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

TSB-A-87 (12) C
Corporation Tax
May 29, 1987

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION PETITION NO. C870212A

On February 12, 1987, a Petition for Advisory Opinion was received from Niagara Mohawk Power Corporation, 300 Erie Boulevard West, Syracuse, New York 13202.

The issue raised is whether Petitioner is liable for the taxes imposed by sections 186 and 186-a of the Tax Law when Petitioner agrees to assist in effectuating the transportation of customer owned natural gas as part of a "Special Transportation Agreement" and a "Limited-Term Transportation Agreement".

Petitioner, a New York corporation with its principal office in Syracuse, New York, is a public utility regulated by the New York State Public Service Commission and the Federal Energy Regulatory Commission.

On July 15, 1986, Petitioner entered into a contract entitled "Special Transportation Agreement" with a customer. The customer had acquired a supply of natural gas in Louisiana, and had requested Petitioner to assist it in transporting the gas to its own facilities. In accordance with the "Special Transportation Agreement", Petitioner agreed to receive a specified amount of gas daily from Consolidated Gas Transmission Corporation ("Consolidated"), on behalf of the customer. In turn, Petitioner agreed to deliver to the customer the amount of gas received from Consolidated.

Further, the "Special Transportation Agreement" provides that the customer will reimburse Petitioner for any and all transportation charges billed to Petitioner by Consolidated for the transportation of the customer-owned gas.

In connection with the above described "Special Transportation Agreement", Petitioner entered into a "Limited-Term Transportation Agreement" with Consolidated. Pursuant to this agreement, Consolidated agreed to deliver the customer-owned gas, which it received from Texas Gas Transmission Company ("Texas Gas") which had received the customer-owned gas from producers in Louisiana, to Petitioner, which would ultimately transport the customer-owned gas to the customer. Petitioner agreed to reimburse Consolidated for all of its expenses, including the expenses incurred by Consolidated in connection with the transportation service from Texas Gas.

Petitioner has agreed to act as a conduit between the customer and Consolidated. Petitioner has agreed to receive the customer-owned gas from Consolidated and pass it along to the customer. Likewise, Petitioner has agreed to receive payment for transportation expenses from the customer and convey such amounts to Consolidated.

Since Petitioner bills the customer and receives an amount, which Petitioner then transmits to Consolidated, it is Petitioner's contention that under the provisions of the "Special Transportation Agreement" and the "Limited- Term Transportation Agreement" it is acting merely as a collecting agent of Consolidated. Accordingly, Petitioner states that to the extent that Petitioner is acting as the collecting agent of Consolidated, the amounts billed and received by Petitioner from the customer should not constitute gross income of Petitioner and therefore, should not be subject to the taxes imposed by sections 186 and 186-a of the Tax Law.

Section 186

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.

It was determined in New York City Energy Office, State Tax Commission Advisory Opinion, October 15, 1986, TSB-A-85(23)C, that where a gas utility, under an arrangement called "contract carriage" is 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, the fee charged by such gas utility for such contract carriage is a receipt of the gas utility and is included in the gas utility's gross earnings under section 186 of the Tax Law.

In Consolidated Edison Company of New York, Inc., State Tax Commission Advisory Opinion, December 1, 1986, TSB-A-86(22)C, it was determined that where Con Edison acted as agent for the New York City Public Utility Service, any amount collected by Con Edison and remitted to the Utility Service for the sale of the Utility Service's preference power that was delivered to Utility Service's customers through Con Edison's distribution system did not constitute gross earnings of Con Edison for purposes of section 186 of the Tax Law. However, if Con Edison receives an amount for such transaction that is not remitted to the Utility Service, such amount not remitted is a receipt of Con Edison and is included in Con Edison's gross earnings.

Accordingly, Petitioner is subject to the tax imposed under section 186 of the Tax Law on the fees imposed for the special gas transportation service (contract carriage) provided to its customer. To the extent Petitioner acts as a collecting agent, the amount collected by Petitioner from its customer and remitted to Consolidated and/or Texas Gas to reimburse Consolidated and/or Texas Gas for all of their rates, charges, costs, fees and expenses in transporting customer's gas to Petitioner's facilities does not constitute gross earnings. However, any amount collected by Petitioner from its customer for such reimbursement that is not remitted to Consolidated and/or Texas Gas is a receipt of Petitioner and is included in Petitioner's gross earnings.

Section 186-a

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 on 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 sales 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 New York City Energy Office, supra, it was determined that, for purposes of section 186-a of the Tax Law, where the gas utility renders a service whereby it transports natural gas owned and ultimately consumed by the purchaser of the service and 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. 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 its New York State pipelines is taxable to the utility under section 186-a of the Tax Law. New York City Energy Office, supra.

Where the gas 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 under section 186-a of the Tax Law. New York Energy Office, supra.

In Consolidated Edison Company of New York, Inc., supra, it was determined that where Con Edison acted as agent for the New York City Public Utility Service, any amount collected by Con Edison and remitted to the Utility Service for the sale of the Utility Service's preference power, did not constitute receipts of Con Edison for purposes of section 186-a of the Tax Law. However, if Con Edison receives an amount for such transaction that is not remitted to the Utility Service, such amount not remitted is a receipt of Con Edison.

Accordingly, for purposes of section 186-a of the Tax Law, the total gross income received by Petitioner as a result of the special gas transportation service (contract carriage) that is provided to its customer is taxable to Petitioner. However, as determined in New York City Energy Office, supra, if Petitioner's pipelines are located both within and without New York State, only the gross income received by Petitioner as a result of contract carriage from the use of Petitioner's New York State pipelines is taxable under section 186-a of the Tax Law. To the extent Petitioner acts as a collecting agent, Petitioner is performing a service incidental to the conduct of Petitioner's principal business. As such, the amount collected by Petitioner from its customer and remitted to Consolidated and/or Texas Gas to reimburse Consolidated and/or Texas Gas for all of their rates, charges, costs, fees and expenses in transporting customer's gas to Petitioner's facilities does not constitute receipts of Petitioner and is not subject to tax under section 186-a of the Tax Law. However, if any amount collected by Petitioner from its customer for such reimbursement is not remitted to Consolidated and/or Texas Gas the profits on such receipt is taxable under section 186-a of the Tax Law.

DATED: May 29, 1987

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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