

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-00(2)C
Corporation Tax
January 28, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C991021A

On October 21, 1999, a Petition for Advisory Opinion was received from Mark H. Levin, CPA, H. J. Behrman & Company, LLP, 215 Lexington Avenue, New York, New York 10016.

The issue raised by Petitioner, Mark H. Levin, CPA, is what entity is responsible for filing Form CT-186-A Utility and Services Tax Return – Gross Operating Income where a single member limited liability company ("LLC") is providing a service that is taxable under section 186-a of the Tax Law.

Petitioner submits the following facts as the basis for this Advisory Opinion.

P, a domestic limited partnership, is the sole member of S1, S2 and S3, newly formed domestic single member LLCs. S1, S2 and S3 each own an office building in which each will charge its tenants for utility services.

S1, S2 and S3 do not elect to be treated as separate entities for federal income tax purposes. Therefore, for federal income tax purposes, they are disregarded as entities separate from P, their owner.

Discussion

Section 186-a of the Tax Law imposes an excise tax on the furnishing of utility services. The tax is imposed on a utility which is not subject to the supervision of the New York State Department of Public Service (a utility of the "second class"), if it "sells gas, electricity, steam, water or refrigeration, delivered through mains, pipes or wires, or furnishes gas, electric, steam, water or refrigerator service, by means of mains, pipes, or wires; regardless of whether such activities are the main business of such person or are only incidental thereto...." The tax is imposed on the utility's gross operating income.

For purposes of section 186-a of the Tax Law, the word "utility" includes a person. Section 186-a.2(b) of the Tax Law provides that the word "person" means "persons, corporations, companies, associations, joint-stock companies or associations, partnerships and limited liability companies, estates, assignee of rents, any person acting in a fiduciary capacity ..."

In El Paso Energy Marketing Company, Adv Op Comm T&F, June 15, 1998, TSB-A-98(8)C, it was held that a limited partnership selling natural gas was a "person" under section 186-a of the Tax Law, and the limited partnership was subject to tax on its gross operating income. Further, it was held that the general partner that was responsible for the management of the limited partnership was not subject to tax under section 186-a on its pro rata share of the gross receipts from the limited

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partnership's sales of natural gas for which the limited partnership had paid the tax imposed under section 186-a of the Tax Law.

For purposes of the section 186-a excise tax under Article 9 of the Tax Law, an LLC, including a single member LLC, that is providing a utility service is a person pursuant to section 186-a.2(b) of the Tax Law, and following El Paso, supra, the LLC, itself, is liable for the tax imposed under section 186-a.

However, effective January 1, 1998, Chapter 536 of the Laws of 1998, amended section 186-a.2 of the Tax Law to provide that sales of electricity, gas, steam, water and refrigeration to a landlord for resale to the landlord's tenants, where such resales are incidental to the landlord's activity of renting premises to tenants, are subject to tax although such sales are not for ultimate consumption by the landlord. That provision also provides that where the tax is imposed on the sale to the landlord, no additional tax would be imposed on a resale by the landlord to its tenants. However, if no tax is imposed on the sale to the landlord, a tax is imposed on the landlord's receipts from the resale of the commodities services, and such receipts are to be equal to the landlord's cost of the commodities or services.

Accordingly, if on or after January 1, 1998, the resale of utility services by S1, S2 and S3 to their tenants is incidental to their activity of renting premises to the tenants, and the tax under section 186-a of the Tax Law is imposed on the sale of the utility services to S1, S2 and S3, then no additional tax will be imposed on the sales of such utility services by S1, S2 and S3 to their tenants.

However, if no tax under section 186-a of the Tax Law is imposed on the sale of the utility services to S1, S2 and S3, pursuant to section 186-a, S1, S2 and S3 will each be a utility of the "second class" that will be providing utility services to its tenants which will be consumed by the tenants in New York. In that case, S1, S2 and S3 will each be subject to the tax imposed under section 186-a of the Tax Law on its "gross operating income", and each entity will be required to file a tax return pursuant to section 186-a of the Tax Law, Form 186-A Utility Services Tax Return – Gross Operating Income, and pay the tax due.

Note that P will not be subject to tax, or required to file a return under section 186-a of the Tax Law for the gross operating income of S1, S2 and S3 for which S1, S2 and S3 file a return and pay the tax imposed under section 186-a of the Tax Law.

DATED: January 28, 2000

/s/
John W. Bartlett
Deputy Director
Technical Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.