

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

TSB-A-05(1)C
Corporation Tax
January 4, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C040806A

On August 6, 2004, a Petition for Advisory Opinion was received from Village of Springville Electric System, 30 Nason Blvd., Springville, New York 14141.

The issue raised by Petitioner, Village of Springville Electric System, is whether the monthly amount charged to Petitioner for electric transmission services provided by a utility company (Utility) subject to the supervision of the New York State Public Service Commission may include an amount for gross receipts tax that is imposed under section 186-a of the Tax Law.

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

Petitioner owns and operates an electric distribution system within its municipal boundaries. Prior to mid-1998, Petitioner purchased its full electric power requirements from the New York State Power Authority (NYPA), and resold the electricity over its own facilities, at retail, within its municipal boundaries. After mid-1998, Petitioner purchased a portion of its electric requirements from sources other than NYPA, but continued to resell the electricity over its own wires, at retail, to customers within its municipal boundaries. Petitioner states that while buying electricity solely from NYPA it was under NYPA's regulatory jurisdiction. However, when it began to purchase electricity from sources other than NYPA, it came under the jurisdiction of the New York State Public Service Commission.

Petitioner states that Utility owns and operates the transmission system over which Petitioner receives its power. Purchased power is distributed by Petitioner, over its own facilities, to its customers within its municipal boundaries. Utility charges Petitioner a monthly charge for the transmission services that Utility provides. Petitioner states that Utility includes a gross receipts tax in the monthly transmission bills.

Applicable law

Section 186-a of the Tax Law imposes a tax on the furnishing of utility services, and provides, in part:

1. Notwithstanding any other provision of this chapter, or of any other law,

* * *

(b) a tax equal to (1) ... two and one hundred twenty-five one thousandths percent from January first, two thousand four through December thirty-first, two thousand four and two percent commencing January first, two thousand five and thereafter of that portion of its gross income derived from the transportation, transmission or distribution of gas or electricity by means of conduits, mains, pipes, wires, lines or the like and (2) ... four-tenths of one percent from January first, two thousand four through December thirty-first, two thousand four and zero percent commencing January first, two thousand five of all of its other gross income, is hereby imposed upon every utility not taxed under paragraph (a) of this subdivision doing business in this state which is subject to the supervision of the state department of public service which has a gross income for the year ending December thirty-first in excess of five hundred dollars ...; and

(c) a tax equal to ... four-tenths of one percent from January first, two thousand four through December thirty-first, two thousand four and zero percent commencing January first, two thousand five of its gross operating income is hereby imposed upon 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 provision of law for the same period.

2. As used in this section,

(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 ... delivered through mains, pipes or wires, or furnishes gas [or] electric ... 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, or of whether use is made of the public streets;

(b) the word "person" means persons, corporations, companies, associations ... except the state; 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 ... 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, conditional or otherwise ... made or service rendered for ultimate consumption or use by the purchaser in this state... without any deduction therefrom

(1) Provided, however, that all receipts from sales of the transportation, transmission or distribution of gas or electricity by means of conduits, mains, pipes, wires, lines or the like, rendered or performed in this state, shall be included in gross income except receipts from (i) sales of the transportation, transmission or distribution of gas or electricity to (A) a utility (excluding a public authority) which is supervised by this state or another jurisdiction ... (B) a municipality which owns and operates facilities which are used to generate or distribute electricity or distribute gas and which distributes and sells such electricity or gas solely at retail, solely within its respective jurisdiction, or (C) a public authority of this state where such public authority is primarily engaged in the generation and transmission or distribution of electricity or the distribution of electricity or gas and at least ninety-five percent of the assets of which are so devoted ... where, as the case may be, such utility or authority purchasing such transportation, transmission or distribution sells the gas or electricity being so transported, transmitted or distributed, (ii) sales of the transportation, transmission or distribution of electricity to a municipality where the electricity being transported has been purchased by such municipality and has been generated solely by and purchased solely from the state or a public authority of the state ... and where such municipality purchasing such transportation, transmission or distribution, sells solely at retail, solely within its respective jurisdiction, the electricity being so transported, transmitted or distributed, ...

* * *

6. 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

Pursuant to section 186-a.2(b) of the Tax Law, a “person” does not include municipalities, political and civil subdivisions and public districts 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, and solely within their respective jurisdiction. A “person” also does not include a municipality with respect to the sale of electricity or the transportation, transmission or distribution of electricity, if it 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. Accordingly, since Petitioner is excluded from the definition of “person” under section 186-a.2(b) of the Tax Law, Petitioner is not a utility subject to the tax imposed under section 186-a.1 of the Tax Law.

Utility, as a person subject to the supervision of the New York State Public Service Commission, is subject to tax under section 186-a of the Tax Law. However, pursuant to section 186-a.2(c)(1)(i)(B) of the Tax Law, it appears that Utility’s gross income would not include receipts from the electric transmission services provided for Petitioner.

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 held that the tax imposed under section 186-a of the Tax Law 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.”

In *Sempre Energy Trading Corp.*, Adv Op Comm T&F, December 18, 2002, TSB-A-02(23)C, it was held that receipts from the sale of natural gas to the Power Authority for consumption by the Power Authority were taxable receipts of Sempra under section 186-a of the Tax Law. Pursuant to the Public Authorities Law, the tax imposed under section 186-a may not be imposed on the Power Authority. However, it was determined that the tax was imposed on Sempra as a sale for ultimate consumption or use by the Power Authority, but the tax was not imposed on the Power Authority even though the amount of tax imposed on Sempra was a separately stated item on the bill rendered to the Power Authority for its purchase of the gas.

Following *New York Telephone, supra*, and *Sempre, supra*, the tax imposed on utilities under section 186-a of the Tax Law is an expense of the utility that may be included in the price that the utility charges for transmission services provided to its customers. However, the inclusion of such expense in the amount charged for transmission services is not the equivalent of directly taxing the purchaser of the service.

In this case, when Utility computes the amount of Petitioner’s monthly charge for electric transmission services, Utility may include amounts to recover its operating expenses, including an amount for the gross receipts tax imposed on Utility under section 186-a of the Tax Law. However, the inclusion in Petitioner’s monthly charge of an amount for the recovery of the gross receipts tax imposed on Utility that is separately stated on Petitioner’s bill pursuant to section 186-a.6 of the Tax Law is not the equivalent of directly taxing Petitioner. The tax imposed on

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Utility under section 186-a of the Tax Law is not being imposed on Petitioner through the monthly charges Petitioner pays Utility for provision of transmission services.

It should be noted that the conclusions of this Advisory Opinion with respect to the application of section 186-a of the Tax Law are not binding with respect to any taxpayer other than Petitioner.

DATED: January 4, 2005

/s/
Jonathan Pessen
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Technical Services Division

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