



## **CORPORATION TAX BULLETIN 2023-01**

**Issued: May 1, 2023**

### **Treatment of Electricity for Corporate Net Income Tax Apportionment Purposes**

The purpose of this bulletin is to provide guidance to taxpayers regarding how the Department intends to assess the taxability and correct apportionment of electricity.

Questions have arisen regarding the appropriate treatment of electricity for purposes of computing a taxpayer's Corporate Net Income Tax ("CNIT") sales apportionment factor pursuant to 72 P.S. § 7401. These questions focus on whether electricity should be treated as:

1. Tangible personal property, and sourced for CNIT apportionment purposes under 72 P.S. § 7401(3)2.(a)(16);
2. A service, and sourced for CNIT apportionment purposes under 72 P.S. § 7401(3)2.(a)(16.1)(C); or,
3. As intangible property, and sourced for CNIT apportionment purposes under 72 P.S. § 7401(3)2.(a)(17).

Courts and administrative bodies around the country are split on whether electricity should be treated as tangible or intangible property for purposes of corporate tax apportionment provisions. By way of example, Massachusetts<sup>1</sup> has found that electricity should be treated as intangible property. Conversely, Illinois<sup>2</sup> has determined that electricity is tangible personal property.

The Department has not previously formally addressed this question. However, the Department has previously stated that for purposes of sourcing sales for apportionment purposes, it is the Department's position that the sale of electricity more closely resembles the sale of a saleable commodity, than it does a service, and the use of the intangible provisions of 72 P.S. §7401(3)2.(a)(17) is inappropriate.

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<sup>1</sup> *EUA Ocean State Corporation, et. al. v. Commissioner of Revenue*, Massachusetts Appellate Tax Board, Dkt. No. C258405-406; C258424-425; C258882-883; C259158-159; C259653; C262566-568 (2006) ("The effects of electricity can be seen, as in a lightning strike, and felt, as in a shock, but electricity itself cannot be seen or touched because, like wind, sunlight, sound, heat, and pain, it has no physical form or body.").

<sup>2</sup> *Exelon Corp. v. Dep't of Revenue*, 917 N.E.2d 899, 911 (Ill. 2009) ("Electricity can be touched, and when a person does so and thereby completes an electrical circuit, it may be the last earthly sensation he or she feels").



More recently, the Board of Finance and Revenue (the "Board") has had to address this exact issue in a number of published decisions. Specifically, the Board has determined that electricity should in fact be treated as tangible personal property for purposes of apportioning income under the CNIT.<sup>3</sup>

As discussed above, electricity does not resemble a service and as a result to source it for CNIT purposes under the provisions of 72 P.S. § 7401(3)2.(a)(16.1)(C) would be inappropriate. Instead, the real question at issue appears to be whether electricity is more appropriately treated as tangible or intangible property for purposes of apportioning income for CNIT purposes. While this issue has occupied administrative hearing bodies and courts around the country, the Department agrees with the Board that electricity is correctly treated as tangible personal property for CNIT apportionment purposes. Accordingly, for all open CNIT periods, the Department will follow the decision of the Board and treat receipts from transactions involving the sale of electricity as generating receipts from the sale of tangible personal property. Such receipts will then be sourced pursuant to 72 P.S. § 7401(3)2.(a)(16), the associated regulations and previous applicable interpretations of the Pennsylvania courts. In the case of partnerships that are engaged in the sale of electricity and have one or more corporate partners, the partnership's receipts from the sale of electricity will flow up to its corporate partner(s) in the same manner as any other sale of tangible personal property.

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<sup>3</sup> See Public Service Enterprise Group Inc., BF&R docket numbers 1828561 (November 5, 2019) and 1706216 (July 24, 2018).