

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-09(12)C
Corporation Tax
June 29, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C090409B

Petitioner, [REDACTED], requests an Advisory Opinion about whether unbundled sales of energy commodities are subject to the local gross receipts taxes authorized to be imposed by General City Law § 20-b and Village Law § 5-530. It is our informal opinion that they are.

Preliminarily, we note that the Department is not responsible for administering the taxes about which Petitioner inquires. Responsibility for interpreting and applying these taxes rests with the cities and villages that impose them. Nevertheless, because this Department is responsible for administering Tax Law section 186-a, the section of law on which the local taxes are based, we are providing this informal opinion for Petitioner's assistance.

Cities and villages in New York State are authorized to impose local taxes on utility services, as such tax was imposed by Tax Law section 186-a in effect on January 1, 1959. See General City Law § 20-b; Village Law § 5-530. Tax Law section 186-a, as it existed on that date, imposed tax on the "gross income" of utilities doing business in this state that were subject to the supervision of the Department of Public Service, and on the "gross operating income" of every other utility doing business in this state, if the gross operating income exceeded \$500 for the 12 month period ending on May 31. For purposes of section 186-a, "utility" included "every person subject to the supervision of the state department of public service" and "every person (whether or not such person is subject to such supervision) who sells gas, electricity, steam, water or refrigeration, telephony or telegraphy, delivered through mains, pipes or wires, or furnishes gas, electric, steam, water, refrigerator, telephone or telegraph 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." Tax Law § 186-a.2 (in effect on January 1, 1959). Thus, a "utility" includes persons who sell only the commodity (e.g., gas, electricity, etc.) and those who sell both the commodity and the transportation, transmission, and distribution of the commodity. The reference in the definition to commodities "delivered through mains, pipes or wires" is merely descriptive; it does not require that the person selling the commodity also deliver the commodity.

In 1959, energy commodities were generally sold with the transportation, transmission and distribution of those commodities. In order to foster competition in the generation of electricity and increase consumers' choice of energy providers, the Department of Public Service restructured the utilities market in the 1990s. This restructuring allowed for the sale of energy commodities and delivery of the commodities by separate entities. See Competitive Opportunities Proceeding, Case No. 94-E-0952. In 2000, Tax Law section 186-a was amended to, among other things, phase out the tax on energy commodities, while continuing to tax the transportation, transmission and distribution of those commodities. However, this change did not affect the cities' and villages' authority to impose tax, which remained fixed in time based on the statute in effect on January 1, 1959. Accordingly, both

