

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

TSB-A-02(20)C  
Corporation Tax  
December 12, 2002

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C020730A

On July 30, 2002, a Petition for Advisory Opinion was received from Leveraged Energy Purchasing Corporation, 403 Main Street, Suite 630, Buffalo, New York 14203.

The issues raised by Petitioner, Leveraged Energy Purchasing Corporation, are:

1. Whether the commodity supplier is responsible for the tax imposed under section 186-a of the Tax Law when it sells gas to a municipality for self-consumption.
2. Whether a municipality that purchases gas and resells the commodity to another entity is responsible for the tax imposed under section 186-a of the Tax Law.
3. Whether there is any fiduciary responsibility on the part of the seller of gas or electricity to collect and remit the tax imposed under section 186-a of the Tax Law that is passed through on bills rendered to its customers.
4. Whether for purposes of calculating the gross operating income of a utility, both the charge for the commodity and the charge for the tax imposed under section 186-a of the Tax Law are included in the receipts from the sale of the commodity.

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

Petitioner is a technical consulting and procurement firm for numerous clients that participate in the deregulated natural gas and electric markets. It is advisor to numerous entities, including municipalities, institutions, commercial and industrial users.

Petitioner provides an example with respect to Issue 4, where the seller has elected to separately charge the end user for the tax imposed on the seller under section 186-a of the Tax Law:

A. Charges of the Seller to the Purchaser:

Cost of the Commodity	\$500.00
Calculation for section 186-a tax:	
$(1.0 - \text{Tax Rate for section 186-a tax})(1 - .019)$	$\div .981$
Total Amount Charged (Tax and Commodity)	\$509.68

B. Calculation of the Tax Liability of Seller under section 186-a:

Total Gross Operating Income	\$509.68
Tax Rate 1.9%	<u>x .019</u>
Total Section 186-a Tax Due	\$ 9.68

**Applicable Law**

Section 186-a of the Tax Law imposes an excise tax on the furnishing of utility services. The tax is imposed on the “gross income” of “every utility ... doing business in this state which is subject to the supervision of the state department of public service” (PSC), and on the “gross operating income” of “every other utility doing business in this state which has a gross operating income for the year ending December thirty-first in excess of five hundred dollars, which taxes shall be in addition to any and all other taxes and fees imposed by any other provisions of law for the same period.” (Section 186-a.1)

Section 186-a.2 of the Tax Law contains definitions and provides, in part:

(a) the word “utility” includes every person ... subject to the supervision of the state department of public service ... and also includes every person (whether or not such person is subject to such supervision) who sells gas [or] electricity ... or furnishes gas [or] electric ... service ... regardless of whether such activities are the main business of such person or are only incidental thereto ...

(b) the word “person” means ... municipalities, political and civil subdivisions of the state or municipality and public districts (provided, however, that with respect to gas, electricity and gas or electric service, including the sale of the transportation, transmission or distribution of gas or electricity, such municipalities, political and civil subdivisions and public districts shall be excluded from the definition of “person” if they own and operate facilities which are used to generate or distribute electricity or distribute gas and they distribute and sell such gas or electricity solely at retail, solely within their respective jurisdiction; or provided, further, with respect to the sale of electricity or the transportation, transmission or distribution of electricity, a municipality shall be excluded from the definition of “person” if it sells electricity at retail where all such electricity (excluding temporary substitution power during outages or periods of reduced output) has been generated solely by and purchased solely from the state or a public authority of the state ...

(c) the words “gross income” mean and include receipts received in or by reason of any sale ... made or service rendered for ultimate consumption or use by the purchaser in this state ... without any deduction therefrom on account of the cost

of the property sold, the cost of materials used, labor or services or other costs, interest or discount paid, or any other expense whatsoever.

\* \* \*

(d) the words “gross operating income” mean and include receipts received in or by reason of any sale ... made for ultimate consumption or use by the purchaser of gas [or] electricity ... or in or by reason of the furnishing for such consumption or use of gas [or] electric ... service in this state ... without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or services or other costs, interest or discount paid, or any other expenses whatsoever....

Section 186-a.6 of the Tax Law provides that: “The tax imposed by this section shall be charged against and be paid by the utility and may be added as a separate item to bills rendered by the utility to customers. Upon request the utility shall furnish a statement of the amount of tax imposed by this section to its customers for bills rendered on or after January first, two thousand.”

### **Opinion**

Section 186-a of the Tax Law imposes an excise tax, in part, on utilities that sell gas or electricity for ultimate consumption or use by the purchaser, except certain sales for resale. If a utility is under the supervision of the Public Service Commission, it is taxed on its gross income, which includes receipts from such sales of gas and electricity; if not so supervised, the utility is taxed on its gross operating income, which also includes receipts from such sales of gas and electricity.

Section 186-a.2(a) of the Tax Law provides that a utility includes a person. Section 186-a.2(b) of the Tax Law defines person, and with respect to the sales of gas and electricity the word “person” includes municipalities of New York State, except where such municipalities own and operate facilities which are used to generate or distribute electricity or distribute gas and they distribute and sell such gas or electricity solely at retail, and solely within their respective jurisdiction; or except where all of the electricity that is sold by such municipalities at retail has been generated solely by and purchased solely from New York State or a public authority of New York.

In New York Telephone Company v County of Nassau, 122 AD2d 124, the defendant, Nassau County, did not pay that portion of its telephone bills attributable to three taxes imposed upon the plaintiff, New York Telephone Company, by New York State and local governments, asserting that the policy of allowing the plaintiff to recover these tax payments from the consumer as an operating expense was impermissible since New York State municipalities are exempt from taxation unless otherwise stated. The Appellate Division found that the tax imposed under section 186-a on a utility constitutes a part of the operating costs of the utility, and held that the “imposition

of surcharges upon the defendant to recover these additional operating expenses is not the equivalent of directly taxing the municipality.”

With respect to the specific issues in this case:

Issue 1. When a commodity supplier that is a utility under section 186-a.2(a) of the Tax Law, sells gas or electricity to a municipality for consumption or use by such municipality (e.g., a county purchases the gas or electricity for county owned facilities), the receipt from such sale is included in the commodity supplier’s gross income or gross operating income, as the case may be, under section 186-a of the Tax Law.

Issue 2. When a municipality (other than a municipality that owns and operates facilities which are used to generate or distribute electricity or distribute gas and the municipality distributes and sells such gas or electricity solely at retail and solely within the municipality’s jurisdiction, or with respect to the sale of electricity or the transportation, transmission or distribution of electricity, and other than a municipality that sells electricity at retail where all such electricity has been generated solely by and purchased solely from the State or a public authority of the State) purchases gas or electricity from a commodity supplier and the municipality resells the gas or electricity to another entity, the municipality is a person under section 186-a.2(b) of the Tax Law, and is a utility under section 186-a.2(a) of the Tax Law. Such municipality would be subject to tax under section 186-a of the Tax Law on its gross income or gross operating income, as the case may be, and the receipts from such sales of gas and electricity to other entities would be included in the municipality’s gross income or gross operating income, as the case may be, when it sells gas or electricity for ultimate consumption or use by the purchaser in New York State. In this case, the tax imposed under section 186-a of the Tax Law is not imposed on the commodity supplier that sold the gas or electricity to the municipality because such sales to the municipality would not be for ultimate consumption or use by the municipality. Accordingly, such commodity supplier would not include its receipts from such sales of gas or electricity to the municipality in its gross income or gross operating income, as the case may be.

Issue 3. There is no fiduciary responsibility on the part of the utility to collect and remit the tax imposed under section 186-a that the utility passes through (whether or not separately stated) on bills rendered to its customers. Such amount that the utility may pass through is not analogous to the New York sales tax, which is required to be collected from the customer, but is, instead, an amount that the utility passes along to its customers as an element of its cost. There is no statutory imposition of any such fiduciary responsibility in connection with the section 186-a tax. This tax is imposed on the utility, and the utility is directly responsible for paying the tax.

Issue 4. Pursuant to section 186-a.2(d) of the Tax Law, the gross operating income of a utility includes receipts from the sale of gas or electricity for ultimate consumption or use by the purchaser in New York State. Such taxable receipts include the total amounts charged by the utility on the bills

TSB-A-02(20)C  
Corporation Tax  
December 12, 2002

rendered to its customers for the sales of such gas and electricity. The example provided by Petitioner constitutes the correct methodology for calculating the tax imposed under section 186-a, when the utility passes through such tax to its customers.

DATED: December 12, 2002

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