

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

TSB-A-98 (21) C  
Corporation Tax  
November 5, 1998

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C980811A

On August 11, 1998, a Petition for Advisory Opinion was received from Rochester Gas & Electric Corporation, 89 East Avenue, Rochester, New York 14649.

The issue raised by Petitioner, Rochester Gas & Electric Corporation, is whether its purchase of holding company stock from unrelated parties will result in a constructive dividend distribution from Petitioner to the holding company that is subject to the excess dividends tax pursuant to section 186 of the Tax Law.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner is a regulated public utility incorporated in New York State that supplies utility services in western New York. Its principal offices are located in Rochester, New York and its common stock is publicly traded. Petitioner has commenced a stock repurchase program pursuant to which it has repurchased its common stock on the open market, subject to Public Service Commission ("PSC") approval and market conditions.

Under a proposed reorganization that is expected to take effect in the Spring of 1999, Petitioner will become a subsidiary of a holding company ("Holding Company") that will own all of Petitioner's common stock. Holding Company will be a publicly traded company. Petitioner states that before and after the reorganization, Petitioner will be taxed under Article 9 of the Tax Law and that Holding Company will be subject to tax under Article 9-A of the Tax Law.

After the reorganization, Petitioner plans to commence a stock purchase program pursuant to which it will directly purchase the publicly traded common stock of Holding Company, its parent corporation, on the open market, subject to PSC approval and market conditions. Under both stock repurchase programs (one before and one after the reorganization), Petitioner expects to purchase up to 4.5 million shares of publicly traded common stock during the period 1998 through 2000.

Discussion

Section 186 of the Tax Law imposes a franchise tax upon every corporation, joint-stock company or association formed for or principally engaged in the business of supplying gas, when delivered through mains or pipes, or electricity, "for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity in this state". The tax is three-quarters of one percent on the taxpayer's gross earnings from all sources within New York State, and four and one-half percent on the amount of dividends paid during each year ending on the thirty-first day of December in excess of four percent on the actual amount of paid-in capital employed in New York State by the taxpayer.

In People ex rel Adams Electric Light Co v Graves, 272 NY 77,79, the Court of Appeals stated that under the franchise tax imposed by section 186 of the Tax Law "[a] dividend on corporate stock implies a division or distribution of corporate profits." In that case, the Court held that the transfer of a portion

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of earned surplus to its non-par capital stock account, pursuant to a resolution of its board of directors, was not a distribution of dividends for tax purposes. Neither money nor property nor stock dividend went into the hands of stockholders. No stockholder acquired a right to receive any equivalent of the amount transferred unless further corporate action was taken.

In Consolidated Edison Company of New York Inc, Adv Op of Comm T&F, May 29, 1998, TSB-A-98(6)C, the petitioner directly purchased the publicly traded common stock of its parent on the open market in a transaction known as a related party redemption, and the petitioner continued to hold the stock. It was held that there was no distribution of property to shareholders or a class of shareholders, and the transaction did not constitute a constructive dividend distribution from the petitioner to its parent for purposes of computing the excess dividends tax under section 186 of the Tax Law.

In this case, like Con Ed, supra, Petitioner will directly purchase the publicly traded common stock of Holding Company, its parent corporation, on the open market in a transaction that appears to be a related party redemption. After purchasing such stock, Petitioner will continue to hold the Holding Company common stock. There will be no distribution by Petitioner of property to its shareholder, Holding Company. Accordingly, following Adams Electric, supra, and Con Ed, supra, Petitioner's purchase of the publicly traded common stock of Holding Company and the holding by Petitioner of that common stock will be treated as a distribution in redemption of the stock of Holding Company, and will not constitute a constructive dividend distribution from Petitioner to Holding Company for purposes of computing the excess dividends tax under section 186 of the Tax Law.

DATED: November 5, 1998

/s/  
John W. Bartlett  
Deputy Director  
Technical Services Bureau

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