

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

TSB-A-87 (22) C
Corporation Tax
August 25, 1987

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. M870413A

On April 13, 1987, a Petition for Advisory Opinion was received from Uni-Marts, Inc., 477 East Beaver Avenue, State College, Pennsylvania 16801-5690.

The issue raised is the application of the tax on petroleum businesses imposed by Article 13-A of the Tax Law in the following situations: (1) where petroleum is imported into New York State by Petitioner's wholly owned subsidiary and subsequently sold to Petitioner, and (2) where petroleum is imported into New York State by Petitioner, sold to Petitioner's wholly owned subsidiary and subsequently resold to Petitioner.

Section 301 of Article 13-A of the Tax Law imposes "...upon every petroleum business, for the privilege of engaging in business, doing business, employing capital, owning or leasing property, or maintaining an office in this state, for all or any part of each of its taxable years, an annual tax equal to two and three-quarters per centum of (i) its gross receipts from sales of petroleum where shipments are made to points within the state "

The term "petroleum business" is defined in section 300(c) of the Tax Law as "every corporation and unincorporated business formed for, engaged in or conducting the business, trade or occupation of importing or causing to be imported (by a person other than one which is subject to tax under this article) into this state for sale in this state, extracting, producing, refining, manufacturing, or compounding petroleum "

Technical Services Bureau Memorandum TSB-M-83(22)C provides that a petroleum business is importing petroleum into New York State if it takes title to petroleum outside New York State and ships or causes to be shipped into New York State 20,000 gallons or more of such petroleum during its taxable year. Also, a petroleum business is deemed to be causing petroleum to be imported into New York State if it purchases 20,000 gallons or more of petroleum located outside New York State for delivery into New York State from a seller not subject to tax under Article 13-A of the Tax Law.

Petitioner contends that most of their competitors do not import petroleum, but acquire petroleum from a wholesale distributor who is the importer of the petroleum and the entity subject to Article 13-A. Under Article 13-A, a taxpayer's tax liability is based on gross receipts from sales of petroleum. Therefore, the tax liability of an Article 13-A taxpayer who sells at the wholesale level is based on the wholesale price.

However, in Petitioner's case, Petitioner, itself, imports petroleum into New York State and sells such petroleum at the retail level at several convenience store locations. Since Petitioner is importing petroleum and selling such petroleum at the retail level, Petitioner's Article 13-A tax liability is based on the gross receipts from the sales of petroleum at the retail price level rather than

the wholesale price level. Accordingly, Petitioner feels it is at a competitive disadvantage because it must either charge more for its petroleum than its competitors to get the same gross margin, or accept a smaller gross margin. Therefore, Petitioner is contemplating changing its business operations to one of the following situations.

Situation 1

Petitioner's wholly owned subsidiary corporation would acquire petroleum from a refiner, import such petroleum into New York State and subsequently sell the petroleum to Petitioner at the current wholesale price level. Petitioner, in turn, would sell the petroleum at its convenience store locations.

Petitioner contends that since the subsidiary is importing petroleum into New York State, the subsidiary is the entity subject to the tax imposed by Article 13-A and that the tax would be assessed on the then current wholesale price.

In this situation, it is agreed that Petitioner's wholly owned subsidiary corporation is importing petroleum into New York State. As such, the subsidiary is engaged in a petroleum business and is subject to the tax imposed by Article 13-A of the Tax Law.

Petitioner, is purchasing petroleum that is located in New York State from a seller that is an Article 13-A taxpayer. Subsequently, Petitioner sells such petroleum at its convenience store locations. Petitioner, itself, is not importing petroleum or causing petroleum to be imported into New York State. Accordingly, Petitioner is not engaged in a petroleum business subject to Article 13-A of the Tax Law.

An Article 13-A taxpayer computes its gross receipts from sales of petroleum pursuant to section 303 of the Tax Law, which provides that such gross receipts means all receipts from sales of petroleum where shipments are made to points within New York State, whether in cash, credits or property of any kind or nature, without deduction for the cost of the property sold, the cost of materials used, labor, services or other costs, interest or discount paid or any other expense. Gross receipts does not include taxes on the sales of petroleum that are imposed directly on the purchaser. Therefore, the New York State and local sales taxes, New York State tax on motor fuel, New York State tax on diesel fuel, federal tax on diesel fuel, and New York City leaded motor fuel tax are excluded from gross receipts. The exclusions from gross receipts provided in section 303(b) of the Tax Law are:

- (1) receipt from any sale of fuel oil (excluding diesel motor fuel) or liquified or liquifiable gases used for residential purposes,
- (2) receipt from any sale for resale to a purchaser that is a petroleum business subject to Article 13-A,
- (3) receipt from any exchange sale of petroleum between petroleum businesses subject to tax under Article 13-A,

- (4) receipt from any sale of petroleum if such petroleum is sold for immediate exportation from New York State,
- (5) receipt from any sale to a purchaser for consumption by it when the purchaser furnishes a consumption certificate.

Even though in this situation the subsidiary's sale of petroleum to Petitioner is a sale for resale, the receipts from such sales are not excluded from the subsidiary's gross receipts because Petitioner is not an Article 13-A taxpayer. Therefore, when Petitioner's subsidiary computes its gross receipts from sales of petroleum, it must include the gross receipts it receives from sales of petroleum to Petitioner where such petroleum is shipped to points in New York State.

Situation 2

Petroleum would be imported into New York State by Petitioner, sold to its wholly owned subsidiary in New York State at the current wholesale price. The subsidiary, in turn, would sell the petroleum back to Petitioner, at the wholesale price plus any additional costs incurred, to be distributed to Petitioner's convenience store locations in New York State for sale to consumers.

Petitioner contends that it would be the entity importing petroleum into New York State and thus would be subject to the tax imposed by Article 13-A and that the tax would be assessed on the wholesale price.

In this situation, it is agreed that Petitioner is importing petroleum into New York State. Accordingly, Petitioner is engaged in the petroleum business and is subject to the tax imposed by Article 13-A of the Tax Law.

Petitioner's subsidiary is purchasing petroleum that is located in New York State from Petitioner, an Article 13-A taxpayer. Petitioner's subsidiary subsequently sells such petroleum back to Petitioner for sale at Petitioner's convenience store locations. Petitioner's subsidiary is not importing petroleum or causing petroleum to be imported into New York State. Accordingly, Petitioner's subsidiary is not subject to the tax imposed by Article 13-A of the Tax Law.

When Petitioner computes its gross receipts from sales of petroleum, it must include all gross receipts from sales of petroleum. Since Petitioner's subsidiary is not an Article 13-A taxpayer, the exclusion from gross receipts of a receipt from a sale for resale is not applicable.

Therefore, Petitioner must include in its gross receipts from sales of petroleum, the gross receipts from petroleum sales to its subsidiary where shipments of such petroleum are made to points in New York State. Petitioner must also include in gross receipts, the gross receipts from sales of petroleum at its convenience store locations within New York State. These sales made at

convenience store locations are separate from the sales made to the subsidiary, and, as such, the gross receipts from both types of sales must be included in the computation of Petitioner's gross receipts.

DATED: August 25, 1987

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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