

**NEW YORK CITY TAX APPEALS TRIBUNAL
ADMINISTRATIVE LAW JUDGE DIVISION**

In the Matter of the Petition	:	DETERMINATION
	:	
Of	:	TAT(H) 12-9(UT)
	:	TAT(H) 12-10(UT)
Securities Industry Automation	:	
Corp.	:	
	:	
	:	

Gallancy-Wininger, A.L.J.:

Petitioner, Securities Industry Automation Corp. (SIAC), 11 Wall Street, New York, New York 10005, filed two Petitions for Hearing (Petition or Petitions) with the New York City (City) Tax Appeals Tribunal (Tribunal) each seeking a redetermination of a tax deficiency of Utility Tax under Chapter 11 of Title 11 of the City Administrative Code (Administrative Code). The first Petition, TAT(H)12-9(UT), seeks a redetermination of a deficiency in the amount of \$341,814,57 asserted in a Notice of Determination (NOD) issued by the City Department of Finance (Respondent) on August 9, 2010 for the period from January 1, 2003 to December 31, 2005. The second Petition, TAT(H)12-10(UT), seeks a redetermination of a deficiency in the amount of \$787,939.95 asserted in an NOD issued by Respondent on March 15, 2011 for the period from January 1, 2006 to December 31, 2009. (The calendar years from beginning January 1, 2003 and ending December 31, 2009 are each a Tax Year and collectively, the Tax Years.) The Petitions were consolidated for Hearing by former Chief Administrative Law Judge Warren P. Hauben.

Petitioner appeared by Irwin M. Slomka, Esq. and Kara M. Kraman, Esq. of the firm of Morrison & Foerster LLP. Respondent

was represented by Martin Nussbaum, Esq., Assistant Corporation Counsel.

A Hearing was held on May 6, 2013, at which time testimony was taken, and a joint Stipulation of Facts including Exhibits was admitted into evidence.¹ Additional Exhibits were admitted into evidence at the Hearing. Petitioner submitted a Post-Hearing Brief on July 19, 2013, Respondent submitted a Brief on October 17, 2013, Petitioner submitted a Reply Brief on November 21, 2013 and Respondent submitted a Sur-Reply Brief on December 19, 2013.

The parties stipulated to certain corrections to the transcript of the Hearing by letter dated July 24, 2013 and the enclosures contained therewith. Those corrections are adopted by the undersigned.

ISSUES

1. Whether Petitioner's revenues from Per End User Fees are properly excluded from the imposition of Utility Tax as sales for resale.

2. Whether income derived from collocation services is subject to Utility Tax.

3. Whether Respondent may characterize the Per End User Fees as "User ID Fees" and amend its Answers after the conclusion of the Hearing.

¹Petitioner's exhibit 9.

4. Whether penalties for negligence and substantial understatement of liability are properly asserted in this matter.

FINDINGS OF FACT

Petitioner is a majority-owned subsidiary of the New York Stock Exchange, Inc. (NYSE), and, for Tax Periods after March 2006, a subsidiary of NYSE's indirect successor-in-interest, NYSE Group, Inc. Petitioner maintained offices in New York City during the Tax Periods. It is a facilities provider for the NYSE, the American Stock Exchange and, the Depository Trust Company.

Following a field audit that began in 2006, Respondent determined that Petitioner failed to include in its computation of Utility Tax due, income received on account of Per End User Fees². Respondent issued two NODs, as follows:

NOD	Tax Periods	Principal	Interest	Penalty	Total Deficiency
011684519s	1/1/03- 12/31/05	\$193,694.19	\$118,583.60 (to 9/30/10)	\$29,536.78	\$341,814.57
013103180s	1/1/06- 12/31/09	\$536,942.57	\$163,687.11 (to 3/31/11)	\$87,310.27	\$787,939.95

On City Utility Tax returns for the Tax Years, Petitioner included in its computation of income, revenue that it received

²Respondent's audit findings also include tax amounts assessed for New York State Excise Tax and MCTD charges and a \$4,441.07 penalty for late filing of a Utility Tax Return for February, 2007.

from collocation services for each of the tax years comprising the Tax Periods.

On September 11, 2001, Petitioner experienced a power outage at a single location which resulted in a loss of connectivity to the New York Stock Exchange. Subsequently, Petitioner developed a private telecommunications network called Secure Financial Transactions Infrastructure (SFTI) to facilitate high-speed transport to the NYSE trading and market data systems.³ All members of the financial industry must obtain access to NYSE trading and data systems through the SFTI network. Purchases of SFTI from Petitioner consist only of the access to the SFTI network. Data and market information services, (a list of which appears in the SFTI Customer Guide), are not owned by Petitioner and are sold separately by the NYSE.⁴

The SFTI Customer Guide (at 1) defines the term "Customer" as "any entity using SFTI to access any Services." (Emphasis supplied.)

Petitioner maintains SFTI access centers throughout the country. Customers are required to maintain one primary and one backup connection to SFTI.

There are several ways that customers may obtain access to the SFTI network. First, they may connect directly into access

³SFTI is the name of Petitioner's telecommunications network. It is not the name of an entity.

⁴Petitioner's witness Robert Stauffer testified that obtaining SFTI access was like putting in place plumbing but needing to connect with the water company to obtain water. (Tr at 86-87)

centers (Direct Customers). There are no Per End User Fees associated with connection to SFTI by Direct Customers.

Customers which access SFTI indirectly (Third Party Users) arrange for their telecommunications carrier to connect through third party service providers (Service Providers) who themselves are Direct Customers of Petitioner.

There are two different models of Service Providers. The first model is an extranet provider (Extranet). An Extranet is a network provider that facilitates managed network services. Extranets do not use stock exchange data for their own purposes since they are not financial participants. During the Tax Periods, there were four Extranets that connected into SFTI: Sector, Radianz, SAVVIS and TNS.

The second model is a service bureau (Service Bureau). A Service Bureau is not a market maker. It aggregates trade activity and provides trading order flow to the New York floor for execution.

Third Party Users seeking connection to SFTI through Service Providers are subject to a review and a credit check. Orders from Third Party Users for access to SFTI come only from Service Providers. A Service Provider may not permit a Third Party User to access SFTI without obtaining Petitioner's prior written consent. In order to obtain consent, the Service Provider is required to comply with specific obligations (Obligations Regarding Permitted End Users) which include the following: (i) the proposed Third Party End User must be satisfactory to Petitioner; (ii) certain provisions, such as an indemnity and

restrictions on use by other parties without Petitioner's consent, must be included in the agreement between the Third Party Provider and its Third Party Users; and (iii) the Third Party Provider must pay Petitioner appropriate Per End User Fee. There is no contractual relationship between Petitioner and the customers of its Service Providers.

One of the documents comprising part of the Stipulation is Petitioner's SFTI Customer Guide (Customer Guide).⁵ The Customer Guide recommends that a new Customer schedule a "Customer Technical Implementation Meeting with SFTI CRM and Provisioning Staff," the purpose of which is to establish a detailed plan. Petitioner's team "will go over all aspects of the connection process to SFTI" including such matters as a detailed plan of those circuits to be subsumed into SFTI, connectivity requirements including a bandwidth forecast, "[a]ccess method (Direct Connect, Extranet, Service Bureau or a combination)", and "[c]ollocation details (what equipment (if any)[the Customer] will place at SFTI Access Centers." (Guide at 15, 16)

According to the Customer Guide, the result of a Technical Implementation Meeting will include:

an order for services that describes the services to be provided by SIAC, the price for the services, and the associated schedule. The order will also outline Customer and SIAC responsibilities (e.g., for management and configuration of equipment)[.]

The SFTI Service Center will record the plan document and monitor and coordinate progress against it. (Guide at 16)

⁵Petitioner's exhibit 9, Tab K.

Petitioner maintains a 24-hour SFTI Service Center. The Customer Guide states that this Service Center is the single point of contact for communications testing. (Guide at 12, 18)

During the Tax Periods, charges by Petitioner to Service Providers for SFTI included a one-time installation fee and monthly fees based on the size of connection requiring access. In addition, Service Providers paid Petitioner a monthly Per End User Fee for each of their Third Party Users determined as follows: \$1,000 for each of the first 20 Third Party Users; \$750 for each of the next 20 Third Party Users; \$500 for each of the next 20 Third Party Users; and \$250 for each additional Third Party User (Tiered Prices). Per End User Fees are not based on the consumption of data.

The SFTI Pricing list⁶ describes the monthly charge as a "Charge to Extranet Providers and Service Bureaus for each customer they indirectly connect into SFTI."

Several invoices were submitted into evidence. A representative customer invoice between Petitioner and Radianz reads as follows⁷:

Bill Item	Description
Third Party Svc Provider Chgs	*See Supplemental Section for details
Indirect Customer	Connection Fee

⁶Petitioner's exhibit 9 Tab N.

⁷Petitioner's exhibit 9 Tab O.

An invoice from NYSE TransactTools (a billing agent for SFTI) to Sector, Inc.,⁸ (an Extranet which is a subsidiary of Petitioner), reflects charges for, among other things, (a) connection to SFTI ports based on a number of megabits or gigabits, (b) Per End User Fees⁹, and (c) collocation. The description of the Per End User Fees in the invoice to Sector, Inc. is substantially similar to the description contained in the invoice between Petitioner and Radianz. A supplemental invoice schedule identifies each Third Party User (labeled as an "Indirect Customer") and the Per End User Fee applicable to each based on Tiered Prices.

Sharon Bendersky, Senior Tax Director of NYSE Euronext, Petitioner's ultimate parent, testified that the purpose of the Per End User Fee is for Petitioner to identify the specific entity accessing the SFTI network.

A Service Provider does not lose any services from Petitioner when it allows a Third Party User to access SFTI through its lines. (Tr at 61)

Petitioner's witness, Vincent Lanzillo, formerly the Vice President of Technical Services of Sector, testified regarding the subsidiary, Sector. Sector purchased SFTI access from Petitioner, broke it up and provided SFTI access to Third Party Users. In addition, Sector launched and managed other technology and extranet services. (Tr at 66, 45)

⁸Petitioner's exhibit 8.

⁹The Per End User Fees appear on the supplemental invoice schedule as "Third Party Sce Provider Chgs Details" beneath which appears "Indirect Customers."

An invoice from NYSE Technologies (another name under which Sector transacted business) to its customer, Activ Financial Systems contains two charges for SFTI. (Tr at 54, Ex 7) One charge is further described as "Enterprise Service/Facilities Mgmt." A second charge, headed "SFTI Direct Connect Fee," is also further described as "Enterprise Service/Facilities Mgmt."

Ms. Bendersky testified that Petitioner does not know whether Service Providers (other than Sector) separately invoice their customers for SFTI, does not know how much Service Providers (other than Sector) report on their Utility Tax returns as gross operating income or even whether they file Utility Tax returns. (Tr at 178). However, Sector paid utility tax on its revenues from its sale of SFTI access to its Third Party User customers.

Ms. Bendersky further testified that upon audit, for purposes of sales tax, the New York State (State) Department of Taxation and Finance determined that the Per End User Fees were not taxable. In support of Ms. Bendersky's testimony, Petitioner offered a closing agreement executed by Petitioner on July 26, 2011, for a State sales tax audit conducted by New York State for the period September 1, 2004 to August 31, 2009, which was admitted into evidence.

Respondent has not promulgated a form of Utility Tax resale certificate. Respondent's auditor testified that Respondent would not have accepted a New York State sales tax resale certificate as establishing that it made a sale for resale for City Utility Tax purposes. However, there is no evidence that Petitioner attempted to provide Respondent with either State

sales tax resale certificates or resale certificates applicable to New York State's excise tax on telecommunications services. The auditor did testify that she reviewed Petitioner's New York State sales tax returns.

Robert Stauffer, the Managing Director of the SFTI Customer Relationship Management Team, testified that collocation is buying space within which to place equipment and facility services. He stated that there are two primary reasons for collocation: (1) to facilitate connectivity to a network and (2) to enhance trading capabilities to "reduce latency degradation" - to "get right next to the trading engine" so that the customer's trades are processed first. (Tr 88-89). A customer who purchases collocation receives designated space containing a metal rack with electrical outlets and shelves on which to place equipment.

Petitioner offers collocation at its access centers solely to facilitate connectivity to the SFTI router, and not to enhance trading capabilities. No trading, data or other applications services take place within Petitioner's access centers.

A "multi-node fiber handoff," (which is a type of circuitry) is required for a customer to "plug into" the SFTI edge router and effect a connection to SFTI. If a customer's telecommunications carrier provides a single-node handoff, the single-node handoff must be converted into a multi-node handoff by means of a switch or router. Where a customer needs a place for its equipment, collocation is required to effect a connection into Petitioner's SFTI router. Customers with the correct circuit handoff do not require collocation. Since the purpose of collocation is to facilitate connectivity to the router, the

location of the customer's collocation space relative to Petitioner's equipment does not matter. Petitioner's customers are not required to purchase collocation space from Petitioner and may purchase such space from an unrelated entity.

Petitioner leases space in its collocation centers expressly for the purpose of subleasing it to Customers who want to collocate in these centers for connectivity reasons. The manner in which Customers may collocate equipment within Petitioner's access centers is an item that is addressed at Petitioner's Customer Technical Implementation Meeting.

STATEMENT OF POSITIONS

Petitioner asserts that revenue from the Per End User Fees charged to Third Party Providers for SFTI access should be excluded from its gross operating income for City Utility Tax purposes as receipts from sales for resale and that failure to make this adjustment will result in improper "pyramiding" of taxes because Providers are reselling SFTI and are responsible for payment of the Utility Tax.

Petitioner asserts alternatively, that it mistakenly included its collocation revenue in its gross operating income and it should be permitted to equitably offset such income against the Per End User Fees if they should be determined to be taxable.

Petitioner further asserts that the penalties should be abated because it had good cause for not including the Per End User Fees in its gross operating income.

Respondent asserts that the Per End User Fees are user identification fees and do not reflect a sale for resale of telecommunications services.

Respondent further asserts that in order to qualify for the Utility Tax sale-for-resale exemption, whatever is resold must be precisely what was purchased and that what Petitioner sold was not what the Users purchased. Respondent asserts that nothing has actually been resold.

Respondent asserts that collocation constitutes a service provided with other telecommunication services, therefore, revenue derived from collocation is not exempt from utility tax.

CONCLUSIONS OF LAW

Section 11-1102 of the Administrative Code imposes Utility Tax on every vendor of utility services based on its gross operating income.

A "vendor of utility services" is defined in Administrative Code § 11-1101 (7) as:

Every person not subject to the department of public service, and not otherwise a utility . . . who furnishes or sells gas, electricity, steam, water or refrigeration, or furnishes or sells gas, electric, steam, water, refrigeration or telecommunication services. . . (Emphasis supplied.)

Telecommunication services are defined in Administrative Code §11-1101 (9) as:

Telephony or telegraphy, or telephone or telegraph service, including, but not limited to, any transmission of voice image, data, information and paging through the use of wire, cable, fiber-optic, laser, microwave, radio wave, satellite or similar media or any combination thereof and shall include services that are ancillary to the provision of telephone services (such as, but not limited to, dial tone, basic service, directory information, call forwarding, caller-identification, call waiting and the like) and also include any equipment and services provided therewith; provided however, that the definition of telecommunication services shall not apply to separately stated charges for any service that alters the substantive content of the message received by the recipient from that sent. . . (Emphasis supplied.)

Although Administrative Code § 11-1102 (b) states that "so much of the gross income of the utility shall be excluded from the measure of the tax imposed by this chapter, as is derived from sales for resale to vendors of utility services validly subject to the tax imposed by this chapter. . . ." Respondent does not challenge the applicability of the sales for resale exclusion to sales made by vendors of utility services. (Emphasis supplied.) (See, FLR 034815-011 [July 21, 2004], which applied the sales for resale exclusion to sales for resale made by vendors of utility services.)

Title 11 of the Administrative Code does not define the term "sale for resale" nor does it establish a procedure that a taxpayer must follow (e.g. obtaining resale certificates from the reseller) in order to demonstrate that a transaction is a sale for resale.

Respondent asserts that the monthly Per End User Fees were user identification fees. While there was testimony that the monthly Per End User Fees enabled Petitioner to know who was accessing SFTI, there was no testimony that the monthly Per End User Fees were for criminal background checks, for example. While Petitioner needed to know who was accessing SFTI, I find that the evidence falls short of establishing that the Per End User Fee is principally a user identification fee. Accordingly, it is not necessary to address the issue of whether Respondent is precluded from asserting after the Hearing that the Per End User Fee is a user identification fee.

Petitioner's invoices to Third Party Providers Sector and Radianz, contain various fees including both (i) connection charges based on a quantity of megabytes or gigabytes and (ii) Per End User Fees based on Tiered Prices.

The definition of the word "Customer" in the SFTI Customer Guide, the start-up procedures, the maintenance of a 24-hour SFTI Service Center as described in the Customer Guide and Petitioner's characterization of Third Party Users as "Indirect Customers" do not support a conclusion that Third Party Users are only customers of Third Party Providers and not customers of Petitioner.

Petitioner asserts that it is appropriate to look to the Sales Tax for guidance regarding sales for resale. State Tax Law § 1101 (b) (5) defines "Sale, selling or purchase" as follows:

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, or any agreement therefor, including the rendering of any service taxable under this article, for a consideration or any agreement therefor.

"Use" is defined in State Tax Law § 1101 (b) (7) as "The exercise of any right or power over tangible personal property or over any of the services which are subject to tax. . . and includes but is not limited to, the receiving, storage or any keeping or retention for any length of time, withdrawal from storage, any installation, any affixation to real or personal property, or any consumption of such property or of any such service subject to tax. . . ."

Petitioner relies on State Sales Tax Advisory Opinion TSB-A-98(12)(S), regarding the applicability of the sales for resale exception to sales tax in a matter involving a company that proposed to lease a dedicated portion of a fiber optic network which would not be available to anyone other than the lessee. The facts in this matter are distinguishable. The Per End User fee does not confer exclusive access to SFTI. Petitioner also relies on the discussion in State Sales Tax Advisory Opinion TSB-A-94(33)(S), concerning costs associated with two services furnished by that taxpayer and the application of State sales tax to each. As in TSB-A-(12)(S), one of the costs was for a dedicated facility. Petitioner also points to an expense in TSB-A-94(33)(S) for a fee for set-up of originating access to switching equipment that facilitated long distance telephone calls. According to that Advisory Opinion, this fee was built into rates that the taxpayer charged its customer.

The Per End User Fee is not based on the actual consumption of telecommunications services. See e.g. State Sales Tax Regulation 526.7 (e)(4), examples 12, 13 and 14, which establish that control over the operation of a computer is required for there to be a transfer of possession. (20 NYCRR 526.7 (e) [4]). No evidence has been presented that would establish that Third Party Users who connect to SFTI exercise any right, power or control over the SFTI architecture or achieve anything more than a connection which permits them to purchase services from another entity. The provision of SFTI access to a Third Party User does not diminish the availability of SFTI access to the Third Party Provider.

In the context of sales tax imposed on utility service, the Appellate Division, Third Department, in *Mutual Redevelopment Houses, Inc. v Roth*, (307 AD2d 422, 425 lv denied 100 NY2d 516 [2003]) quoting *Debevoise Plimpton v New York State Dept. of Taxation & Fin.*, (80 NY2d 657 [1993]), stated:

Tax Law §1105(b) authorizes a tax on a utility service only when furnished in an identifiable sales transaction as a commodity of commerce. . . . Stated another way, the statute applies only to separate transactions which have as their primary purpose the furnishing of utilities or utility service.

Petitioner charged a separately stated fee for megabytes and gigabytes of data service. The Per End User Fee does not represent a fee for "a utility service furnished in an identifiable sales transaction as a commodity of commerce," or a "transaction which has as [its] primary purpose the furnishing of utilities or a utility service." (*Mutual Redevelopment Houses* at 425).

In *Cut-Outs, Inc. v State Tax Comm*, (85 AD2d 838 [3rd Dept 1981]), concerning whether the purchase of cutting dies used in a graphic arts process are excluded from sales tax as sales for resale, the Appellate Division, Third Department, contrasting the facts in *Cut-Outs* with those in *Matter of Burger King v State Tax Comm*, (51 NY2d 614 [1980]), (concerning whether packaging materials for fast food were sold for resale), found cutting dies not to be "a critical element of the final product sold to customers" and this resale to be "purely incidental" rather than a sale for resale. Similarly, mere connection to SFTI without information services would not serve any meaningful purpose to end-users.

New York State imposes both an excise tax and a sales tax on telecommunications services. (See New York Tax Law §§ 186-e et seq. and 1105 [b])¹⁰. Commencing on January 1, 2009, a provider of telecommunications services is entitled to exclude sales for resale from the excise tax if the provider obtains a valid resale certificate from the reseller. (Tax Law § 186-e [2][b][1]).¹¹

State Sales Tax Regulation § 527.2 (e) provide:

Purchases of utility services by a utility for resale as such may be made without payment of the sales tax. The purchaser must

¹⁰The definition of "Telecommunications services" in State Tax Law § 186-e [1] [g] is substantially similar to the definition in Administrative Code § 11-1101 (9).

¹¹Prior to January 1, 2009, a credit was allowed to a purchaser who was not an inter-exchange or local carrier where telecommunications services purchased are later resold by such purchaser as telecommunications services. To effectuate the credit, the tax was imposed on the difference between the amount of the charge made by the provider to the purchaser and the amount of the charge made by the purchaser for the resold service. (Tax Law former § 186-e [2] [b] [4] [1]).

furnish the supplier of the utility to be resold with a resale certificate (Form ST-120). When the utility services are resold by the purchaser, he must collect the sales tax on the receipts from his sales as imposed under section 1105(b) of the Tax Law. A purchase of a utility service which is not resold is subject to tax as a purchase at retail. (Emphasis supplied). (20 NYCRR 527.2 [e]).

New York State accepted Petitioner's position that for State sales tax purposes, its Per End User fees were sales for resale. However, Petitioner did not introduce evidence that it obtained resale certificates covering Per End User Fees for the excise tax imposed under New York Tax Law §186-e et seq. for the tax period January 1, 2009 to December 31, 2009.

Petitioner asserts that it incorrectly reported its revenue from its collocation services and, if it is determined that Petitioner is liable for Utility Tax on its Per End User Fees, Petitioner is entitled to apply the amount of its collocation revenue against such liability.

Administrative Code § 11-1101.5 defines the term "gross operating income" to include:

. . . receipts received in or by reason of any sale made or service rendered, of the property and services specified in subdivision seven of this section in the city, including cash, credits and property of any kind or nature. . .

There are cases where, for sales tax, collocation was treated as ancillary to a taxpayer's telecommunications business. (See, *Matter of Fastnet Corporation*, DTA No. 819632 [2006], in

which collocation was found to involve the use of space in the active conduct of the particular taxpayer's business and was therefore not subject to tax under Tax Law § 1105 (c)(4); *Matter of Level 3 Communications, Inc.*, DTA No. 820259 [2006] where it was found that collocation services played an integral part in the telecommunications services furnished by the particular taxpayer).¹²

Petitioner's collocation services are used for the express purpose of facilitating connectivity to SFTI by those Third Party Users that did not provide multi-node handoffs. The SFTI Customer Guide provides that collocation details regarding equipment to be placed by a customer at a SFTI access center is one of the items to be discussed at the Customer Implementation Meeting. The collocation services provided by Petitioner are "equipment and services provided" with Petitioner's SFTI telecommunication services and the receipts from the provision of such services are taxable under Administrative Code § 11-1102. Accordingly, Petitioner's collocation revenues were properly included in its gross operating income.

Petitioner asserts that it should not be liable for penalties. Administrative Code § 11-1114 (c) provides penalties for underpayment of Utility Tax due to negligence.

¹²While the decisions of New York State Administrative Law Judges may not be cited as precedent, they are nevertheless illustrative. The Administrative Law Judge in *Level 3* concluded, "[W]ithout the collocation services provided by petitioner, the collocators' switching and transmission devices would be unable to switch or transmit telecommunications signals between their networks and either petitioner's telecommunications network or another telecommunications carrier's network and, as a result, there would be no production of end-to-end telecommunications services."

Administrative Code § 11-1114 does not define the terms "negligence" or "intentional disregard." However, Internal Revenue Code ("IRC") § 6662 offers some guidance and provides that "'negligence' includes any failure to make a reasonable attempt to comply with the provisions of this article, and the term 'disregard' includes any careless, reckless or intentional disregard.'"

The U.S. Tax Court defined "negligence" as a lack of due care or failure to do what a reasonable and prudent person would do under similar circumstances. (*Van Alen v Commr.*, TC Memo 2013-235 [Tax Ct.2013] and cases cited therein.)

Had Petitioner wished to establish that it was entitled to a sales for resale exemption for Per End User fees, for the January 1, 2009 to December 31, 2009 Tax Year under State Tax Law § 186-e, it should have obtained resale certificates.¹³ For the January 1, 2009 to December 31, 2009 Tax Year, the penalties asserted by Respondent under City Administrative Code §§ 11- 1114 (c) were appropriately imposed.

Petitioner asserts that the acceptance of its position for sales tax purposes by the State Department of Taxation and Finance is evidence that Petitioner acted reasonably and in good faith in excluding the Per End User Fees from its gross operating income. Further, Respondent does not have a resale certificate procedure analogous to that of New York State that would permit a

¹³L 2008, ch 297, which became effective January 1, 2009, excludes from sales tax, receipts from the sale of telecommunications services if the provider obtains resale certificates from the purchaser for resale within 90 days after the provision of the telecommunications services. A provider of telecommunications services who has not obtained a resale certificate within 90 days may comply with other provisions of State Tax Law § 186-e (b) (1) to establish that telecommunications services were sold for resale.

vendor of utility services to establish that it has made a sale for resale. For such reasons, Petitioner has established that it acted reasonably and in good faith during the Tax Years from January 1, 2003 to December 31, 2008 the negligence penalties asserted for that period under City Administrative Code §§ 11-1114 (c) should be abated.

ACCORDINGLY, IT IS CONCLUDED THAT Petitioner is liable for the Utility Tax asserted for the periods January 1, 2003 to December 31, 2005 and January 1, 2006 to December 31, 2009, as Petitioner has failed to establish that the Per End User Fees constituted sales for resale, Petitioner is not entitled to offset its collocation revenues against its Per End User Fees and Petitioner is liable for the negligence penalties asserted by Respondent pursuant to Administrative Code § 11-1114 (c) for the January 1, 2009 to December 31, 2009 tax year. The negligence penalties asserted for the Tax Years from January 1, 2003 to December 31, 2008 are abated.

The Petition of Securities Industry Automation Corp. is denied, except that the negligence penalties asserted by Respondent pursuant to Administrative Code § 11-1114 (c) are abated for Tax Years January 1, 2003 to December 31, 2008 and the Notices of Determination dated August 9, 2010 and March 15, 2011 are, in all other respects, sustained.

DATED: June 17, 2014
New York, New York

Jean Gallancy-Wininger
Administrative Law Judge