

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

TSB-A-04(9)C
Corporation Tax
May 24, 2004

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C031118A

On November 18, 2003, a Petition for Advisory Opinion was received from Mirant America's Energy Marketing, L.P., 1155 Perimeter Center West, Atlanta, Georgia 30338-5416.

The issue raised by Petitioner, Mirant America's Energy Marketing, L.P., is whether a vendor of natural gas must include its receipts from the sale of natural gas to a company that uses the gas in the generation of electricity for sale to customers in the vendor's gross income or gross operating income under section 186-a of the Tax Law.

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

Mirant Bowline, LLC (Bowline) is an independent power producer. Bowline operates a natural-gas fired electricity generation facility located in Rockland County in New York State. Bowline produces electricity that will be sold in the wholesale and the deregulated electricity marketplace. Bowline is not a utility that is subject to regulation by the New York Public Service Commission (PSC).

Petitioner sells natural gas to Bowline, which Bowline uses to power turbines that produce electricity. Title to, and possession of, the gas transfers from Petitioner to Bowline in New York State. Petitioner is a utility under section 186-a of the Tax Law.

Applicable law and regulations

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 ...; 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 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, electricity, steam, water or refrigeration, delivered through mains, pipes or wires, or furnishes gas, electric, steam, water or refrigerator 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...;

* * *

(c) the words “gross income” mean and include receipts received in or by reason of any sale, conditional or otherwise, (except sales hereinafter referred to with respect to which it is provided that profits from the sale shall be included in gross income) made or service rendered for ultimate consumption or use by the purchaser in this state, ...

* * *

(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, electricity, steam, water or refrigeration, or in or by reason of the furnishing for such consumption or use of gas, electric, steam, water or refrigerator service in this state, ...

* * *

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.

Section 45.9(a) of the Tax on the Furnishing of Utility Services Regulations (section 186-a Regulations) promulgated with respect to section 186-a of the Tax Law provides, in part:

Receipts from sales or services for ultimate consumption or use by the purchaser in this State are taxable, but receipts from sales for resale, as distinguished from sales for consumption, are not taxable.

Opinion

In this case, Petitioner is a utility subject to the tax imposed under section 186-a of the Tax Law. It is not clear from the facts whether Petitioner is taxable on its gross income or its gross operating income. However, in either case, its receipts from sales of natural gas for ultimate consumption or use in New York State are taxable receipts.

The natural gas that is used to power a natural-gas fired turbine that produces electricity is used or consumed in the electric generation process, and does not become a component of the electricity generated. Therefore, for purposes of section 186-a of the Tax Law, the sale of natural gas that is used for such purpose in New York State is a sale for ultimate consumption or use by the purchaser in New York State. Under section 45.9(a) of the section 186-a Regulations the sale of natural gas that is consumed or used in the electric generation process is not a sale for resale.

The sales of natural gas by Petitioner to Bowline for use in the generation of electricity that Bowline will sell to its customers are sales of natural gas by Petitioner for ultimate use or consumption in New York State by Bowline. Since the incidence of the tax imposed under section 186-a of the Tax Law is on the seller, Petitioner's receipts from the sale of natural gas to Bowline for use or consumption by Bowline in the generation of electricity in New York State are taxable receipts of Petitioner under section 186-a of the Tax Law.

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 *Sempra 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 Energy as a sale for ultimate consumption or use by the Power Authority, but the tax was not

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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 *Sempra, supra*, the tax imposed under section 186-a of the Tax Law on the receipts of a utility selling gas to end users is an expense of the utility that may be included in the price that the utility charges for the sale of the gas, and may be separately stated on the bill rendered to the purchaser pursuant to section 186-a.6 of the Tax Law. However, the inclusion of such expense in the amount charged for the gas sold is not the equivalent of directly taxing the purchaser of such gas. The incidence of the tax imposed under section 186-a of the Tax Law is on the selling utility. (See also *Brooklyn Union Gas Company v Commissioner of Taxation and Finance*, 255 AD2d 80.)

Petitioner's receipts from the sale of natural gas to Bowline for use or consumption by Bowline in the generation of electricity in New York State are taxable receipts of Petitioner under section 186-a of the Tax Law. The taxable receipts include the total charge for the sale of such natural gas, without any deduction or exclusion for the expense of Petitioner attributable to the tax imposed on Petitioner under section 186-a of the Tax Law that is included in such total charge. The tax imposed under section 186-a of the Tax Law on Petitioner is an expense of Petitioner that may be included in the amount charged for the sale of natural gas that is sold to Bowline. However, the inclusion of such expense does not result in the imposition of such section 186-a tax on Bowline itself. See *New York Telephone, supra*, and *Sempra, supra*.

DATED: May 24, 2004

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