

Opinion of Counsel

Deductibility of Federal Windfall Profits  
Tax Under Article 9-A

To: William A. Craven, Director  
Audit Division

May 28, 1982

Your memorandum of November 14, 1980 to Saul Heckelman requested an opinion as to whether the windfall profit tax imposed by Chapter 45 of the Internal Revenue Code of 1954, as amended, is a modification increasing the entire net income base for the Article 9-A franchise tax of subject taxpayers.

Section 208.9 of the Tax Law provides in pertinent part that:

"(b) Entire net income shall be determined without the exclusion, deduction or credit of:

(1) the amount of any specific exemption or credit allowed in any law of the United States imposing any tax on or measured by the income of corporations,

\* \* \* \*

(3) taxes on or measured by profits or income paid or accrued to the United States,  
..."

Section 4986(a) of the Internal Revenue Code provides that:

"An excise tax is hereby imposed on the windfall profit from taxable crude oil removed from the premises during each taxable period."

The tax is also characterized in the conference report as a severance tax.

Section 4987(a) thereof states that the tax is an applicable percentage of windfall profit; windfall profit is defined in section 4988(a) thereof as follows:

"General Rule. For purposes of this chapter, the term 'windfall profit' means the excess of the removal price of the barrel of crude oil over the sum of -

(1) the adjusted base price of such barrel, and

(2) the amount of the severance tax adjustment with respect to such barrel provided by section 4996(c)."

Section 4988 thereof places a net income limitation on windfall profit.

Section 164(a)(5) of the Internal Revenue Code, as amended by Public Law 96-223, allows a deduction from federal adjusted gross income for the amount of windfall profit tax; other deductible taxes allowed under section 164 include those levied on real property, personal property, foreign, state and local income taxes, and general sales taxes.

The modification required by section 208.9(b)(3) of the Tax Law is not dependent on whether the federal tax is an excise tax or property tax or income tax in nature. The modification is required where the tax is levied on or measured by profit or income. As the windfall profit tax is measured by profit, the modification is required and the tax must be added to entire net income.

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