. Towards that end, petitioner argues that the Tax Law defines tangible personal property to include electricity. It argues that a limitation of the exclusion to sales for resale "as such" was not found in the Tax Law and thus the Administrative Law Judge's reliance on that phrase in her determination was misplaced. Petitioner takes exception to the Administrative Law Judge's rejection of its multiple taxation argument, stating that multiple taxation distorts legislative intent. Petitioner disagrees with the Administrative Law Judge's conclusion that petitioner did not provide sufficient evidence to support its refund claim, stating that the Administrative Law Judge erred in concluding that petitioner used direct current in providing telecommunication services to its customers.

The Division asserts that the Administrative Law Judge correctly decided the issues presented in this case. It argues that the findings of fact reveal that petitioner's purchases of electricity were not for the purposes of resale. Similarly, the Division argues that electricity is not defined as tangible personal property except for the purposes of Tax Law § 1105 (b). Thus, according to the Division, the purchased electricity cannot be a component part of a product or service for purposes of the resale exclusion. The Division argues that its interpretation of the regulation regarding imposition of sales tax on purchases of electricity is entitled to deference. The Division asserts that petitioner has not borne its burden of proof in demonstrating its entitlement to its refund claim. Lastly, the Division contends that there is no impermissible multiple taxation in this instance where the product or services purchased and sold are distinct.

OPINION

We begin with petitioner's exceptions to the Administrative Law Judge's findings of fact. Following our review of the record established at the hearing, we find that petitioner's exceptions numbered 1, 2, 4 and 5 are supported by the record and have been substantially incorporated in the findings of fact as determined by the Administrative Law Judge. We do not include petitioner's proposed factual finding contained in its exception 3 as it does not accurately reflect the record. Petitioner's exception 6 is likewise rejected to the extent that it proposes a legal conclusion, but we find that it has been otherwise accepted and incorporated into these findings of fact.

We now turn to petitioner's legal arguments. We first address petitioner's argument that the resale exclusion pursuant to Tax Law § 1105 (b) requires that any ambiguities in the statute be construed in its favor and against the Division (*see People ex rel. Mutual Trust Co. of Westchester County v Miller*, 177 NY 51 [1903]; *Matter of Finch, Pruyn & Co. v Tully*, 69 AD2d 192 [3d Dept 1979]).

Tax Law § 1105 provides for the imposition of a tax, including, in relevant part, on:

“(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

(b) (1) The receipts from every sale, other than sales for resale, of the following: (A) gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature . . .

(c) The receipts from every sale, except for resale, of the following services . . .” (Tax Law § 1105 [a] - [c]).

Tax Law § 1105 (b) imposes sales tax on receipts from sales, other than sales for resale, of specified utility services, including electricity. Sales for resale of utilities are thus excluded from the tax. In determining whether the exclusion applies, we construe the statute most strongly against the government and in favor of the taxpayer (*see Matter of Building Contrs. Assn. v*

Tully, 87 AD2d 909 [3d Dept 1982]). We note this rule of construction stands in contrast to the rule applicable with respect to exemptions from tax, which should be constructed strictly and narrowly against the taxpayer (*see Matter of International Bar Assn. v Tax Appeals Trib. of State of N.Y.*, 210 AD2d 819 [3d Dept 1994], *lv denied* 85 NY2d 806 [1995]). However, the burden of proof of entitlement to either an exclusion or an exemption from tax ultimately remains with the taxpayer (*see* Tax Law § 1132 [c] [1]; *Matter of Grace v New York State Tax Commn.*, 37 NY2d 193 [1975], *rearg denied* 37 NY2d 816 [1975], *appeal denied* 338 NE2d 330 [1975]; *Matter of Upstate Farms Coop. v Tax Appeals Trib. of State of N.Y.*, 290 AD2d 896 [3d Dept 2002])

With this principle in mind, we address petitioner's argument that its purchases of electricity qualified for the resale exclusion because the electricity was resold as a component part of the telecommunications services sold to its customers. Petitioner posits that electricity qualifies as tangible personal property under Tax Law § 1105 (a) for purposes of the resale exclusion, citing to *Matter of Burger King v State Tax Commn.* (51 NY2d 614 [1980]) in support of its argument. It asserts that the regulation describing the resale exclusion at 20 NYCRR 526.6 (c) applies to purchases of electricity where such electricity comprises a component part of services to be sold.

As stated above, Tax Law § 1105 (a) imposes a tax on the receipts from every *retail sale* of tangible personal property, except sales for resale. Tax Law § 1105 (b) imposes sales tax on the receipts of *sales* of certain utilities, including electricity, other than sales for resale. Tax Law § 1101 (b) sets forth definitions of terms used in Tax Law § 1105, including the definitions of "sale" and "retail sale." "Sale" is defined as "any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume. . . , conditional or otherwise, in any manner or by any means whatsoever for a consideration . . ." (Tax Law § 1101 [b] [5]). A "retail sale," in

contrast, is defined as “a sale of tangible personal property to any person for any purpose, other than . . . for resale as such or as a physical component part of tangible personal property . . .”(Tax Law § 1101 [b] [4]).

“Tangible personal property” is defined as “corporeal personal property of any nature” (Tax Law § 1101 [b] [6]). The same subsection of the Tax Law defines electricity as tangible personal property but only for purposes of the tax imposed by Tax Law § 1105 (b) (*id.*:

“However, except for purposes of the tax imposed by subdivision (b) of section eleven hundred five of this article, such term shall not include gas, electricity, refrigeration and steam”).

The regulations distinguish between 1) purchases of tangible personal property or services for resale as such or as a component part of other property and services; and 2) sales of utilities for resale as such (*compare* 20 NYCRR 526.6 [referencing Tax Law § 1101 (b) (4)] and 20 NYCRR 527.2 [referencing Tax Law § 1105 (b)]).

20 NYCRR 526.6 provides, in relevant part:

“Retail Sale. (a) The term retail sale or sale at retail means the sale of tangible personal property to any person for any purpose, except as specifically excluded.

* * *

(c) Resale exclusion. (1) Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer.”

Our examination of the law indicates that petitioner’s position that the electricity it purchased should be considered a component part of the telecommunication services it sells to its customers is not correct. We first observe that petitioner relies on the regulation dealing with “retail sales” of tangible personal property (20 NYCRR 526.6 [c]) as authority supporting its position, despite the fact that the subsection of the Tax Law imposing sales tax on the sales of

utilities only makes mention of “sales,” and not “retail sales” (*compare* Tax Law §§ 1105 [a] and [b]; *see also* Tax Law § 1101 [b] [6]). As we described above, the Tax Law defines “tangible personal property” as including electricity and other utilities only for the purposes of the sales tax imposed by Tax Law § 1105 (b). As these statutory terms are given specific definitions under Tax Law § 1101, we must give these terms the meanings as defined therein. We find that Tax Law § 1105 (a) imposes sales tax on retail sales, which only concern sales of tangible personal property, while Tax Law § 1105 (b) imposes tax on sales of electricity and other specified utilities. Similarly, we find that the resale exclusion for tangible personal property comprising a physical component part of tangible personal property applies only to retail sales under Tax Law § 1105 (a), and not sales under Tax Law § 1105 (b) (*see* Tax Law § 1101 [b] [4]; *compare* Tax Law § 1101 [b] [5]). For these reasons, we do not agree with petitioner that electricity should be considered included in the definition of tangible personal property for purposes of Tax Law § 1105 (a).

Petitioner attempts to analogize its position to the prevailing position of the taxpayer in *Matter of Burger King v State Tax Commn.*, where the taxpayer protested the Division’s determination that food packaging did not qualify for the tangible personal property resale exclusion. However, *Burger King* does not provide authority supporting petitioner’s argument that electricity qualifies as tangible personal property if used to provide services for sale to its customers (*see Burger King* at 622-623). *Burger King* does not impact our interpretation of Tax Law § 1101 limiting the inclusion of electricity within the definition of tangible personal property for purposes of the sales tax imposed by Tax Law § 1105 (b) (*see* Tax Law § 1101 [b] [6]). We agree with the Administrative Law Judge that petitioner’s reliance on 20 NYCRR 526.6 (c) and *Burger King* in support of its position is misplaced.

As the Administrative Law Judge noted, the “component part” language found in

20 NYCRR 526.6 (c), which deals with the treatment of retail sales of tangible personal property, is conspicuously absent from 20 NYCRR 527.2 (e), the regulation relating back to the utility service resale exclusion under Tax Law § 1105 (b). Furthermore, Tax Law § 1105 (b) makes no mention of a resale exclusion for utilities comprising a component part of property or services sold to a taxpayer's customers. We agree with the Administrative Law Judge that the sales tax resale exclusion under Tax Law § 1105 (a) and 20 NYCRR 526.6 (c) for the purchase of tangible personal property or services for resale does not apply to the purchase of utilities. We thus reject petitioner's contention that petitioner's purchases of electricity are exempt from sales tax as a component part of the services it offers its customers.

We now turn to petitioner's argument that the Division's rejection of its refund claim resulted in impermissible multiple taxation. Petitioner claims that the Administrative Law Judge erred in relying on dicta in *Matter of XO N.Y., Inc.* that stated that there was nothing inherently improper in multiple taxation. Petitioner relies on *Empire State Bldg. Co. v New York State Dept. of Taxation & Fin.* (185 AD2d 201 [1st Dept. 1992], *aff'd* 81 NY2d 1002 [1993]) in support of its argument that multiple taxation impermissibly distorts legislative intent.

We disagree with petitioner's characterization of the Appellate Division's holding in *Matter of XO N.Y., Inc.* on this point to be dicta; rather, it was an issue presented for review to the Appellate Division on appeal from our decision in that case (*see Matter of XO New York, Inc.*, Tax Appeals Tribunal, November 9, 2006). The Appellate Division held that purchases made to produce or provide a product do not automatically exempt such purchases from sales tax (*see XO New York, Inc.* at 1158; *citing Celestial Food of Massapequa Corp. v New York State Tax Commn.*, 63 NY2d 1020 [1984], *rearg denied* 64 NY2d 776 [1985]). Even if this were not so, *Empire State Bldg. Co.* is distinguishable on the facts and law; there the taxpayer charged its commercial tenants for electric service, which the court deemed to not represent the sale or resale

of electricity where it was not separately submetered, but was rather a rental charge not subject to sales tax (*see Empire State Bldg. Co.*). We thus reject petitioner's argument that imposition of sales tax on its purchases of electricity represented impermissible multiple taxation.

Finally, we address petitioner's contention that the Administrative Law Judge erred in concluding that it had not provided sufficient evidence in support of the amount of its refund claim. Petitioner claims that the Administrative Law Judge incorrectly found that a fraction of the electricity it claims was used in providing services to its clients was actually used for its own purposes.

Tax Law § 1132 (c) (1) provides, in relevant part:

“For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five . . . are subject to tax until the contrary is established, and the burden of proving that any receipt, amusement charge or rent is not taxable hereunder shall be upon the person required to collect tax or the customer.”

Whether certain purchases are entitled to a resale exclusion requires that the taxpayer show, to avoid imposition of sales tax on the entire transaction, that each purchase was made only for the purposes of resale (*Matter of P-H Fine Arts v New York State Tax Appeals Trib.*, 227 AD2d 683 [3d Dept 1996], *lv denied* 89 NY2d 804 [1996]; *see also Matter of Savemart Inc. v State Tax Commn.*, 105 AD2d 1001 [3d Dept 1984], *appeal dismissed* 64 NY2d 1039 [1985]; *Micheli Contr. Corp. v New York State Tax Commn.*, 109 AD2d 957 [3d Dept 1985]).

Petitioner claims to seek a refund only for sales tax paid on purchases of electricity it asserts was resold to customers as part of taxable telecommunication services it sells to its customers. Petitioner based its refund claim on calculations of percentages of total sales revenue, but the record contains no evidence demonstrating that the percentage of sales in each service category correlated to the actual amount of electricity purchased to provide such services to

petitioner's customers. We agree with the Administrative Law Judge that petitioner's reliance on a summary document without backup documentation supporting the claimed percentages used to calculate its refund claim failed to meet its standard of proof. Accordingly, even assuming that some of the electricity petitioner purchased eventually flowed to its customers, petitioner simply failed to meet its burden of proving how much electricity was purchased solely for resale. Thus, we conclude that petitioner's refund claim was properly denied.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of XO Communications Services, LLC is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of XO Communications Services, LLC are denied; and
4. The Division's refund denials dated November 11, 2013 and August 7, 2014 are sustained.

DATED: Albany, New York
May 9, 2018

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner