STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C941031H

On October 31, 1994, a Petition for Advisory Opinion was received from Long Island Lighting Company, 175 East Old Country Road, Hicksville, New York 11801.

The issue raised by Petitioner, Long Island Lighting Company, is whether the amounts subject to tax under sections 186 and 186-a of the Tax Law are the amounts billed to and received from customers pursuant to Petitioner's rate tariffs established by the New York State Public Service Commission ("PSC") in conformance with the Settlement Agreement.

Petitioner is a publicly-held utility corporation subject to the supervision of the PSC and subject to tax under sections 186 and 186-a of the Tax Law.

On February 14, 1989, Petitioner entered into an agreement ("Settlement Agreement") settling certain civil lawsuits brought against Petitioner under the Federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 USCS 1961 et seq. and under the common law of New York State. These lawsuits had alleged that Petitioner fraudulently misled the PSC and the public concerning the cost of construction and completion of its Shoreham and Jamesport nuclear generating facilities. Petitioner denied all wrongdoing of any kind and denied all liability. The Settlement was reached in the interest of avoiding further expense, to dispose of burdensome and protracted litigation, and to permit the continued operation of Petitioner's affairs unhindered by expensive litigation and by distraction and diversion of Petitioner's personnel.

On June 28, 1989, at Petitioner's annual shareholders' meeting, the Settlement Agreement was approved by Petitioner's shareholders and on October 30, 1990, the U.S. District Court ordered that the effective date of the Agreement would be December 1, 1990.

The Settlement Agreement, as modified by the Court, establishes a Rate Reduction Plan ("RRP") pursuant to which Petitioner is required to reduce the amount it receives from its ratepayers by $390 million over a 10 year period, beginning December 1, 1990. As described below, a $10 million payment to a fund for former ratepayers was deducted from the initial $20 million rate reduction. The annual rate reductions required by the Settlement Agreement are to be accomplished in accordance with the following schedule, commencing on the month and year indicated:

Dec. 1990	--	May 1991	$ 20 million
June 1991	--	May 1992	$ 20 million
June 1992	--	May 1993	$ 20 million
June 1993	--	May 1994	$ 30 million
June 1994	--	May 1995	$ 30 million

June 1995	--	May 1996	$ 40 million
June 1996	--	May 1997	$ 50 million
June 1997	--	May 1998	$ 60 million
June 1998	--	May 1999	$ 60 million
June 1999	--	May 2000	$ 60 million
	TOTAL		$390 million

All rate reductions required to date have been made. Under the RRP, the ratepayers' individual monthly bills are to be reduced over a ll4-month period. Petitioner is required to reduce rates to its ratepayers in proportion to the electric rate payments that would otherwise have been made by each ratepayer. The RRP provides for a percentage reduction in each monthly bill, with such percentage calculated as the ratio of (1) the total dollar amount of the required rate reduction for the year, divided by (2) Petitioner's anticipated revenue for that year as established in Petitioner's rates filed with the PSC. Any deficiency or overage between the actual rate reductions in a given year and the reductions required for that year under the RRP are applied to the rate reductions for the following year with an interest factor.

Under the Settlement Agreement, Petitioner is required to file tariffs with the PSC showing its methodology for adjusting the customer bills pursuant to the RRP. Petitioner must also certify in each rate application that it has not sought nor been provided with any rate revenue which recovers any portion of these rate reductions.

Petitioner's rate tariffs, as approved by the PSC, reflect the rate reductions as required by the RRP established pursuant to the Settlement Agreement. Accordingly, Petitioner's approved PSC tariffs are lower than they would have been absent the Settlement Agreement.

Under the Settlement Agreement, Petitioner was also required to establish a Former Ratepayer Fund in the amount of $10 million for the purpose of satisfying the claims of former ratepayers and claims of the United States of America for reimbursement of electric utility payments that the United States had paid directly to Petitioner on behalf of former ratepayers or indirectly to Petitioner through former ratepayers. Petitioner was permitted to subtract the $10 million Former Ratepayer Fund from the $20 million annual rate reduction effective December 1, 1990. Accordingly, the first year's reductions amounted to a $10 million deposit into the Former Ratepayers Fund, and a $10 million reduction to the PSt-approved tariffs for existing customers to be reflected in filings commencing, December 1, 1990.

Petitioner also agreed to pay the reasonable attorneys' fees and litigation expenses of Class Counsel, Suffolk County, and the Government's Counsel, up to a maximum of $10 million. Payments of these litigation expenses did not reduce the RRP rate reductions.

Payments to the Former Ratepayer Fund and for attorneys' fees and litigation expenses were made from revenues actually received by Petitioner upon which the gross earnings and gross income taxes have been paid. Since these amounts did not reduce the gross receipts of Petitioner, their tax treatment is not at issue.

On June 28, 1989, Petitioner's shareholders approved the Class Settlement, thereby establishing a $400 millon liability pursuant to the Settlement Agreement to present and former ratepayers. In accordance with Generally Accepted Accounting Principles, Petitioner was required to record a liability and corresponding charge to earnings for $160 million, representing the present value of the $390 million due ratepayers and $10 million in plaintiff's legal fees.

Beginning December 1, 1990, pursuant to an order of the Court, monthly rate reductions were reflected in the electric tariffs charged to Petitioner's electric customers. Concurrently, at the end of each month Petitioner makes accounting entries to both true-up the liability and to recognize the rate reductions reflected in the customers' billings for the month. Additional non-cash entries are also made to restore electric operating income to a level prior to the rate reductions as required by both the PSC and the Settlement Agreement, to ensure that Petitioner will not recover any of the monies returned from its customers through rates.

During the years 1990, 1991, 1992 and 1993 Petitioner returned through monthly rate reductions $924,768, $19,473,212, $19,026,139, and $25,301,604, respectively. These rate reductions will continue through May, 2000 to fully liquidate the $390 million refund liability.

Section 186 of the Tax Law imposes a tax on every corporation 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 New York State. The term "gross earnings" as used in this section means all receipts from the employment of capital without any deduction.

The term "receipts" is not defined in section 186 of the Tax Law. However, "words of ordinary import are to be construed according to their ordinary and popular significance, and are to be given their ordinary and usual meaning" (McKinney's Cons Laws of NY, Book 1, Statutes section 232).

The term "receipt" is defined, in part, in Black's Law Dictionary (Sixth Edition) as the "act of receiving; also the fact of receiving or being received; that which is received. That which comes in, in distinction from what is expanded, paid out, sent away, and the like." Further, the term "gross receipts" is defined in Black's Law Dictionary (Sixth Edition) as the "total amount of money or the value of other considerations received from selling property or from performing services."

Herein, pursuant to section 186 of the Tax Law, the amounts billed to Petitioner's electric customers pursuant to the PSt-approved tariffs, which reflect the rate reduction as required by the Settlement Agreement constitute the receipts from such customers that are includable in Petitioner's "gross earnings" for purposes of section 186 of the Tax Law. The amounts reflected in the accounting entries Petitioner is required to make each month, in accordance with Generally Accepted Accounting Principles, to "true-up" the liability and to recognize the rate reductions reflected in the customers' billings for the month are not "receipts" of Petitioner. Further, the amounts reflected in the non-cash entries required by both the PSC and the Settlement Agreement that are made to restore electric operating income to a level prior to the rate reductions to ensure that Petitioner will not recover any of the monies returned from its customers through rates are not "receipts" of Petitioner.

Section 186-a of the Tax Law imposes a gross receipts tax on the gross income of every utility doing business in New York State which is subject to the supervision of the New York State Department of Public Service. Section 186-a.2(c) states that

> 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, including cash, credit and property of any kind or nature (whether or not such sale is made or such service is rendered for profit), without any deduction therefrom on account of the cost of property sold, the cost of material used, labor or services or other costs, interest or discount paid, or any other expense whatsoever.

Section 501.4 of the regulations promulgated pursuant to section 186-a of the Tax Law provides that there shall be included in gross income, receipts from sales made and services rendered for ultimate consumption or use in New York State by the purchaser. Question 22 of such section states as follows:

> Question 22: A utility renders a bill to a consumer showing the gross amount due to be $4.00, but stating that, if payment is made within 30 days, $3.69 will be accepted in full settlement. The consumer pays the net amount of $3.69. How much should be included by the utility in gross income? Answer: $3.69.

Accordingly, pursuant to section 186-a of the Tax Law and the regulations promulgated thereunder, the amounts billed to Petitioner's electric customers pursuant to the PSC-approved tariffs, which reflect the rate reduction as required by the Settlement Agreement constitute the "receipts" from such customers that are includable in Petitioner's "gross income" for purposes of section 186-a of the Tax Law. The amounts reflected in the accounting entries Petitioner is required to make each month, in accordance with Generally Accepted Accounting Principles, to "true-up" the liability and to recognize the rate reductions reflected in the customers billings for the month are not "receipts" of Petitioner. Further, the amounts reflected in the non-cash entries required by both the PSC and the Settlement Agreement that are made to restore electric operating income to a level prior to the rate reductions to ensure that Petitioner will not recover any of the monies returned from its customers through rates are not "receipts" of Petitioner.

DATED: March 31, 1995

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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