

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

TSB-A-96 (8) C  
Corporation Tax  
March 25, 1996

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C951219B

On December 19, 1995, a Petition for Advisory Opinion was received from Iroquois Energy Brokers, LLC, 6161 South Park Avenue, Hamburg, New York 14075.

The issue raised by Petitioner, Iroquois Energy Brokers, LLC, is whether a New York limited liability company ("LLC") which is a natural gas broker that never owns the natural gas is subject to tax under sections 186 and 186-a of Article 9 of the Tax Law.

Petitioner, a New York State LLC, is engaged in the business of natural gas brokering. Petitioner facilitates the transfer of natural gas from in-state and out-of-state producers of natural gas to end-users of the natural gas. Petitioner has two members, both of whom are individuals, and is taxed as a partnership for Federal income tax purposes.

Approximately 30 percent of Petitioner's business is with in-state producers. Petitioner facilitates the transfer and sale of gas from an in-state producer to an end-user without ever taking title to the gas, without having possession or control of the gas, and without bearing any risk of loss with respect to the gas. The gas is transported from the producer to the end-user on a pipeline system owned by a large New York utility (the "Utility") that does not allow Petitioner to own gas on its system. Title to the gas is transferred directly from the producer to the end-user, and Petitioner serves merely as a broker.

In a typical transaction, Petitioner locates an end-user and determines its need for gas. Petitioner then matches this need with a producer's ability to provide the gas. The gas is then transferred from the producer to the end-user via the Utility's system. Petitioner never owns any of the gas.

Approximately 70 percent of Petitioner's business is with out-of-state producers. As with the in-state producers, the gas is transferred from the producer to the end-user, and Petitioner never takes title to the gas, has possession or control of the gas, or bears any risk of loss with respect to the gas. In addition, title transfers from the out-of-state producer to the end-user outside New York. The end-users pay the gas importer tax under section 189 of the Tax Law to the Utility which then remits the tax to New York State.

With both in-state and out-of-state gas, Petitioner receives a commission from the end-user as compensation for its services. The amount is set by the producer. On behalf of the producers, and for the convenience of both producers and end-users, Petitioner bills end-users for the amount of gas purchased by the end-users from the producers. The end-users remit payments to Petitioner which then deposits the payments in a separate noninterest-bearing bank account set up

solely for the deposit of amounts received from end-users. Petitioner forwards the sale proceeds to the producer and then withdraws its commission from the account for its own use.

Petitioner uses two separate brokerage agreements in doing business with its customers: one is entitled "Gas Brokerage Agreement with Seller" and is used to enter into agreements with the producers of gas; and the other is entitled "Gas Brokerage Agreement with Buyer" and is used to enter into agreements with end-users of the gas. Each of these agreements states that Petitioner is acting as a broker, and that Petitioner itself is not involved in buying or selling natural gas. Both of the agreements also clearly state that Petitioner never takes title to the gas, is never in possession or control of the gas, and never bears any risk of loss with respect to the gas. In both the in-state and out-of-state situations described above, a new end-user located by Petitioner must, in writing, indicate to the Utility that Petitioner is acting as its agent.

For Federal income tax purposes, Petitioner reports only its commissions as income. It does not report the remaining gross receipts received from end-users.

Section 2 of the Tax Law provides the definition of certain terms used in the Tax Law, and was amended by Chapter 576 of the Laws of 1994 which added the following:

5. The term "limited liability company" means a domestic limited liability company or a foreign limited liability company, as defined in section one hundred two of the limited liability company law.

6. "Partnership and partner," unless the context requires otherwise, shall include, but shall not be limited to, a limited liability company and a member thereof, respectively.

Section 186.1 of the Tax Law provides that the term "corporation" includes an association within the meaning of section 7701(a)(3) of the Internal Revenue Code, including a LLC.

Accordingly, a LLC that is treated as a corporation for Federal income tax purposes is treated as a corporation for New York State tax purposes. A LLC that is treated as a partnership for Federal income tax purposes is treated as a partnership for New York State tax purposes. (See, Department of Taxation and Finance Memorandum, October 25, 1994, TSB-M-94(6)I and (8)C.)

Section 186 of the Tax Law imposes a franchise tax on a corporation, joint stock company or association "formed for or principally engaged in the business of supplying ... gas, when delivered through mains or pipes .... " The tax is imposed for the privilege of exercising its corporate franchise or carrying on its business in a corporate or organized capacity in New York State and is based, in part, upon gross earnings from all sources within New York State.

Petitioner states that it is a New York State LLC that is treated as a partnership for Federal income tax purposes, and that Petitioner's two members are individuals. Accordingly, neither Petitioner nor its two members are subject to the franchise tax imposed on corporations under section 186 of the Tax Law regardless of Petitioner's activities.

Section 186-a of the Tax Law imposes a tax on the furnishing of utility services. The tax is imposed on a utility which is not subject to the supervision of the New York State Department of Public Service, if it "sells gas ... delivered through mains [or] pipes ... or furnishes gas ... service, by means of mains [or] pipes ... regardless of whether such activities are the main business of such person or are only incidental thereto " The tax is equal to three and one-half percent of the gross operating income of such a utility doing business in New York State which has annual gross operating income in excess of \$500. The tax imposed under section 186-a of the Tax Law is imposed in addition to any and all other taxes and fees imposed by any other provision of law for the same period.

For purposes of section 186-a of the Tax Law, the word "utility" includes a person and the word "person" includes, among others, a person and a copartnership. Thus, section 186-a imposes a tax upon incorporated and unincorporated entities alike, including a partnership (see, Partners of Buffalo Telephone Company, Adv Op Comm T & F, February 22, 1989, TSB-A-89(3)C) and a LLC that is treated as a partnership for Federal income tax purposes.

In Nixon, Hargrave, Devans & Doyle, Adv Op Comm T & F, July 28, 1995, TSB-A-95(12)C, the Commissioner of Taxation and Finance determined that a corporation which is a natural gas broker that (1) never takes title to the gas; (2) never has possession or control of the gas; (3) never bears any risk of loss with respect to the gas; (4) indicates in its brokerage agreements that it is acting as a broker and it does not engage in the business of selling or buying gas; (5) only includes its commission in its gross income on its Federal income tax returns; and (6) has a separate account into which it deposits payments it receives from end-users, and only retains its commissions is not engaged in the business of supplying gas through mains or pipes and would not be subject to tax under section 186 or section 186-a of the Tax Law.

Herein, Petitioner's activities are similar to those in Nixon, supra. Petitioner (1) never takes title to the gas; (2) never has possession or control of the gas; (3) never bears any risk of loss with respect to the gas; (4) indicates in its brokerage agreements that it is acting as a broker and it does not engage in the business of selling or buying gas; (5) only includes its commission in its gross income on its Federal income tax returns; and (6) has a separate account into which it deposits payments it receives from end-users, and only retains its commissions.

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Accordingly, pursuant to Nixon, supra, Petitioner is not engaged in the business of supplying gas through mains or pipes. Therefore, neither Petitioner nor its two members are subject to tax under section 186-a of Article 9 of the Tax Law.

DATED: March 25, 1996

/s/  
DORIS S. BAUMAN  
Director  
Technical Services Bureau

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