

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

TSB-A-86 (22) C
Corporation Tax
TSB-A-86 (49) S
Sales Tax
December 1, 1986

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. Z860307C

A Petition for Advisory Opinion, submitted jointly by Consolidated Edison Company of New York, Inc., 4 Irving Place, New York, New York 10003, and New York City Public Utility Service, 49 Chambers Street (Suite 720), New York, New York 10007, was received on March 7, 1986.

The Petition raises three issues regarding tax consequences with respect to transactions arising from a Lease and Operating Agreement between the Petitioners by which New York City Public Utility Service arranges for the distribution and sale, through Consolidated Edison Company of New York facilities, of preference power it purchases from the New York State Power Authority. These issues involve the (1) Sales and Use Tax; (2) Franchise Tax on Utility Companies; and (3) Tax on the Furnishing of Utility Services.

The City of New York has established a Public Utility Service ("Utility"), which, among other things, is authorized to purchase electrical power and energy ("preference power") from the Power Authority of the State of New York ("PASNY") and from other entities, to arrange with utility companies such as Consolidated Edison Company of New York ("Con Edison") for the distribution of such preference power through the lease of transmission, substation and distribution facilities within the service areas of such utility companies; and to sell and distribute such preference power to itself and to residential, commercial, industrial and other consumers. Utility will determine who is to receive the preference power. Con Edison will act as the operating agent of Utility in the sale of such power. Con Edison will do all billing and collection.

Con Edison will lease to Utility an undivided interest in Con Edison's distribution system, to the extent required to sell and distribute preference power to consumers. Con Edison has exclusive control of its entire system, including all matters relating to the design, construction, expansion, operation, use, maintenance and retirement of the system. Con Edison will indemnify and hold Utility harmless from and against any and all liability, suits, claims, demands, actions, judgments, costs and expenses arising from Con Edison's exercise of exclusive control of its system.

If PASNY does not make the necessary arrangements, Con Edison will make arrangements with other utilities, if available, for transmission of preference power to Con Edison's system, and where feasible, Utility will contract with and pay such other utilities directly for such transmission.

If PASNY does not make the necessary arrangements, Con Edison will make arrangements with Long Island Lighting Company, Inc. ("LILCO") (if Con Edison's facilities are available) to transmit a proportionate share of preference power for delivery to consumers in that portion of the City which is in LILCO's service territory. Utility will pay a wheeling charge to Con Edison for such transmission.

RODERICK G. W. CHU, COMMISSIONER

GABRIEL B. DICERBO, DEPUTY COMMISSIONER

FRANK J. PUCCIA, DIRECTOR

The rental is calculated on the basis of kilowatt hours of preference power sold by, and distributed on behalf of Utility during the month. The amount of the rental is the sum of -

1. other than "Industrial Economic Development Consumers" -- the charges which would have been billed at Con Edison's applicable tariffs -- including the fuel adjustment clause less Con Edison's fuel and purchased power costs reflected in such tariffs; and
2. for "Industrial Economic Development Consumers" -- the charges under rates, pursuant to Con Edison's tariff, applicable to such consumers.

Utility's rates are fixed to provide revenue in an amount not less than necessary to recover the following costs and expenses: the actual cost to Utility for the purchase, transmission, distribution and delivery including the rental paid by Utility; the actual expenses necessary for administration of the Public Utility Service; and any other costs or charges that Utility incurs or has an obligation to pay under the agreement.

The "funds collected for preference power" is the amount billed at Utility's rates, adjusted to reflect amounts uncollected. The adjustment is computed as follows:

1. Subtract the rental from the gross amount billed.
2. Multiply the remainder by the provision for uncollectible accounts approved by the PSC in the most recent rate case.

Con Edison will forward to Utility all "funds collected for preference power" after deducting the rental amount, any transmission cost incurred by Con Edison, and any additional costs actually incurred by Con Edison. In the event the funds collected for preference power are less than the deductions, Con Edison will bill Utility for the deficiency.

Utility assigns to Con Edison Utility's rights to amounts due and owing from Utility's consumers to the extent such amounts are included in "funds collected for preference power" and remitted to Utility. Con Edison will retain any such amount together with other amounts related to the late payment or non-payment of bills, as prescribed by Con Edison's PSC schedule, that it may collect from Utility's consumers.

ISSUE I - Sales and Use Tax

Questions Presented

(a) Is the New York City Public Utility Service, established by the City of New York as authorized by Local Law No. 78 for the year 1982, which is an agency, instrumentality or political subdivision of New York State as defined in section 1116 of the Tax Law, exempt from the imposition of sales and use taxes as imposed by sections 1105 and 1110 of the Tax Law?

Article 28 of the New York State Sales and Use Tax Law provides in Section 1116(a) that any sale by or to the following and any use by any of the following shall not be subject to the sales and compensating use taxes imposed under such article:

"(1) The state of New York, or any of its agencies, instrumentalities, public corporations, . . . or political subdivisions where it is the purchaser, user or consumer, or where it is the vendor of services or of property of a kind not ordinarily sold by private persons".

Regulation 529.2, subdivision (a), offers the following definitions:

(1) Agencies and instrumentalities of the State as used in this section means any authority, commission or independent board created by an act of the Legislature for a public purpose.

(2) A public corporation as used in this section means any corporation created by an act of the Legislature for a public purpose or pursuant to an agreement or compact with another state or Canada.

Subdivision (b)(2) provides that "governmental entities [as defined above] as purchasers, users, consumers, occupants or patrons must exercise their right to exemption through the issuance of governmental purchase orders or the appropriate exemption document".

Accordingly, upon issuing a governmental purchase order to its vendors, Utility is not required to pay sales or use tax on property or services purchased for its own use or consumption.

(b) Is the sale of preference power by PASNY to Utility exempt from sales taxes?

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

Regulation 527.2(e) provides that the purchaser of utility services intended for resale must furnish its supplier with a Resale Certificate (Form ST-120).

Consequently, Utility must furnish a Resale Certificate to PASNY when purchasing preference power which will be resold.

(c) Are charges to Utility for the rental of Con-Edison's distribution system, and for Con-Edison's services of billing and collecting monies, taxable?

Although the utilization of Con-Edison's transmission system in the distribution of preference power is viewed as a lease transaction by the Petitioners, for sales tax purposes it is considered the purchase of a service by a governmental entity which is exempt from taxation under Tax Law 1116(a)(1), supra. Furthermore, Con Edison's charges for billing and collecting monies from Utility's customers are exempt because the Tax Law imposes no sales tax on such services.

(d) Is the sale of preference power by Utility to the ultimate consumer subject to sales taxes?

Section 529.2(c) of the Sales and Use Tax Regulations relating to governmental entities as vendors, states in part that "(2) [s]ales by New York State governmental entities of tangible personal property or services of a kind which are ordinarily sold by private persons . . . are subject to the sales and use tax. . . .

Example 6: A municipality sells electricity to its residents. The sale is taxable."

Regulation 527.7(d)(3) provides that "[m]unicipalities which provide services subject to tax are required to register as a vendor with the [sales tax] bureau and collect the appropriate tax which shall be remitted with a timely filed return".

In the Lease and Operating Agreement, Con Edison agrees to perform, as Utility's agent, the services of selling, billing, and collecting monies arising from the distribution and sale of preference power. In this regard it must be noted that the Tax Law, in defining the term "vendor", adds the following provisions:

when in the opinion of the tax commission it is necessary for the efficient administration of this article to treat any salesman, representative, peddler or canvasser as the agent of the vendor, distributor, supervisor or employer under whom he operates or from whom he obtains tangible personal property sold by him or for whom he solicits business, the tax commission may, in its discretion, treat such agent as the vendor jointly responsible with his principal, distributor, supervisor or employer for the collection and payment over of the tax. (Tax Law, 1101(b)(8)(ii)).

Consequently, the Petitioners must share the obligation for the proper collection of the tax including obtaining the proper certification from customers claiming exemption from tax. Exempt retail purchases of electricity to be used exclusively for non-residential purposes, must be supported by one of the following documents:

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Resale Certificate, Form ST-120
Exempt Use Certificate, Form ST-121,
Exempt Organization Certificate, Form 119.1,
Direct Payment Permit, Form AU-297, or
Governmental Purchase Order.

No certificate is required to claim the exemption from statewide sales tax provided under Tax Law 1105-A for purchases of electric power solely for residential use. This exemption, both from statewide tax and certification, extends to billings (in a lump sum or based on a single meter) combining both residential and non-residential power usage, if the non-residential use does not exceed 25 percent. When the portion representing residential usage is less than 75 percent of the total bill, the purchaser must file Form TP-385, Certification of Residential Use.

Technical Services Bureau Memorandum TSB-M-78(7)S, Reduction in Rate on Certain Energy Sources and Services, should be reviewed for additional information regarding the sale of utility services.

ISSUE II - Franchise Tax on Utility Companies

Questions Presented

- (a) Is the New York City Public Utility Service subject to the tax imposed under section 186 of the Tax Law?

Section 186 of the Tax Law imposes a franchise taxon "Every corporation, joint-stock company or association... formed for or principally engaged in the business of supplying... electricity...."

Since Utility is a municipality, it is not a corporation, joint-stock company or association formed for or principally engaged in business that would subject it to tax under section 186 of the Tax Law.

- (b) Are the rentals received by Con Edison from Utility for the use of its distribution system and for its services in billing and collecting monies as agent for Utility gross earnings to Con Edison subject to the tax imposed by section 186 of the Tax Law?

- (c) Do the monies collected by Con Edison from Utility's consumers as agent for Utility for the sale of preference power constitute gross earnings to Con Edison subject to the tax imposed by section 186 of the Tax Law?

The tax imposed by section 186 of the Tax Law is based, in part, upon gross earnings from all sources within New York State. Such section defines the term "gross earnings" as all receipts from the employment of capital without any deduction.

Accordingly, the rental Con Edison receives from Utility for the use of its distribution system and for its services in billing and collecting monies as Utility's agent are receipts of Con Edison for services performed and are included in Con Edison's gross earnings. Any wheeling charge Con Edison receives from Utility for the transmission of preference power is also included in Con Edison's gross earnings. The funds collected for preference power that are collected by Con Edison, as Utility's agent, from Utility's consumers for the sale of preference power do not constitute gross earnings of Con Edison. However, any amount not included in "funds collected for preference power" that is collected by Con Edison, as Utility's agent, from Utility's consumers for the sale of preference power, such as an amount related to late payment or non-payment of bills, is a receipt of Con Edison and is included in Con Edison's gross earnings.

(d) Are such rentals and preference power sales monies collected by Con Edison from Utility's consumers as agent for Utility subject to the temporary metropolitan transportation business tax surcharge imposed under section 186-b of the Tax Law?

Section 186-b of the Tax Law provides that the temporary metropolitan transportation business tax surcharge on utilities is in addition to the tax imposed under section 186 of the Tax Law and, for the taxable years such tax surcharge is applicable, the rate of the tax surcharge is applied to the tax imposed under section 186 or to that portion of the tax imposed under section 186 which is attributable to the taxpayer's business activity carried on within the Metropolitan Commuter Transportation District ("MCTD"). The portion of the tax attributable to business activity carried on within the MCTD shall be determined by multiplying the tax imposed under section 186 by the ratio of the taxpayer's gross earnings from all sources within the MCTD to its gross earnings from all sources within New York State.

Consequently, for the taxable years the temporary metropolitan transportation business tax surcharge on utilities under section 186-b of the Tax Law is in effect, if Con Edison has business activities both within and without the MCTD it must determine its gross earnings from within the MCTD as well as its gross earnings from within New York State. Con Edison's gross earnings from within the MCTD include the rental received from Utility for the use of its distribution system and for its services in billing and collecting monies as Utility's agent, any wheeling charge received from Utility for the transmission of preference power, and any amount that is collected from Utility's consumers, as Utility's agent for the sale of preference power, that is not included in "funds collected for preference power".

ISSUE III Tax on the Furnishing of Utility Services

Questions Presented:

(a) Is the New York City Public Utility Service subject to the tax imposed under section 186-a of the Tax Law?

Section 186-a of the Tax Law provides:

. . . [A] tax equal to 3% of its gross income is imposed on every utility doing business in New York State which is subject to the supervision of the State Department of Public Service. . . .

. . . . A tax equal to 3% of its gross operating income is imposed on every other utility doing business in New York State. . .

. . . . The word "utility" includes every person subject to the supervision of the State Department of Public Service,. . . also every person who sells electricity etc. delivered through mains, pipes or wires, or furnishes electric etc. by means of mains, pipes or wires, regardless of whether such activities are the main business of such person or are only incidental thereto. . . .

. . . . The word "person" means persons, corporations, companies, associations, joint-stock associations, etc. . . . except New York State, municipalities, political and civil subdivisions of the State or municipality. . .

Utility is a municipality and as such is not subject to tax imposed under section 186-a of the Tax Law.

(b) Is the rental received by Con Edison from Utility for the use of its distribution systems and for its services as agent for Utility in billing and collecting monies from Utility's consumers for the sale of preference power gross income to Con Edison subject to tax under section 186-a of the Tax Law?

(c) Do the monies collected by Con Edison from Utility's consumers as agent for Utility for the sale of preference power constitute gross income to Con Edison subject to tax under section 186-a of the Tax Law?

Section 186-a of the Tax Law provides:

. . . . 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.

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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 1946, the Attorney-General of the State of New York rendered an opinion relating to what constitutes a rental for purposes of section 186-a of the Tax Law. In that opinion, the Attorney-General approved a proposed ruling by the Tax Department that equipment for street lighting and for the control of such lighting transferred from a utility company to the City of New York, where the equipment was clearly in the control of the City, constituted a rental. (1946 Op. Atty. Gen. 326) However, in that opinion, the Attorney-General noted that: "Nothing in the history or language of the statute indicates that amounts which are actually charges for service may be excluded from gross income by merely calling them rentals."

The attribute that distinguishes a rental from a service is that in a rental situation the lessee has possession and efficient control of the rented equipment or rented real property. Since Con Edison has exclusive control of its entire distribution system, including all matters relating to the design, construction, expansion, operation, use maintenance and retirement of the system, Con Edison's lease to Utility of an undivided interest in Con Edison's distribution system, to the extent required to sell and distribute preference power to consumers, is not a rental but rather a service being performed by Con Edison.

Accordingly, the funds collected for preference power that are collected by Con Edison as Utility's agent from Utility's consumers for the sale of preference power do not constitute receipts of Con Edison. However, any amount not included in "funds collected for preference power" that is collected by Con Edison as Utility's agent from Utility's consumers for the sale of preference power, such as an amount related to late payment or non-payment of bills, is a receipt for services performed by Con Edison. Any wheeling charge Con Edison receives for contracting with others for the transmission of preference power is a fee for a service.

The services that Con Edison performs for Utility are not services "for ultimate consumption or use by the purchaser", within the meaning intended, so that the total "receipts" for such services do not constitute gross income as defined. Such services rendered are incidental to the conduct of Con Edison's principal business. As such, the services rendered are transactions taxable on the profits derived therefrom. To the extent that such services are rendered on behalf of New York State consumers, such profits would be subject to tax in their entirety. New York City Energy Office, State Tax Commission Advisory Opinion, October 16, 1985, TSB-A-85(23)C.

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(d) Is such rental and preference power sales monies collected by Con Edison from Utility's consumers as agent for Utility subject to the tax surcharge imposed by section 186-c of the Tax Law?

Section 186-c of the Tax Law provides that the temporary metropolitan transportation business tax surcharge on utility services is in addition to the tax imposed under section 186-a of the Tax Law and, for the taxable years such tax surcharge is applicable, the rate of the tax surcharge is applied to the tax imposed under section 186-a or to that portion of the tax imposed under section 186-a which is attributable to the taxpayer's business activity carried on within the MCTD. The portion of the tax attributable to business activity carried on within the MCTD shall be determined by multiplying the tax imposed under section 186-a by the ratio of the taxpayer's gross income from all sources within the MCTD to its gross income from all sources within New York State.

Consequently, for the taxable years the temporary metropolitan transportation business tax surcharge on utility services under section 186-c of the Tax Law is in effect, if Con Edison has business activities both within and without the MCTD it must determine its gross income from within the MCTD as well as its gross income from within New York State. Con Edison's gross income from within the MCTD includes the rental received from Utility for the use of its distribution system and for its services in billing and collecting monies as Utility's agent, any wheeling charge received from Utility for the transmission of preference power, and any amount that is collected from Utility's consumers, as Utility's agent for the sale of preference power, that is not included in "funds collected for preference power".

DATED: December 1, 1986

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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