New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-86 (17) C
Corporation Tax
August 29, 1986

STATE OF NEW YORK
STATE TAX COMMISSION
ADVISORY OPINION PETITION NO. C860416A

On April 16, 1986, a Petition for Advisory Opinion was received from Sears Oil Co., Inc. and Sears Petroleum & Transport Co., 1914 Black River Boulevard, Rome, New York 13440.

The question raised is whether, pursuant to section 182-a of the Tax Law, Petitioners' acceptance of properly completed resale certificates from customers which were not listed on the Tax Department's roster of Tax Law Article 12-A motor fuel distributors was, ipso facto, not in good faith.

Section 182-a.2(b) of the Tax Law provides, in part:

"...However, to prevent the multiple application of the tax imposed by this section, gross receipts shall not include the receipts from any sale for resale to a purchaser which is an oil company subject to tax under this section. It shall be presumed that no receipts are receipts from a sale for resale to such purchaser unless such purchaser furnishes the oil company with a resale certificate in such form and under such terms and conditions as the tax commission may prescribe and such certificate is accepted in good faith by such oil company...."

Section 182-a.10(a) of such law, as amended by Chapter 1043 of the Laws of 1981, provides, in part:

"Where a false or fraudulent resale certificate ... has been furnished to an oil company or to any other person, the corporation or person furnishing such certificate shall be subject to a penalty equal to three per centum of the gross receipts which would have otherwise been taxable to such oil company if such certificate had not been furnished to such company or to such other person...."

With respect to the secrecy of information contained in reports under Article 9 of the Tax Law required of officials, the pertinent provisions of section 202.1 of the Tax Law, applicable by reason of section 182-a.6 of the Tax Law, provide, in part:

"... Provided, further, nothing herein shall be construed to prohibit the disclosure of the names of corporations subject to tax under section ... one hundred eighty-two-a ... for purposes of assisting corporations subject to such tax ... in determining whether ... a gross receipt from sales of petroleum is an ... excludible gross receipt from sales of petroleum because it is derived from a sale for resale." (Tax Law, 202, subd. 1, as amended by L. 1981, Ch. 481, L. 1983, Ch. 18).

Petitioners are currently under audit for taxable years ended December 31, 1981 and December 31, 1982. For such taxable years, Petitioners were subject to section 182-a which imposed a franchise tax on certain oil companies under Article 9 of the Tax Law. One of the outstanding

audit issues is whether Petitioners' receipts from sales of petroleum are includable in Petitioners' gross receipts upon which the tax is measured where Petitioners accepted completed resale certificates from various purchasers which, although certifying that they were oil companies, are not in fact oil companies. Petitioners feel that they accepted such resale certificates "in good faith".

Petitioners requested a Declaratory Ruling on this issue and on July 31, 1985, the State Tax Commission signed Declaratory Ruling 85-02. The ruling states, in part:

"... the receipts derived from an oil company's petroleum sales in each instance where it accepted in good faith a properly completed resale certificate in the form prescribed by the Tax Commission, are excludible from its gross receipts from sales of petroleum. As has been held in the sales tax context, a seller is not required to police or investigate his customers as to their subsequent use of the purchased product ... The penalty imposed by section 182-a.10(a) upon a corporation or person issuing a false or fraudulent resale certificate, measured by a percentage of the gross receipts which would have otherwise been taxable, serves, not only to deter such activity, but to protect the revenue. The existence of the penalty does not, however, relieve an oil company from its liability to pay tax on those receipts subject to tax. The question of good faith, however, is a factual one. Although good faith does not require an oil company to police or investigate its purchasers as to the subsequent use of petroleum, the Legislature, by making an exception to the secrecy provision to enable oil companies to inquire of the Department of Taxation and Finance as to a purchaser's status as a section 182-a taxpayer, obviously intended that an oil company make such an inquiry in order to be protected. Otherwise there would have been no purpose to this narrowly written exception to the general secrecy provisions applicable to an oil company as well as all other taxpayers under article 9 of the Tax Law. The issue of good faith, then, will turn on, in addition to factors such as the oil company's knowledge of a purchaser's business activities as to whether the purchaser would be an oil company under section 182-a.2(a) (e.g., knowledge of circumstances indicating that the purchaser did not import or cause to be imported, extract, produce, refine, manufacture or compound petroleum or that the purchaser was principally engaged in selling residential fuel oil) and the circumstances of the transaction, whether the oil company inquired of the Department as to the purchaser's status as a section 182-a taxpayer and the extent to which this information was made available to the oil company. For example, where by reason of intercorporate affiliation, an oil company had actual knowledge of the business circumstances of its affiliate purchaser, the mere acceptance of a resale certificate of the type described in the petition would not constitute a good faith acceptance...."

As the Declaratory Ruling states, the question of good faith is a factual one and several factors must be considered. No one factor is determinative. A transaction must be considered in its totality.

Subsequent to the Declaratory Ruling, the Tax Department's Audit Division developed a set of rules on which a determination could be made as to whether a taxpayer's customer was a possible

"oil company" and whether a resale certificate was accepted in good faith. In making its determination the Audit Division looks at several factors, such as:

1. whether the sale of distillates was a rack sale from a location within New York State;

2. whether the sale of petroleum, of any kind, was made to a customer who is registered under Article 12-A of the Tax Law; and

3. whether the sale was made to a customer from a location outside New York State where title passed to the customer outside New York State and delivery of the product to a location within New York State was made via a common carrier.

Accordingly, the absence of a customer from the Tax Department's roster of Tax Law Article 12-A motor fuel distributors is not, of itself, sufficient evidence to determine that the acceptance by Petitioners of a section 182-a resale certificate from such customer was not in good faith. It should be noted, however, that the determination of good faith is a question of fact, and questions of fact are not susceptible of determination in an Advisory Opinion. An Advisory Opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to "a specified set of facts." Tax Law, 171, subd. twenty-fourth; 20 NYCRR 901.1(a). Inasmuch as the question of good faith arises within the context of an audit, the necessary factual determination will be made within such context, in accordance with the principles outlined in the Declaratory Ruling.

DATED: August 29, 1986

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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