

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

TSB-A-95 (8) C
Corporation Tax
April 20, 1995

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO Z940118B

On January 18, 1994, a Petition for Advisory Opinion was received from Niagara Mohawk Power Corporation, 300 Erie Blvd. West, Syracuse, New York 13202-4250.

The issues raised by Petitioner, Niagara Mohawk Power Corporation, concern a marketer's sale of natural gas to a consumer and the questions are whether, under the scenarios presented herein, Petitioner or the marketer would be liable for payment of (1) franchise tax on utilities under section 186 of the Tax Law, (2) the gross receipts tax under section 186-a of the Tax Law and (3) the gas importer tax under section 189 of the Tax Law.

Petitioner is a New York State public utility that is principally engaged in the manufacture, distribution and sale of electricity. It also distributes and sells natural gas. Petitioner's business also includes the delivery of natural gas as a local distribution company pursuant to the terms of a transportation tariff on file with the Public Service Commission. Petitioner's pipelines run from the intersection of an interstate pipeline with its facilities in New York State (*i.e.*, the "City-gate") to a consumer's facilities. The City-gate is located in New York State. The natural gas delivered by Petitioner is sold by a seller thereof, referred to as a marketer ("Marketer") to a consumer ("Consumer"). Petitioner never holds title to the gas wherein Petitioner is providing only a transportation service.

Marketer is a natural gas seller, a wholesaler of natural gas, that is incorporated and headquartered in a state other than New York. Marketer is principally engaged in the sale of natural gas. It is not under the supervision of the New York State Public Service Commission. Marketer does not maintain a permanent office, facilities, or staff in New York. Marketer, however, regularly solicits business in New York by telephone and mail, and through visits to prospective purchasers by its marketing representatives.

Consumer is located in New York and is an end-user of natural gas. When Consumer purchases natural gas for its use from Marketer, Consumer pays Marketer directly. The transactions are reflected in the following scenarios.

Scenario 1: Marketer acquires natural gas outside New York State. Consumer and Marketer negotiate a gas sales contract that does not specify where transfer of title takes place. The contract price includes the cost of shipping the gas to Petitioner's City-gate. Marketer transports such natural gas to the City-gate under a separate contract with an interstate pipeline company. Consumer has no independent control over, or rights to service under, the transportation contract between Marketer and the interstate pipeline company. Risk of loss transfers from Marketer to Consumer at the City-gate.

Scenario 2: Marketer acquires natural gas within New York State. Consumer and Marketer negotiate a gas sales contract that does not specify where transfer of title takes place. The contract price includes the cost of shipping the gas to Petitioner's City-gate. Marketer transports such natural gas to the City-gate under a separate contract with an interstate pipeline company. Consumer has no independent control over, or rights to service under, the transportation contract between Marketer and the interstate pipeline company. Risk of loss transfers from Marketer to Consumer at the City-gate.

Scenario 3: Marketer acquires gas outside New York State. Marketer transfers title to Consumer at a point outside New York. The contract price continues to include the cost of shipping the gas to Petitioner's City-gate. Marketer transports such natural gas to the City-gate under a separate contract with an interstate pipeline company. Consumer has no independent control over, or rights to service under, the transportation contract between Marketer and the interstate pipeline company. Risk of loss transfers from Marketer to Consumer at the City-gate.

Scenario 4: Marketer acquires gas outside New York State. Marketer transfers title to Consumer at a point outside New York, and the contract price includes the cost of shipping the gas to the point where title transfers. In a separate transaction, Marketer transfers to Consumer rights under Marketer's contract with the interstate pipeline that are sufficient to permit Consumer to transport all the gas purchased from Marketer from the title transfer point to the City-gate in New York. (The transfer of transportation rights is for the duration of the gas sales contract only, and is effectuated in accordance with all applicable regulations of the Federal Energy Regulatory Commission.) Consumer pays Marketer directly for the gas commodity and pays the interstate pipeline company for the transportation service. The interstate pipeline company then credits Marketer's account for the amount paid to it by Consumer. Risk of loss transfers from Marketer to Consumer at the point where title transfers.

Scenario 5: Marketer acquires gas outside New York State. Marketer transfers title to Consumer at a point outside New York, and the contract price includes the cost of shipping the gas to the point where title transfers. Interstate transportation of the gas into New York is accomplished under a contract directly between the interstate pipeline and Consumer. Marketer has no control over, or rights to service under, the transportation contract. Risk of loss transfers from Marketer to Consumer at the point where title transfers.

Section 186 of the Tax Law imposes a tax on "[e]very corporation, joint-stock company or association ... formed for or principally engaged in the business of supplying ... gas, when delivered through mains or pipes" The tax is imposed for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity in New York State and is based, in part, upon gross earnings from all sources within New York State. The term "gross earnings" as used in this section means all receipts from the employment of capital without any deduction.

An earlier advisory opinion issued to Niagara Mohawk Power Corporation, Adv Op St Tax Comm, May 29, 1987, TSB-A-87(12)C, involved a situation in which Petitioner agreed to receive customer-owned gas from a gas transmission corporation and transport it to the customer, and to receive payment for transportation expenses from the customer

and payover such amounts to the gas transmission corporation. The advisory opinion held that the fees imposed for the special gas transportation service (contract carriage) provided to its customer are receipts of Petitioner and are included in Petitioner's gross earnings under section 186 of the Tax Law. See, New York City Energy Office, Adv Op St Tax Comm, October 15, 1985, TSB-A-85(23)C.

In Mark S. Klein, Partner, Hodgson, Russ, Andrews, Woods & Goodyear, Adv Op Comm T & F, April 29, 1991, TSB-A-91(11)C, a foreign corporation is principally engaged in the business of supplying natural gas to end-users. The foreign corporation's requirements contracts with suppliers provided that the delivery point of the natural gas was the point of sale. At the point of sale, both legal possession and title passed to the foreign corporation and that same point of sale is the point the end-user takes possession and title. The foreign corporation is subject to tax under section 186 of the Tax Law on its gross earnings from the sale of natural gas where the point of sale is located within New York State. However, if the foreign corporation sells natural gas to an end-user where the point of sale is in Louisiana, the gross earnings from such sale are not from a source in New York State. The end-user's subsequent contract with a pipeline company to transport the purchased natural gas to its destination, even if such destination is in New York State, is not relevant in determining the taxability of the foreign corporation selling the natural gas outside New York State.

Herein, Marketer sells natural gas to Consumer under a sales contract. In all scenarios, Petitioner delivers the natural gas from Petitioner's City-gate in New York State to Consumer's facilities, but never takes title to such gas. Petitioner's fee for the transportation of the natural gas (contract carriage) is a receipt of Petitioner's and is included in Petitioner's gross earnings under section 186 of the Tax Law. Since Petitioner is not the seller or owner of such natural gas, the receipt from such sale is not a receipt of Petitioner.

Marketer is a foreign corporation that is principally engaged in the sale of natural gas. Like any other seller of natural gas, Marketer is subject to tax under section 186 of the Tax Law on its gross earnings from the sale of natural gas within New York State. The determination of where Marketer's sale of natural gas occurs in each of the Scenarios is a factual matter 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. Twenty-fourth; 20 NYCRR 2376.1(a). Accordingly, it is not within the scope of this advisory opinion to determine whether Marketer has gross earnings from the sale of natural gas within New York State.

However, under section 186 of the Tax Law, where the sale of Marketer's natural gas to Consumer occurs within New York State, Marketer must include the receipts from such sale in gross earnings from all sources within New York State. See, Mark S. Klein, supra.

Section 186-a of the Tax Law provides in part:

1. Notwithstanding any other provision of this chapter, or of any other law, a tax equal to three and one-half per centum of its gross income is hereby imposed upon every utility doing business in this state which is subject to the supervision of the state department of public service . . . and a tax equal to three and

one-half per centum of its gross operating income upon every other utility doing business in this state ... 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)(i) 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 ... delivered through mains [or] pipes ... or furnishes gas ... by means of mains [or] pipes ... regardless of whether such activities are the main business of such person or are only incidental thereto ... (b) the word "person" means persons, corporations, companies, associations, joint-stock associations ... (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 ... also profits from any transaction ... within this state whatsoever; and (d) the words "gross operating income" mean and include receipts received in or by reason of any sale, conditional or otherwise, made for ultimate consumption or use by the purchaser of gas ... or in or by reason of the furnishing for such consumption or use of gas ... service in this state ... without any deduction

For purposes of section 186-a of the Tax Law, a utility subject to the supervision of the Department of Public Service is a utility of the first class, and every other utility is a utility of the second class.

Herein, for purposes of section 186-a of the Tax Law, Petitioner is a utility of the first class and the total gross income received by Petitioner as a fee for the delivery of natural gas from Petitioner's City-gate to Consumer's facilities (contract carriage) is taxable to Petitioner. (See Niagara Mohawk Power Corporation, supra, and New York City Energy Office, supra.)

Marketer is a utility of the second class for purposes of section 186-a of the Tax Law and is subject to tax on its gross operating income. Pursuant to section 186-a of the Tax Law where the sales of natural gas by Marketer to Consumer occur in New York State, the receipts from such sale are includible in Marketer's gross operating income.

As stated above, the determination of where Marketer's sale of natural gas occurs in each of the Scenarios is a factual matter not susceptible of determination in an advisory opinion. Accordingly, it is not within the scope of this advisory opinion to determine whether Marketer has receipts from sales of natural gas or gas service delivered into New York State through mains or pipes for ultimate use or consumption by Consumer.

Section 189.2 of the Tax Law imposes on every gas importer a monthly privilege tax on the privilege or act of importing gas services or causing gas services to be imported into New York State for its own use or consumption in New York State. Section 189.1 of the Tax Law provides, in pertinent part, as follows:

(a) The term "gas services" means gas delivered through mains or pipes.

(b) The term "gas importer" means every person who imports or causes to be imported into this state services which have been purchased outside the state for its own use or consumption in this state, provided such term does not include a public utility subject to the jurisdiction of the public service commission as to the matter of rates on sales to customers.

(c) The term "person" includes an individual, partnership, society, association, joint stock company, corporation

Section 189.3 of the Tax Law provides that the privilege tax shall be paid to New York State by the use of one of the two following methods:

(a)(1) If the gas services are delivered in this state to the gas importer by a public utility, then the public utility making such delivery of gas services shall be required to collect the tax imposed by this section pursuant to subparagraph two of this paragraph, and shall be collected monthly from such gas importer and such gas importer shall so pay the tax required to be collected to such public utility The amount of tax required to be collected shall be paid to such public utility required to collect it as trustee for and on account of the state

(b) If the gas services are delivered to the gas importer by other than a public utility subject to the supervision of the public service commission, a gas importer shall file a return quarterly covering each month during such quarter with the department of taxation and finance and shall pay such tax at the time of filing such return.

The Legislature, in enacting section 189 of the Tax Law, stated that:

[t]he main goal of [section 189] is to attempt to equalize the tax burden in relation to consumers of gas service. Presently, consumers of gas services may avoid the burden of the taxes imposed by sections 186 and 186-a of the tax law by purchasing the service out-of-state and hiring transportation to carry that service to the consumer's premises in this state. The legal incidence of the taxes imposed by sections 186 and 186-a of the tax law are on the utility making sales of gas services in this state. However, both of these taxes are presently passed through by the utility separately, and in their entirety, to consumers purchasing gas services from such utility in this state pursuant to rate regulation of the charge for such services by the public service commission. Thus, consumers of gas services purchased in this state from utilities bear the direct pass-through of both such taxes. [This bill is] an attempt to impose on those consumers who purchase gas services outside this state a comparable fair tax burden. Accordingly, to insure continuing comparability, pursuant to regulation by the public service commission, utilities shall be required to continue to pass through the total amount of such taxes to in-state consumers so that such consumers will continue to bear the economic burden of such taxes. In this manner a continuing comparable economic burden is imposed by... this act on these consumers who purchase gas service out-of-state for

use or consumption in this state as compared to consumers who purchase gas services in this state from utilities . . ." (emphasis added) (L 1991, ch 166, §149).

Herein, Petitioner as a public utility is responsible for the collection of the section 189 tax if it is delivering the gas to importers of gas services. The determination with respect to importation revolves around the issue of where the sale of gas takes place, either within or without New York State. As discussed previously, the finding of where Marketer's sale of natural gas occurs in each of the Scenarios is a factual matter not susceptible of determination in an advisory opinion. However, in the Scenarios where Marketer's sale of natural gas occurs in New York State, Consumer is not importing gas services into New York State because it is purchasing the natural gas in New York State. But, in the Scenarios where Consumer purchases natural gas outside New York State and imports gas service into New York State for its own use or consumption, Petitioner is responsible for the collection of the gas importer tax under section 189 of the Tax Law on the gas services Petitioner delivers to Consumer under such Scenarios.

Note that, with respect to Scenarios 1 through 5 described herein, the following discussion may help in making the determination of when the sale of natural gas occurs in New York State for purposes of sections 186, 186-a and 189 of the Tax Law.

Scenario 1: Absent any other information which would more fully describe the agreement between the parties or their relationship, it appears, based upon these limited facts, that the pipeline company is acting as agent for the seller (Marketer), and that neither transfer of title nor transfer of possession occurs until the gas is delivered at the City-gate. As a result, the sale for New York State tax purposes occurs within New York State.

Scenario 2: Absent any other information which would more fully describe the agreement between the parties or their relationship, it appears, based upon these limited facts, that the gas never leaves New York State, as it is both acquired by the seller and purchaser within New York State. As a result, the sale for New York State tax purposes occurs within New York State.

Scenario 3: This scenario presents a conflicting set of facts. On the one hand, the contract provides for the transfer of title outside of New York State, however, such clause may be solely self-serving, in light of the fact that all the other indica of sale (delivery, risk of loss, control, etc.) indicate a sale within New York State. However, the substantial contacts lead to an inference that, pending more specific information regarding the proposed transactions and the relationships of the parties and their past dealings, the situs of the sale will be presumptively placed in New York State.

Scenario 4: Absent any other information which would more fully describe the agreement between the parties or their relationship, it appears, based upon these limited facts, transfer of title and transfer of possession occur outside of New York State. As a result, the sale for New York State tax purposes occurs outside New York State.

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Scenario 5: Absent any other information which would more fully describe the agreement between the parties or their relationship, it appears, based upon these limited facts, transfer of title and transfer of possession occurs outside of New York State. As a result, the sale for New York State tax purposes occurs outside New York State.

DATED: April 20, 1995

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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