

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

TSB-A-96 (13) C
Corporation Tax
TSB-A-96 (29) S
Sales Tax
May 8, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z950626B

On June 26, 1995, a Petition for Advisory Opinion was received from Christopher L. Doyle, Esq., Hodgson, Russ, Andrews, Woods and Goodyear, LLP, 1800 One M&T Plaza, Buffalo, New York 14203-2391.

The issues raised by Petitioner, Christopher L. Doyle, Esq., are (1) whether a taxpayer's receipts from sales of natural gas to New York end-users pursuant to the "Natural Gas Sales Agreement" described below ("Agreement") will be included in the taxpayer's "gross earnings from all sources within this state" as that term is used in section 186 of the Tax Law; (2) whether a taxpayer's receipts from sales of natural gas to New York end-users pursuant to the Agreement will be included in the taxpayer's "gross operating income" as that term is used for purposes of section 186-a.1 of the Tax Law; (3) whether the New York end-users purchasing natural gas from a taxpayer pursuant to the Agreement will be subject to the tax imposed under section 189 of the Tax Law with respect to that purchases; and (4) whether a taxpayer's receipts from sales of natural gas to New York end-users pursuant to the Agreement will be subject to New York State sales and/or use tax.

The Petitioner presents the following facts as the basis for the Advisory Opinion.

The Agreement is between the seller ("Seller") and buyer ("Buyer") concerning the sale and purchase of natural gas ("Gas") and states as follows:

1. **Nature of Services:** Seller shall sell and deliver, and Buyer shall purchase and receive, an Interruptible Daily Quantity or a Base Daily Quantity of Gas, as defined in Section 16, which will be identified in a Purchase Order.
2. **Term:** The Agreement will remain in effect for one year ... and year to year thereafter until terminated by either party ... Each Purchase Order will state the period of time during which a specific transaction will occur ("Term") pursuant to the Agreement.
3. **Quantity:** A specified Sales Quantity for each Term will be shown on each Purchase Order
4. **Price:** The price agreed upon by the parties for Gas deliveries will be shown on the Purchase Order. If Buyer requests Seller to arrange for transportation of Gas on Buyer's behalf from the Sales Point to a downstream Transportation Nomination Point, the price will be inclusive of all transportation charges, unless otherwise

TSB-A-96 (13) C
Corporation Tax
TSB-A-96 (29) S
Sales Tax
May 8, 1996

stated. The price shown on the Purchase Order will exclude all taxes applicable to Buyer unless otherwise indicated in writing.

5. **Gas Quality and Measurement:** Buyer is not obligated to accept deliveries of Gas if the Gas is not merchantable. Gas is merchantable if it meets all specifications which are required by the pipeline(s) both upstream and downstream of the Sales Point. Measurement of Gas volumes will be conducted by the transporting pipelines or the local distribution company at the Sales Point or Transportation Nomination Point, whichever is further downstream.

6. **Title:** Title to, and risk of loss of, the Gas passes from Seller to Buyer at the Sales Point(s). Seller warrants title to all Gas sold at the Sales Point and also warrants that the Gas is free from liens and adverse claims of any kind. Seller agrees to indemnify Buyer against any liens or claims to the Gas that arise just prior to delivery of the Gas at the Sales Point.

7. **Transportation Services:** If Buyer requests Seller to arrange for transportation of Buyer's Gas from the Sales Point(s) to a downstream Transportation Nomination Point, and Seller agrees to arrange the transportation for the Buyer, Seller shall act solely as Buyer's agent to arrange for Gas deliveries on behalf of Buyer to the Transportation Nomination Point identified in the Purchase Order.

8. **Agency Agreement:** If Buyer requests transportation service, Buyer agrees to allow Seller to act as Buyer's agent to arrange for delivery and transportation of Gas under this Agreement.

9. **Billing and Payment:** Within ten (10) days of receipt of Seller's invoice for Gas delivered, or by the 25th of the subsequent month, whichever is later, Buyer will pay Seller in full

Unless the parties agree otherwise in writing, the Gas price shown on each Purchase Order is exclusive of any applicable federal, state and local taxes including, but not limited to, sales, use, gross receipts, gross earnings, importer privilege, franchise, excise or other taxes. Any taxes, fees, charges or other assessments (excluding taxes based on Seller's net income) levied by any state or jurisdiction in connection with this Agreement (whether now in effect or later enacted) will be paid by Purchaser. If Seller is required to pay the levy, Buyer shall reimburse the full amount paid by Seller upon receipt of satisfactory proof of payment. If Buyer is claiming exemption from any taxes, an exemption certificate or other proof will be provided promptly to Seller.

TSB-A-96 (13) C
Corporation Tax
TSB-A-96 (29) S
Sales Tax
May 8, 1996

Any penalty charge, cash out or other assessment imposed by the transporting pipelines or local distribution companies due to an imbalance or failure to deliver or receive Gas will be paid by the party responsible for causing the imbalance or failure. To prevent penalties, Buyer and Seller agree to notify each other as soon as possible after receipt of any notice(s) by a transporting pipeline or local distribution company that an imbalance is occurring

10. **Force Majeure:** Except for Buyer's obligations to make payment for Gas deliveries, neither party is liable for any failure of performance due to causes beyond its reasonable control(force majeure), the occurrence of which could not have been prevented by the exercise of due diligence

11. **Conflicting Terms:** If, for any reason, the terms in the Purchase Order conflict with the terms of this base agreement, the terms in the Purchase Order dictate the obligations and responsibilities of the parties.

12. **Assignment:** This Agreement may not be assigned without the written consent of the non-assigning party, such consent not to be unreasonably withheld.

13. **Confidentiality:** The terms of this Agreement and any Purchase Order will be kept confidential between the parties except when disclosure is required by law or regulation or as needed to arrange transportation.

14. **Governing Law and Severability:** This Agreement will be construed in accordance with, and governed by, the laws of the State of New Jersey

15. **Right to Match:** Before Buyer enters into a new natural gas sales agreement with another supplier, Buyer will give Seller the right to match any written offer from another supplier.

16. **Definitions:** The definitions in this Section are to be used where a word or phrase being defined appears in the Agreement.

1. "Sales Quantity" means a daily volume of Gas stated in MMBtu's which is deliverable by or on behalf of Seller to Buyer as specified in an executed Purchase Order.

2. "Base Daily Quantity" means the average daily volume of Gas that Seller will deliver and Buyer will purchase during the Term specified in the Purchase Order, which volume is not subject to interruption by either party except by reason of force majeure.

TSB-A-96 (13) C
Corporation Tax
TSB-A-96 (29) S
Sales Tax
May 8, 1996

3. "Interruptible Daily Quantity" means the average daily volume of Gas which the parties agree to buy and sell during the Term specified in the Purchase Order which may be interrupted by either party at any time by giving notice within a reasonable time prior to the nomination deadline. Such volumes may also be referred to as "swing volumes" in the Purchase Order.

4. "Sales Point" means the point shown on Exhibit B (a) where Seller agrees to deliver and Buyer agrees to purchase Gas and (b) at which title and risk of loss pass from Seller to Buyer.

5. "Transportation Nomination Point" means the point at which Buyer becomes responsible for arranging transportation in those instances in which Seller, acting as agent for the Buyer, obtains transportation services downstream of the Sales Point.

6. "Purchase Order" means the one-page attachment to this Agreement which identifies the Nature of Service (Base Daily Quantity or Interruptible Daily Quantity), Sales Quantity, Price, Sales Point(s), transporting pipeline(s), Transportation Nomination Point(s), Term and other specifics relevant to a particular transaction between Buyer and Seller.

Petitioner represents Taxpayer, a corporation engaged in the purchase and sale of natural gas. Taxpayer is a foreign corporation engaged in business activities in New York State that make it subject to tax in New York. Although Taxpayer is not subject to the administrative oversight of the Public Service Commission, Taxpayer is principally engaged in the sale of natural gas. Accordingly, Petitioner states that Taxpayer is subject to tax under section 186 of the Tax Law, and potentially subject to tax as a second class utility under section 186-a of the Tax Law.

As part of its business activities, Taxpayer acquires natural gas outside of New York State, and sells the natural gas to consumers ("end-users") located in New York and elsewhere. Taxpayer does not own or operate facilities for transporting the natural gas it purchases and sells. Transportation is provided by unrelated third-party pipeline companies hired either by the seller, Taxpayer or the end-user.

Taxpayer proposes to adopt the Agreement for use for all sales of natural gas to New York end-users. The Agreement provides that Taxpayer will sell natural gas on either an "interruptible" or "firm" basis to the buyer (i.e. New York end-user). According to the terms of the Agreement, title, risk of loss and transportation responsibility for the gas will pass from Taxpayer to the New York end-user at certain Sales Points listed on Exhibit B to the Agreement. Exhibit B lists, by meter number, the meters at which sales of natural gas pursuant to

the terms of the Agreement will take place, the location of such meters (by town, county and state) and the pipeline upon which the meters are located.

None of the Sales Points are located in New York State.

The Agreement also provides that an end-user may appoint Taxpayer as the end-user's agent to arrange for transportation and delivery of the gas to a "Transportation Nomination Point" provided on the purchase order to be submitted by the end-user to Taxpayer. With respect to Taxpayer's sales of natural gas to New York end-users, it is likely that at least some of the New York end-users will exercise the option to have Taxpayer act as their agent for purposes of arranging for the transportation of the natural gas from the Sales Point to the Transportation Nomination Point. For the purpose of the advisory opinion it should be assumed that New York is the location of all Transportation Nomination Points for gas sold to New York end-users who have elected to have Taxpayer act as their agent for transportation purposes.

Section 186 of the Tax Law imposes a tax on "[e]very 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. The term "gross earnings" as used in this section means all receipts from the employment of capital without any deduction.

In Mark S. Klein, Partner, Hodgson, Russ, Andrews, Woods & Goodyear, Adv Op Comm T & F, April 29, 1991, TSB-A-91(11)C, a foreign corporation is principally engaged in the business of supplying natural gas to end-users. The foreign corporation's requirements contracts with its suppliers provide that the delivery point of the natural gas is the point of sale. At the point of sale, both legal possession and title passes to the foreign corporation and that same point of sale is the point the end-user takes possession and title. The Advisory Opinion holds that the foreign corporation is subject to tax under section 186 of the Tax Law on its gross earnings from the sale of natural gas where the point of sale is located within New York State. However, if the foreign corporation sells natural gas to an end-user where the point of sale is in Louisiana, the gross earnings from such sale are not from a source in New York State. The end-user's subsequent contract with a pipeline company to transport the purchased natural gas to its destination, even if such destination is in New York State, is not relevant in determining the taxability of the foreign corporation selling the natural gas outside New York State.

Section 186-a of the Tax Law provides, in part:

1. Notwithstanding any other provision of this chapter, or of any other law, a tax equal to three and one-half per centum of its gross income is hereby

TSB-A-96 (13) C
Corporation Tax
TSB-A-96 (29) S
Sales Tax
May 8, 1996

imposed upon every utility doing business in this state which is subject to the supervision of the state department of public service ... and a tax equal to three and one-half per centum of its gross operating income upon every other utility doing business in this state ... which taxes shall be in addition to any and all other taxes and fees imposed by any other provision of law for the same period.

2. As used in this section, (a)(i) the word "utility" includes ... every person (whether or not such person is subject to [the department of public service] supervision) 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 ... (b) the word "person" means ... corporations ... (d) the words "gross operating income" mean and include receipts received in or by reason of any sale, conditional or otherwise, made for ultimate consumption or use by the purchaser of gas ... or in or by reason of the furnishing for such consumption or use of gas ... service in this state ... without any deduction

For purposes of section 186-a of the Tax Law, a utility subject to the supervision of the Department of Public Service is a utility of the first class, and every other utility is a utility of the second class.

Section 189.2 of the Tax Law imposes on every gas importer a monthly privilege tax on the privilege or act of importing gas services or causing gas services to be imported into New York State for its own use or consumption in New York State. Section 189.1 of the Tax Law provides, in part, as follows:

(a) The term "gas services" means gas delivered through mains or pipes.

(b) The term "gas importer" means 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.

(c) The term "person" includes an individual, partnership, society, association, joint stock company, corporation

TSB-A-96 (13) C
Corporation Tax
TSB-A-96 (29) S
Sales Tax
May 8, 1996

Section 189.3 of the Tax Law provides that the privilege tax shall be paid to New York State by the use of one of the two following methods:

(a)(1) If the gas services are delivered in this state to the gas importer by a public utility, then the public utility making such delivery of gas services shall be required to collect the tax imposed by this section pursuant to subparagraph two of this paragraph, and shall be collected monthly from such gas importer and such gas importer shall so pay the tax required to be collected to such public utility The amount of tax required to be collected shall be paid to such public utility required to collect it as trustee for and on account of the state

(b) If the gas services are delivered to the gas importer by other than a public utility subject to the supervision of the public service commission, a gas importer shall file a return quarterly covering each month during such quarter with the department of taxation and finance and shall pay such tax at the time of filing such return.

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

Section 1101(b)(6) of the Tax Law defines the term "tangible personal property" as "[c]orporeal 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 "

In Niagara Mohawk Power Corporation, Adv Op Comm T & F, April 20, 1995, TSB-A-95(8)C, one of the issues raised was whether a marketer's receipt from the sale of natural gas to a consumer is taxable under sections 186, 186-a and 189 of the Tax Law under five scenarios. The Advisory Opinion held that the determination of where the marketer's sale of natural gas occurs in each of the scenarios is a factual matter not susceptible of determination in an advisory opinion. However, the opinion discusses each scenario to aid in making a determination for purposes of sections 186, 186-a and 189 of the Tax Law. The situation in scenario five is similar to the facts in this case. In scenario five, marketer acquires gas outside New York State. The marketer transfers title to the consumer at a point outside New York, and the contract price includes the

TSB-A-96 (13) C
Corporation Tax
TSB-A-96 (29) S
Sales Tax
May 8, 1996

cost of shipping the gas to the point where title transfers. Interstate transportation of the gas into New York is accomplished under a contract directly between the interstate pipeline and the consumer. The marketer has no control over, or rights to service under, the transportation contract. Risk of loss transfers from the marketer to the consumer at the point where title transfers. With respect to scenario five, the opinion provides that absent any other information, it appears that transfer of title and transfer of possession occurs outside of New York State and that the sale occurs outside New York State for purposes of these taxes.

It would also appear that the sale occurs outside New York for purposes of the sales and use taxes in this scenario. Section 1110 of the Tax Law, which imposes the compensating use tax on tangible personal property purchased outside the State, contains no language similar to that contained in section 1105(b) of the Tax Law which imposes the sales tax on gas and gas services. Accordingly, the use tax imposed by section 1110 of the Tax Law will not apply to the New York end-users' use in New York State of gas purchased outside of New York State. (See Matter of Penn York Energy Corporation, Dec Tax App Trib, October 1, 1992, TSB-D-92(71)S).

As stated in Niagara Mohawk, supra, the determination of where the sale of natural gas occurs for purposes of sections 186, 186-a and 189 of the Tax Law is a factual matter not susceptible of determination in an advisory opinion. An advisory opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to a "a specified set of facts." Tax Law, §171.20; 20 NYCRR 2376.1(a).

Accordingly, it is not within the scope of this advisory opinion to determine (i) whether Taxpayer has "gross earnings" from the sale of natural gas within New York State under section 186 of the Tax Law or "gross operating income" from the sale of natural gas delivered into New York State through mains or pipes for ultimate use or consumption by the end-user under section 186-a of the Tax Law, (ii) whether the end-user purchasing natural gas from Taxpayer is subject to the tax imposed under section 189 of the Tax Law or (iii) whether Taxpayer's receipts from sales of natural gas to New York end-users are subject to sales tax.

However, it appears that under the terms of the Agreement, title, risk of loss and transportation responsibility for the gas will pass from Taxpayer to the New York end-user at Sales Points outside New York State. Like Mark S. Klein, supra, and Niagara Mohawk, supra, it appears that the sale of this natural gas for New York State tax purposes occurs outside New York State. When Taxpayer acts as the end-user's agent to arrange for the delivery and transportation of the natural gas to a Transportation Nomination Point in New York State pursuant to the Agreement, the sale of the natural gas for New York State tax purposes may

TSB-A-96 (13) C
Corporation Tax
TSB-A-96 (29) S
Sales Tax
May 8, 1996

occur within New York State. For instance, the sale may occur in New York State if the activities of Taxpayer while acting as agent for an end-user are not conducted at arms-length or if the cost of the transportation services arranged by Taxpayer is not at unrelated third-party prices consistent with the industry.

DATED: May 8, 1996

/s/
DORIS S. BAUMAN
Director
Technical Services Bureau

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