

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

TSB-A-96 (38) S
Sales Tax
TSB-A-96 (16) C
Corporation Tax
July 2, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z951004A

On October 4, 1995, a Petition for Advisory Opinion was received from Consolidated Edison Company of New York, Inc., 4 Irving Place - Room 200, New York, New York 10003.

The issues raised by Petitioner, Consolidated Edison Company of New York, Inc., concern the taxes imposed under sections 186, 186-a, 186-b, 186-c, 188 and 189 of Article 9 of the Tax Law and sales tax imposed under Article 28 of the Tax Law based on the facts presented.

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

Petitioner is an investor owned regulated public utility incorporated in New York State. Petitioner supplies electricity and electric services in all of New York City (except part of Queens) and most of Westchester County. It also supplies gas and gas services in Manhattan, the Bronx and parts of Queens and Westchester County, as well as steam and steam services in Manhattan.

Petitioner has entered into agreements with several gas/electricity marketers ("marketers"). The marketers are, for the most part, non-regulated companies, but one company was a New York regulated public utility. They are located throughout the continental United States. These marketers deliver natural gas that they own into Petitioner's system for Petitioner to burn as fuel to produce electricity that the marketers own. Petitioner receives a fee for this production of electricity. Petitioner never takes title to the gas used in these transactions.

The natural gas is delivered into Petitioner's system through the New York CityGate. The CityGate refers to the points of interconnection between the pipelines' facilities and Petitioner's facilities. All of the interconnections are in New York State. Petitioner has two interconnections in Manhattan and six in Westchester County. Brooklyn Union Gas ("BUG") has two interconnections in Staten Island and the Long Island Lighting Company ("LILCO") has one interconnection in Nassau Country and one in Suffolk County. Some of the gas involved in these transactions is delivered through the interconnections of BUG and LILCO into Petitioner's system. The gas which the marketers deliver into Petitioner's system is either imported into New York by the marketers from out-of-state or bought by the marketers from sources within New York State.

The electricity which Petitioner generates from the burning of the marketers' gas belongs to the marketers and is produced in direct proportion to the amount of gas delivered into Petitioner's system by the marketers. Petitioner states that it does not sell electricity to the marketers, but merely converts the marketer's gas into electricity for a fee. For purposes of the

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advisory opinion it is assumed that the transaction is structured in this manner. The amount of energy generated is based upon the amount of gas provided. Generally, the electricity can be sold by the marketers to a third party (commercial end-user, Independent Power Producers or utility), but in many instances the electricity is sold to Petitioner. Petitioner, in turn, resells the electricity to its customers.

Issue I - Sections 189, 189-a and 189-b of the Tax Law

Section 189.2 of the Tax Law imposes a monthly privilege tax on every gas importer for "the privilege or act of importing gas services or causing gas services to be imported into this state for its own use or consumption in this state."

Section 189.1(a) of the Tax Law defines "gas services" as gas delivered through mains or pipes. Section 189.1(b) defines "gas importer" as:

every person who imports or causes to be imported into this state services which have been purchased outside the state for its own use or consumption in this state, provided such term does not include a public utility subject to the jurisdiction of the public service commission as to the matter of rates on sales to customers.

Section 189.3 of the Tax Law provides that if the gas services are delivered in New York State to the gas importer by a public utility, the public utility making the delivery is required to collect the tax imposed by section 189 of the Tax Law.

Section 189-a of the Tax Law imposes a temporary metropolitan transportation tax surcharge on every gas importer importing or causing gas service to be imported into New York State for its own use or consumption in the metropolitan commuter transportation district.

Section 189-b of the Tax Law imposes a tax surcharge in addition to the tax imposed under section 189 of the Tax Law.

Questions:

Imported Gas

(1) Are the marketers "gas importers" subject to the tax imposed under section 189, with regard to the gas that they have purchased outside of New York State and that is delivered to Petitioner's system for the purpose of producing electricity?

Answer: Yes. The marketers are gas importers subject to the tax imposed under section 189 of the Tax Law. The marketers are purchasing natural gas outside New York State and importing the gas into New York State for their own use in producing electricity in New York State.

That is, the marketers are delivering the gas into Petitioner's system, in New York State, for the purpose of burning the gas to produce the marketers' electricity.

(2) If the marketers are gas importers subject to tax under section 189, is Petitioner required to collect, from the marketers, the tax imposed by this section?

Answer: Yes. Petitioner is a public utility that delivers the marketers imported gas from the New York CityGate to Petitioner's facilities. This activity is separate from Petitioner's activity of producing electricity for the marketers. Pursuant to section 189.3 of the Tax Law, Petitioner is required to collect, from the marketers, the tax imposed under section 189.

(3) Are the marketers "gas importers" subject to the tax surcharges imposed under sections 189-a and 189-b, with regard to the gas that they have purchased outside of New York State and that is delivered to Petitioner's system for the purpose of producing electricity?

Answer: Yes. Same reason as in the answer to Question (1).

(4) If the marketers are "gas importers" subject to the tax surcharges imposed under sections 189-a and 189-b, is Petitioner required to collect, from the marketers, the tax surcharges imposed by these sections?

Answer: Yes. Both sections 189-a.2 and 189-b.2 of the Tax Law provide that the provisions concerning payment and collection of tax in section 189.3 of the Tax Law are applicable to these sections. See answer to Question (2).

Gas Purchased Within New York State

(5) Are the marketers "gas importers" subject to the tax imposed under section 189, with regard to the gas that is purchased within New York State and that is delivered into Petitioner's system for the purpose of producing electricity?

Answer: No. Since the marketers are purchasing the gas within New York State, there is no gas importation.

(6) If the marketers are gas importers subject to the tax imposed under section 189 with regard to their in-state purchases of gas, is Petitioner required to collect, from the marketers, the tax imposed by this section?

Answer: No. See the answer to Question (5).

(7) Are the marketers "gas importers" subject to the tax surcharges imposed under sections 189-a and 189-b, with regard to the gas that is purchased within New York State and that is delivered into Petitioner's system for the purpose of producing electricity?

Answer: No. Same reason as in the answer to Question (5).

(8) If the marketers are gas importers subject to the tax surcharges imposed under sections 189-a and 189-b with regard to their in-state purchases of gas, is Petitioner required to collect, from the marketers, the tax surcharges imposed by these sections?

Answer: No. See the answer to Question (5).

Issue II - Sections 186, 186-a, 186-b, 186-c and 188 of the Tax Law

Section 186 of the Tax Law imposes a franchise tax on every corporation formed for or principally engaged in the business of supplying electricity, steam or 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 such corporate or organized capacity in New York State. The tax is based, in part, upon gross earnings from all sources within New York State. The term "gross earnings" means all receipts from the employment of capital without any deduction.

Section 186-a of the Tax Law imposes a tax on the "gross income" of every utility doing business in New York State which is subject to the supervision of the Department of Public Service. A "utility" includes every person "who sells gas ... delivered through mains [or] pipes ... or furnishes gas ... by means of mains [or] pipes ... regardless of whether such activities are the main business of such person or are only incidental thereto." "Gross income" is defined, in pertinent part, as meaning and including (a) receipts received in or by reason of any sale, conditional or otherwise, made or service rendered for ultimate consumption or use by the purchaser in New York State, and (b) profits from any transaction (except sales for resale and rentals) within New York State.

Section 186-b of the Tax Law imposes a temporary metropolitan transportation business tax surcharge on utilities doing business in the metropolitan commuter transportation district in addition to the tax imposed by section 186 of the Tax Law.

Section 186-c of the Tax Law imposes a temporary metropolitan transportation business tax surcharge on every utility doing business in the metropolitan commuter transportation district in addition to the tax imposed by section 186-a of the Tax Law.

Section 188 of the Tax Law imposes a tax surcharge in addition to the taxes imposed under section 186 and 186-a of the Tax Law.

Questions:

(9) Is the fee that Petitioner charges the marketers, to burn the marketers' gas to produce electricity, "gross earnings" subject to the tax imposed under section 186?

Answer: Yes. Section 186.1 of the Tax Law defines "gross earnings" as all receipts from the employment of capital without any deduction.

(10) Is the fee that Petitioner charges the marketers, to burn the marketers' gas to produce electricity, "gross earnings" subject to the tax surcharges imposed under sections 186-b and 1887

Answer: Yes. Same reason as in the answer to Question (9). Under sections 186-b and 188 of the Tax Law, the tax surcharges imposed are computed as a percentage of the tax imposed under section 186 of the Tax Law.

(11) Is the profit from the fee that Petitioner charges the marketers, to burn the marketers' gas to produce electricity, "gross income" subject to the tax imposed under section 186-a?

Answer: Yes. Pursuant to section 186-a.2 of the Tax Law, gross income includes receipts from the sale of electricity and the profits from any transaction within New York State that is not enumerated in the definition. Since Petitioner does not own the electricity that it produces for the marketers, Petitioner can not sell that electricity. Therefore, it is the profit from the fee that Petitioner charges the marketers to produce the electricity that is included in gross income under section 186-a of the Tax Law.

(12) Is the profit from the fee that Petitioner charges the marketers, to burn the marketers' gas to produce electricity, "gross income" subject to the tax surcharges imposed under sections 186-c and 1887

Answer: Yes. Same reason as in the answer to Question (11). Under section 186-c and 188 of the Tax Law, the tax surcharges imposed are computed as a percentage of the tax imposed under section 186-a of the Tax Law.

Issue III - Sales Tax

Section 1105 of the Tax Law states in part:

Imposition of sales tax. On and after ... there is hereby imposed and there shall be paid a tax ... upon:

(a) The receipts from every retail sale of tangible personal property,

(b) The receipts from every sale, other than sales for resale, of gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature

(c) The receipts from every sale, except for resale, of the following services:

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(2) Producing, fabricating, processing, printing or imprinting tangible personal property, performed for a person who directly or indirectly furnishes the tangible personal property, not purchased by him for resale, upon which such services are performed.

Section 527.4(d) of the Sales Tax Regulations defines processing as "the performance of any service on tangible personal property for the owner which effects a change in the nature, shape, or form of the property."

Section 1101(b)(6) of the Tax Law defines the term "tangible personal property" in part as follows:

Tangible personal property. Corporeal personal property of any nature. However, except for purposes of the tax imposed by subdivision (b) of section eleven hundred five, such term shall not include gas, electricity, refrigeration and steam

Question:

(13) Is the fee that Petitioner charges the marketers, to burn the marketers' gas to produce electricity, subject to sales tax?

Answer: In this case, Petitioner neither owns the gas nor the electricity it produces by burning the gas. Petitioner merely charges the owner of the gas (the Marketer) a fee for producing electricity by burning the marketers' gas. Generally, the electricity can be sold by the marketer to a third party (commercial end-user, independent power producers or utility), but in many instances the electricity is sold to Petitioner.

By virtue of section 1101(b)(6) of the Tax Law, the gas supplied to Petitioner by the marketers is not considered to be tangible personal property. Therefore section 1105(c)(2) is not applicable. The construction of section 1105(c) of the Tax Law is such that unless a service is specifically subjected to tax, it is outside the scope of the Sales Tax Law and thus not subject to sales tax. The fee that Petitioner charges the marketers to produce electricity by burning the marketers' gas is outside the scope of the Sales Tax Law, and is not subject to the sales and compensating use taxes.

DATED: July 2, 1996

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

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