

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
CODE 3 BROADCASTING, LLC : DETERMINATION
for Revision of a Determination or for Refund of Sales and : DTA NO. 829389
Use Taxes under Articles 28 and 29 of the Tax Law for
the Periods Ending February 29, 2016, February 28, 2017 :
and February 28, 2018. :
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Petitioner, Code 3 Broadcasting, LLC, 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 periods ending February 29, 2016, February 28, 2017 and February 28, 2018.

A Cisco Webex hearing was held before Donna M. Gardiner, Administrative Law Judge, on October 20, 2020 at 10:30 a.m., with all briefs to be submitted by February 10, 2021, which date began the six-month period for the issuance of this determination. Petitioner appeared by Southtowns Tax Service (Peter D. Stevanoff, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Mary R. Humphrey, Esq., of counsel).

ISSUE

Whether petitioner is exempt from paying sales and use taxes on its purchases of utilities and utility services.

FINDINGS OF FACT

1. Petitioner, Code 3 Broadcasting, LLC, is a broadcasting company for a local television station, WBBZ, located at 4545 Transit Road, Suite 750, in Williamsville, New York.

2. The Division of Taxation (Division) began a sales tax audit of petitioner in March of 2018. The audit period was March 1, 2015 through February 28, 2018. On March 27, 2018, the Division made a request for books and records to petitioner through an information document request. Petitioner provided the requested documentation.

3. The auditor reviewed the documents and determined that all of petitioner's sales were exempt from tax and that petitioner was an annual tax filer. She also reviewed the depreciation schedules and concluded that no assets were purchased during the audit period. She then reviewed capital, expense and utilities accounts. The auditor reviewed invoices from New York State Electric and Gas (NYSEG) and from National Fuel for the audit period. The auditor noted that petitioner did not pay tax on certain purchases of utilities.

4. Specifically, petitioner had three NYSEG accounts for its purchases of electricity. NYSEG account 1003-4948-876 did not charge sales tax for the entire audit period. NYSEG accounts 1003-5259-372 and 1004-2140-938 did charge sales tax on the invoices for the period ending February 29, 2016, but did not charge tax for the remaining two years under audit. The auditor determined that additional tax was due on the three NYSEG accounts in the amount of \$4,574.40 for the audit period.

5. With respect to the purchase of gas from National Fuel, no tax was charged for the entire audit period. The auditor determined that additional tax in the amount of \$356.63 was due for the audit period.

6. On May 2, 2018, the Division issued to petitioner a statement of proposed audit changes in the amount of \$4,931.03 in tax, plus interest. No penalties were assessed.

7. Petitioner disagreed with the statement of proposed audit changes. Therefore, on August 9, 2018, a notice of determination (notice), assessment number L-048646195, was issued to petitioner in the amount of \$4,931.03 plus interest.

8. Petitioner then filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services in protest of the notice. A conciliation order, CMS No. 304901, was issued March 1, 2019, sustaining the notice.

9. On May 28, 2019, petitioner timely filed its petition with the Division of Tax Appeals in protest of the conciliation order.

10. At the hearing, the auditor testified to the work performed during her audit and explained the basis for her conclusion that petitioner was liable for sales tax on its purchases of utilities pursuant to Tax Law § 1105 (b) (1) (A).

CONCLUSIONS OF LAW

A. It is undisputed that petitioner, who is engaged in broadcasting, provides an exempt service pursuant to Tax Law § 1115 (a). The issue in this case is whether petitioner's purchases of utilities are taxable.

B. Tax Law § 1105 (b) (1) (A) imposes a sales tax on the receipts from every sale, other than sales for resale, of gas and electricity.

Petitioner argues that, pursuant to Tax Law § 1115 (a) (38), tangible personal property regularly used by broadcasters that is consumed directly and predominantly in the production of live programming is exempt from sales tax, if the program is intended for broadcast over the air or transmission through a cable television system or direct broadcast satellite system by a broadcaster. Petitioner agrees that utilities, such as water, power and gas, are taxable. However, petitioner argues that the sales tax exempts components of equipment and supplies that

are used or consumed in the production or transmission of television broadcasting. Petitioner argues that because the tax law does not tax certain equipment that provides the gas and electricity, the State should not be taxing the electricity or gas. Petitioner asserts that the equipment is useless without the electricity or gas and, as such, states that electricity and gas is tangible personal property within the meaning and intent of the exemption set forth in Tax Law § 1115 (a) (38).

C. The Appellate Division has addressed the issue of whether gas and electricity qualify as tangible personal property. In *Matter of XO New York, Inc. v Commissioner of Taxation and Fin.* (51 AD3d 1154, 1157 [3d Dept 2008]), the court rejected the argument that electricity was tangible personal property and stated that: “[e]lectricity, simply stated, is not a tangible piece of property that has a material existence or physical form.” Therefore, since electricity and gas are not tangible property, the exemption set forth in Tax Law § 1115 (a) (38) is inapplicable.

D. Tax Law § 1105 (b) (1) (A) clearly imposes a tax on the purchase of utilities (*see* 20 NYCRR 527.2 [a] [1] [i]). Additionally, the Division points to its Publication 825, *A Guide to Sales Tax in New York State for Broadcasters* (May 2008). This publication provides guidance to broadcasters with information on how sales tax applies to their business activities and includes a question and answer section. Question 16 addresses the issue herein:

“Q. Are purchases by a regular or system broadcaster of utilities and utility services, such as natural gas and electricity, used to heat and light production areas exempt from sales tax?”

A. No. Section 1105 (b) (1) (A) of the Tax Law imposes tax on utilities and utility services, such as natural gas and electricity. Since there is no specific exemption for utilities and utility services purchased by a regular or system broadcaster, such purchases are subject to sales tax.”

Therefore, the statute is clear and petitioner's purchases of both electricity and gas are properly subject to sales tax.

E. The petition of Code 3 Broadcasting, LLC, is denied and notice of determination number L-048646195, dated August 9, 2018, is sustained.

DATED: Albany, New York
August 5, 2021

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE