

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

TSB-A-85 (23) C
Corporation Tax
TSB-A-85 (49) S
Sales Tax
October 16, 1985

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S841220A

On December 20, 1984, a Petition for Advisory Opinion was received from the New York City Energy Office, 49 Chambers Street - Suite 720, New York, New York 10007.

Issues

At issue is whether and to what extent the (1) franchise tax on utility companies, (2) tax on the furnishing of utility services, (3) temporary metropolitan transportation business tax surcharges, and (4) sales tax apply to a "contract carriage" arrangement to transport natural gas owned by a consumer or under contract for sale by a producer to a consumer.

Facts

Section 66-d of the Public Service Law requires a gas utility, under an arrangement called "contract carriage," to transport or to contract with others to transport natural gas owned by a consumer or under contract for sale by a producer to a consumer, under certain conditions. The gas utility is permitted to charge a fee for the transport of natural gas under such contract carriage. The Public Service Commission is authorized to establish the terms and conditions for contract carriage and to fix the fee charged therefor.

Opinion

Issue (1)

Section 186 of the Tax Law imposes a tax on "every corporation, joint stock company or association formed for or principally engaged in the business of supplying water, steam or gas, when delivered through mains or pipes, or electricity, or principally engaged in two or more such businesses." The tax is based, in part, upon gross earnings from all sources within this state. The term "gross earnings" as used in this section means all receipts from the employment of capital without any deduction. Thus, the fees charged to a gas producer or a customer by a gas utility are receipts of the gas utility and are included in the utility's gross earnings. Accordingly, the utility is subject to the tax imposed under section 186 of the Tax Law on the fees imposed for such contract carriage.

Issue (2)

The tax imposed by Section 186-a of Article 9 of the Tax Law relies heavily on the uniform system of accounting prescribed by the Public Service Commission. It was the intent of the legislature to tax:

1. Receipts from sales made and services rendered (revenue accounts).
2. Receipts from the sale of inventory without reduction for cost of good sold.
3. Profits from any other transactions.

We must, therefore, determine the proper classification of the receipts of a gas utility required to transport or to contract with others to transport natural gas owned by a consumer or under contract for sale by a producer to a consumer.

Section 186-a provides in part:

. . . . a tax equal to 3% of its gross income is hereby imposed on every utility doing business in this state which is subject to the supervision of the state department of public service. . .

. . . . The word "utility" includes every person subject to the supervision of the state department of public service,. . . .

. . . . The word "person" means persons, corporations, companies, associations, joint-stock associations, etc. . . .

. . . . 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,

. . . . Also profit from any transaction (except for sales for resale and rentals) within this State whatsoever. . . .

Generally, "sales made and services rendered for ultimate consumption or use within this state" means sales of gas, electricity, steam, water, refrigeration, telephony or telegraph when delivered through mains, pipes or wires, sale of merchandise which are part of stock in trade, charges for transportation of passengers and/or goods, toll charges and service charges such as charges for installation and moving of telephones and for the delivery of messages. Thus, "sales made and services rendered" has been defined to include sale and services which are the principal business of the taxpayer and which are made to customers.

In order to be included under the heading "profit from any other transaction whatsoever, except the profit on sales for resale and rentals," the profits must be from labor not performed in the conduct of the taxpayer's principal business and from the sales of materials and supplies, other than such as are purchased for resale. Isolated transactions also come under this item such as when a water company, which does not make a practice of furnishing this service, lays pipes and mains for a customer with title vesting in such customer.

In one instance, the gas utility renders a service whereby it transports natural gas owned and ultimately consumed by the purchaser of the service. If the pipelines of the utility which renders the

service are located entirely within New York State, the total gross income received by the utility as a result of contract carriage is taxable to the utility under section 186-a of the Tax Law. If the pipelines of the utility which renders the contract carriage service are located within and without New York State and the natural gas is shipped in intrastate, interstate or foreign commerce, the gross income received by the utility as a result of contract carriage from the use of New York State pipelines is taxable to the utility under section 186-a of the Tax Law.

In the other instance where the utility contracts with others to transport the natural gas, although a service is rendered, it is not a service "for ultimate consumption or use by the purchaser", within the meaning intended so that the total "receipts" for such services does not constitute gross income as defined. Contracting with others to transport natural gas owned by a consumer on behalf of such consumer, is a service rendered but is incidental to the conduct of the utility's principal business. As such, the service rendered is properly a transaction taxable on the profits derived therefrom. To the extent that such service is rendered on behalf of a New York State consumer, such profits would be subject to tax in their entirety.

Issue (3)

Section 186-b of the Tax Law imposes a temporary metropolitan transportation business tax surcharge on any company subject to tax under section 186 of the Tax Law and exercising its corporate franchise or carrying on its business in such corporate or organized capacity within the metropolitan commuter transportation district (hereinafter "MCTD"). The surcharge is imposed upon that portion of the taxpayer's section 186 tax which is attributable to the taxpayer's business within the MCTD. Such district includes the counties of New York, Bronx, Kings, Queens, Richmond, Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk and Westchester.

Section 186-c of the Tax Law imposes a tax surcharge on every utility subject to tax under section 186-a of the Tax Law and doing business in the MCTD. The surcharge is imposed upon the portion of the taxpayer's section 186-a tax which is attributable to the taxpayer's business activity within the MCTD.

In the case of a utility subject to tax under section 186 of the Tax Law, the portion of the tax attributable to business activity carried on within the MCTD is determined by multiplying the tax by the ratio of the taxpayer's gross earnings from business activities carried on within the MCTD to its gross earnings from business activities carried on within New York State.

In the case of a utility subject to tax under section 186-a and subject to the supervision of the State Public Service Commission, the portion of the tax attributable to gross income from business activity carried on within the MCTD is the ratio of the taxpayer's gross income from all sources within the MCTD to the gross income from all sources within New York State.

Thus, for corporations subject to tax under sections 186 and 186-a, and carrying on business in the MCTD, a tax under sections 186-b and 186-c would be due.

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Issue (4)

Section 1105(b) of the Tax Law imposes a sales tax on "the receipts from every sale, other than sales for resale, of gas, electric refrigeration and steam service of whatever nature. . . ."

Section 1107 of the Tax Law imposes a temporary municipal assistance tax within the City of New York on the same receipts subject to tax under section 1105 of the Tax Law.

Section 1109 of the Tax Law imposes an additional tax within the MCTD on the same receipts subject to tax under section 1105 of the Tax Law.

As stated above, no sale of the gas takes place under a contract carriage. Rather, the gas utility is providing the service of transportation of goods. Such service is not among the services subject to sales tax pursuant to the provisions of sections 1105, 1107 and 1109 of the Tax Law. Accordingly, a gas utility engaged in contract carriage is not required to collect sales tax on the fees paid for such contract carriage.

DATED: October 15, 1985

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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