

**New York State Department of Taxation and Finance**  
**Office of Tax Policy Analysis**  
**Technical Services Division**

TSB-A-02(23)C  
Corporation Tax  
December 18, 2002

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C020624A

On June 24, 2002, a Petition for Advisory Opinion was received from Sempra Energy Trading Corp., c/o Hodgson Russ LLP, James R. Maloney, One M&T Plaza, Suite 2000, Buffalo, New York 14203.

The issue raised by Petitioner, Sempra Energy Trading Corp., is whether receipts from the sale of natural gas to the Power Authority are exempt from the tax imposed under section 186-a of Article 9 of the Tax Law.

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

Petitioner is a foreign corporation principally engaged in the purchase and sale of natural gas throughout North America, including New York State. Petitioner's sales include sales to the Power Authority of the State of New York for the Power Authority's consumption in New York State. All sales by Petitioner to the Power Authority are in-state sales, i.e., transfer of title, possession and risk-of-loss take place in New York State. The Power Authority is a corporate instrumentality of New York State.

**Applicable Law**

Section 186-a of Article 9 of the Tax Law imposes an excise tax on the furnishing of utility services. The tax is imposed on the "gross income" of "every utility ... doing business in [New York State] which is subject to the supervision of the state department of public service," and on the "gross operating income" of "every other utility doing business in [New York State] which has a gross operating income for the year ending December thirty-first in excess of five hundred dollars, 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." (Section 186-a.1)

Section 186-a.2 of the Tax Law contains definitions and provides, in part:

(a) the word "utility" includes every person ... subject to the supervision of the state department of public service ... and also includes every person (whether or not such person is subject to such supervision) who 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 ...

(b) the word “person” means persons, corporations, companies, associations, joint-stock companies or associations, partnerships and limited liability companies ... except the state; municipalities, political and civil subdivisions of the state or municipality and public districts (provided, however, that with respect to gas, electricity and gas or electric service, including the sale of the transportation, transmission or distribution of gas or electricity, such municipalities, political and civil subdivisions and public districts shall be excluded from the definition of “person” if they own and operate facilities which are used to generate or distribute electricity or distribute gas and they distribute and sell such gas or electricity solely at retail, solely within their respective jurisdiction; or provided, further, with respect to the sale of electricity or the transportation, transmission or distribution of electricity, a municipality shall be excluded from the definition of “person” if it sells electricity at retail where all such electricity (excluding temporary substitution power during outages or periods of reduced output) has been generated solely by and purchased solely from the state or a public authority of the state) ...

(c) the words “gross income” mean and include receipts received in or by reason of any sale, conditional or otherwise, (except sales hereinafter referred to with respect to which it is provided that profits from the sale shall be included in gross income) made or service rendered for ultimate consumption or use by the purchaser in this state ... without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or services or other costs, interest or discount paid, or any other expense whatsoever.

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(5) “Gross income” also includes profits from the sale of securities; also profits from the sale of real property growing out of the ownership or use of or interest in such property; also profit from the sale of personal property (other than property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the period for which a return is made); also receipts from interest, dividends, and royalties, derived from sources within this state ... also profits from any transaction (except sales for resale and rentals) within this state whatsoever;

(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 ....

Section 186-a.6 of the Tax Law provides that: “The tax imposed by this section shall be charged against and be paid by the utility and may be added as a separate item to bills rendered by

the utility to customers. Upon request the utility shall furnish a statement of the amount of tax imposed by this section to its customers for bills rendered on or after January first, two thousand.”

Section 1002.1 of the Public Authorities Law (PAL) provides for the creation of the Power Authority of the State of New York (Power Authority) which is “a corporate municipal instrumentality of the state ... which shall be a body corporate and politic, a political subdivision of the state, exercising governmental and public powers, perpetual in duration, capable of suing and being sued, and having a seal, and which shall have the powers and duties hereinafter enumerated, together with such others as may hereafter be conferred upon it by law.”

Section 1012 of the PAL contains an exemption from taxation for the Power Authority, and provides, in part:

... the authority shall be regarded as performing a governmental function in undertaking such projects and in carrying out the provisions of this title, and shall be required to pay no taxes or assessments upon any of the property acquired by it for such projects or upon its activities in the operation and maintenance thereof ...

Section 1014 of the PAL provides, in part:

The rates, services and practices relating to the generation, transmission, distribution and sale by the authority, of power to be generated from the projects authorized by this title shall not be subject to the provisions of the public service law nor to regulation by, nor the jurisdiction of the department of public service.... and wherever any provision of law shall be found in conflict with the provisions of this title or inconsistent with the purposes thereof, it shall be deemed to be superseded, modified or repealed as the case may require.

### **Opinion**

In New York Telephone Company v County of Nassau, 122 AD2d 124, the defendant, Nassau County, did not pay that portion of its telephone bills attributable to three taxes imposed upon the plaintiff, New York Telephone Company, by New York State and local governments, asserting that the policy of allowing the plaintiff to recover these tax payments from the consumer as an operating expense was impermissible since New York State municipalities are exempt from taxation unless otherwise stated. The Appellate Division held that the tax imposed under section 186-a on a utility constitutes a part of the operating costs of the utility, and held that the “imposition of surcharges upon the defendant to recover these additional operating expenses is not the equivalent of directly taxing the municipality.”

Pursuant to sections 1012 and 1014 of the PAL, the tax imposed under section 186-a of the Tax Law may not be imposed on the Power Authority. This means that for purposes of section 186-a

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of the Tax Law, the Power Authority would not be treated as a utility under section 186-a.2(a) and it would not be subject to the tax imposed under such section 186-a of the Tax Law.

In this case, Petitioner is a utility subject to the tax imposed under section 186-a of the Tax Law. It is not clear from the facts, whether Petitioner is taxable on its gross income or its gross operating income. However, in either case, its receipts from sales of natural gas for ultimate consumption or use in New York State are taxable receipts. Petitioner's sales of natural gas include sales to the Power Authority for consumption or use by the Power Authority in New York State.

Following New York Telephone, supra, the tax imposed under section 186-a on the receipts of a utility selling gas to end users, is an expense of the utility that may be included in the price that the utility charges for the sale of the gas, and may be separately stated on the bill rendered to the purchaser. However, the inclusion of such expense in the amount charged for the gas sold is not the equivalent of directly taxing the purchaser of such gas.

Accordingly, the tax imposed under section 186-a of the Tax Law on Petitioner is an expense of Petitioner that may be included in the amount charged for the sale of natural gas that is sold to the Power Authority. However, the inclusion of such expense does not result in the imposition of such section 186-a tax on the Power Authority itself. Therefore, Petitioner's receipts from the sales of natural gas to the Power Authority for the Power Authority's consumption or use in New York State are taxable under section 186-a of the Tax Law. The taxable receipts include the total charge for the sale of such natural gas, without any deduction or exclusion for the expense of Petitioner attributable to the tax imposed on Petitioner under section 186-a of the Tax Law that is included in such total charge.

DATED: December 18, 2002

/s/  
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Technical Services Division

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