

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

TSB-A-82(16)C
Corporation Tax
December 9, 1982

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. C810903A

On September 3, 1981 a Petition for Advisory Opinion was received from Dickstein, Shapiro and Morin on behalf of Boundary Gas, Inc., 2101 L Street, N.W., Washington, D.C. 20337.

The issue raised by Petitioner is whether Boundary Gas, Inc., under the circumstances described below, would be subject to the franchise tax on water-works companies, gas companies, electric or steam heating, lighting and power companies imposed under section 186 of the Tax Law, or the tax on the furnishing of utility services imposed under section 186-a of the Tax Law. It is concluded herein that it would not be subject to either of these taxes.

The facts set forth by Petitioner, and upon which this Advisory Opinion is based are, with one exception, those set forth in Dickstein, Shapiro and Morin on behalf of Boundary Gas, Inc., Advisory Opinion, April 9, 1982, TSB-H-81(24)C. In addition to the facts set forth in such Advisory Opinion, it is indicated that two of the Boundary stockholders will use accounting procedures which will result in a portion of their purchases of natural gas from Boundary being allocated to consumption by such stockholders, rather than to resale.

Section 186 of the Tax Law, contained in Article 9 thereof, imposes a franchise 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 . . ." In the previous Advisory Opinion issued to Petitioner it was determined that Boundary would not be subject to the tax imposed under section 186 because the nature of its purposes and activities were not those described in the quoted statutory provision. The fact that the two Boundary stockholders in question may purchase gas from Boundary for their own use and consumption rather than for resale would not change the nature of Boundary's purposes and activities and, accordingly, does not warrant disturbing the conclusion reached in the previous Advisory Opinion.

Section 186-a of the Tax Law, also contained in Article 9 thereof, imposes a tax on the furnishing of utility services. In the case of utilities not subject to the supervision of the Department of Public Service, as is the case with respect to Boundary, the tax is equal to three per cent of the "gross operating income" of every such utility doing business in New York which has an annual gross operating income in excess of five hundred dollars. The term "utility" includes every "person," including every corporation, " . . . who sells gas . . . delivered through mains, pipes regardless of whether such activities are the main business of such person or are only incidental thereto" The term "gross operating income" means and includes " . . . receipts received in or by reason of any sale, conditional or otherwise, made for ultimate consumption or use by the purchaser . . . of gas"

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The previous Advisory Opinion held in effect that whatever else might be the case, Boundary would have no liability under Section 186-a because it would have no operating income, "operating income" being that income arising from sales of gas to ultimate consumers. It was understood from Petitioner's initial statement of facts that all of the gas purchased by Boundary's stockholders would be purchased for resale. It is now indicated that two of Boundary's stockholders purchase gas from a number of sources, one of which will be Boundary, and utilize some of that gas for their own purposes. It is stated that inasmuch as the gas so used cannot be identified as being derived from any specific source, certain accounting methods are utilized in order to ascribe portions of it to specific sources. Where gas sold by Boundary to a stockholder is used by such stockholder for its own use or consumption (whether or not that customer's specific accounting methods indicate the same) the revenue derived therefrom would constitute "operating income," within the meaning of section 186-a of the Tax Law.

It is therefore necessary to make a determination, which it was not necessary to make in the previous Advisory Opinion (with regard either to section 186 or 186-a of the Tax Law), as to whether Boundary, a Delaware Corporation, could, under the described facts, be said to be "doing business" in New York, as required by both statutory and constitutional considerations. A consideration of this question in light of the unique set of facts set forth in the text of the previous Advisory Opinion compels the conclusion that Boundary's activities would not constitute the doing of business in New York. Thus, Boundary will not have an office in New York, will not advertise or secure a telephone listing in New York, will not maintain any employees or agents (other than the escrow agent) in New York, and will not own any facility or other property within New York. Rather, as described, its sole function will be to take title to the gas sold by TransCanada on the boundary between the United States and Canada and instantaneously to transfer title to such gas to the Boundary shareholders, such transfers occurring entirely within the confines of a pipeline owned, operated and controlled by a common carrier. Payments to Boundary are to be made not to Boundary itself but to an escrow agent whose function is thereupon to transmit such payments directly to TransCanada. Boundary is thus not only prohibited from deriving any profit from the sale of gas, it has direct control of neither the gas nor the funds. With regard to the funds, indeed, it acts as a purely passive conduit. See in this regard Ford Dealers Advertising Fund, Inc. v. Commission 55 T.C. 761, aff'd 456 F.2d 955 (5th Cir., 1972). Accordingly, it is here concluded that Boundary's described activities would not constitute "doing business" within the meaning of section 186-a of the Tax Law, and Boundary would thus not be subject to the tax imposed thereunder. National Bellas Hess v. Illinois, 380 U.S. 753, 18 L. Ed. 2d 505; Ammex Warehouse v. Procaccino, 85 Misc. 2d 327, aff'd 55 AD 2d 535.

DATED: December 2, 1982

s/FRANK J. PUCCIA
Director
Technical Services Bureau