

Memorandum

Mr. Robert M. Frank
Excise Tax Unit

Date February 16, 1989

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UNIT

From : David H. Levine
Tax Counsel

Subject: Exemptions Under Energy Resources Surcharge Law

This is in response to your memorandum to Gordon Adelman dated December 30, 1988. Your request was referred to me early this month since this law remains my assignment. You should continue to direct your inquiries on this law to my attention.

_____ has requested exemption from the Energy Resources Surcharge with respect to certain accounts. _____ included with its request a copy of a letter from the General Services Administration which describes _____'s contracts with the GSA. _____ provides comprehensive commercial facility management services at three federally-owned buildings. According to the GSA, "[t]hese services include all utility services required for these buildings for which _____ is] fully responsible for payment in behalf of the Federal Government." The relevant _____ accounts apparently list _____ as the purchaser.

The surcharge is imposed upon the consumption of electrical energy purchased from an electric utility. (Rev. & Tax. Code § 40016.) The person consuming electrical energy purchased from an electric utility is liable for the surcharge. (Rev. & Tax. Code § 40018.) If, however, the United States is the consumer of that electrical energy, the consumption is exempt from the surcharge. (Rev. & Tax. Code § 40041.)

The facts in this case are susceptible to three different analyses. _____ could be regarded as consuming the electrical energy in the performance of its services for the United States. (Cf. Rev. & Tax. Code § 40010 ("electric utility" does not include person redistributing energy for use of tenants).) The United States could be regarded as the consumer of the electrical energy, purchasing it from _____. (This would probably mean that we would have to regard _____ as an electric utility under Section 40010.) Finally, the United States could be regarded as the consumer of the electrical energy, purchasing it from _____ with _____ acting merely as a billing agent even though designated as the purchaser by _____.

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We believe the third analysis is the correct manner in which this transaction should be viewed. neither owns nor leases the buildings and apparently does not occupy or have the right to occupy them. It therefore does not actually consume the electrical energy. If is not the consumer, then the consumer must be the United States. (If the United States is the consumer, its purchase of the energy will be exempt regardless of whether that purchase is from or) does not appear to be an electric utility within the definition of Section 40010 unless it can be said that furnishes, distributes, or delivers the electrical energy for sale to the United States. We do not believe that these are accurate descriptions of the services performs. Rather, we believe that should be regarded merely as a billing agent for the United States. Apparently, for the ease of the parties' administration, is listed as the purchaser from . However, under these circumstances, we believe the United States should be regarded as purchasing the energy from and that no surcharge applies to those charges.

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cc: E. L. Sorensen, Jr.

Dana H. Lewis