

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C870803A

On August 3, 1987, a Petition for Advisory Opinion was received from Paul D. Reid and Reid Petroleum Corp., 100 West Genesee Street, Lockport, New York 14094.

Issues

1. Whether Reid Petroleum Corp. ("Reid") will be subject to the gross receipts tax imposed by Article 13-A of the Tax Law if it purchases its petroleum products from Reid Trading Corp. ("Trading"), a corporation owned and controlled by one of the shareholders of Reid, which purchases its petroleum products from both interstate and intrastate vendors and is subject to tax under Article 13-A.

2. Whether the financial condition of Reid and Trading will be considered jointly in determining the bonding requirement of the Article 13-A corporation if the two corporations cross-guarantee their tax obligations.

3. Whether the answers to Issues 1 and 2 above will be affected by the fact that Trading leases its trucks from both Reid and a second corporation related to Reid.

4. Whether the answers to Issues 1, 2, and 3 above will be affected by the retention of an Article 12-A distributor registration by Reid.

Facts

Reid is presently a distributor of motor fuel within the meaning of Article 12-A of the Tax Law, but does not import such fuel into the state. Reid presently complies with the registration provisions of Article 12-A of the Tax Law. Most of Reid's gross receipts are derived from retail sales of petroleum. Reid would like to begin importing motor fuel and convert to a petroleum business described in Article 13-A of the Tax Law. However, the bulk of Reid's gross receipts would still be derived from retail sales of nonimported fuel. Reid does not want to pay a gross receipts tax on the retail markup of the motor fuel which was not subject to such tax when Reid was not importing motor fuel, and therefore, was not subject to the Article 13-A gross receipts tax. Reid thus proposes that one of the shareholders of Reid form a new corporation ("Trading") which will be an importer of such motor fuel and will be subject to tax under Article 13-A.

The proposal is as follows:

1. One of the shareholders of Reid will form Trading for the purpose of purchasing all petroleum products, from both within New York State and outside New York State.

2. Trading will meet all of the necessary registration and bonding requirements for conducting a petroleum business, including, but not limited to, obtaining an importing transporter license, an Article 12-A distributor license, an Article 13-A petroleum business license, and a federal excise tax permit.

3. Trading will lease trucks from both Reid and a second corporation related to Reid to transport petroleum products interstate and intrastate primarily for delivery to Reid. Trading will employ drivers to operate the trucks through the Reid companies payroll system.

4. Trading will sell petroleum products to Reid, F.O.B. delivery point, and to others on terms agreed upon by the parties.

5. Trading will remit the prepaid sales tax, state motor fuel tax and other taxes required by applicable statutes and regulations to the vendor for intrastate purchases, and to New York State directly for interstate purchases, and will collect such taxes on its own sales.

6. Reid will pay the prepaid sales tax and state motor fuel tax to Trading and will also collect and remit to New York State the actual sales tax on retail sales. In addition, Reid will pay the federal excise tax.

7. Trading will remit to New York State the Article 13-A gross receipts tax calculated, pursuant to TSB-M-83(22)C, to include the tax on gross receipts minus New York State and local sales taxes (including the prepaid sales tax), New York State taxes on motor fuel and diesel fuel, and any other taxes imposed directly on the purchaser.

8. Reid will not register as an Article 13-A corporation and will not incur any gross receipts tax liability, particularly upon the retail mark-up and federal excise tax component of Reid's gross receipts.

Issue 1

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.

Assuming Trading has an importing transporter's license under Article 12-A of the Tax Law and is registered as a distributor under Article 12-A and registered as a petroleum business under Article 13-A of the Tax Law, Reid is not importing petroleum or causing petroleum to be imported into New York State when it purchases petroleum that is located in New York State from Trading, a seller that is an Article 13-A taxpayer. It is presumed that Trading is paying the Article 13-A gross receipts tax on its gross receipts from sales of petroleum and then passing along the cost of this tax in the price of the products charged to its customers. Accordingly, Reid is not engaged in a petroleum business subject to Article 13-A of the Tax Law.

Issue 2

Section 302(c) of the Tax Law and Part 63 of the Petroleum Business Tax regulations provide that where the Department of Taxation and Finance deems it necessary to protect the revenue to be obtained under Article 13-A of the Tax Law, it may require a petroleum business to file with the Department a bond or other security. Whenever possible, the requirements of section 302(c) is to be coordinated with the bonding requirement of Article 12-A of the Tax Law and Part 414 of the motor fuel tax regulations. The bonding requirements under both Part 63 of the Petroleum Business Tax regulations and Part 414 of the motor fuel tax regulations provide that the amount of the bond or other security be determined according to the taxpayer's own statement of financial condition and cannot be determined through the use of joint financial condition statements of it and its affiliate by cross-guaranteeing each others tax obligations. Accordingly, Trading's bond requirement must be determined according to its own statement of financial condition, not by using a joint statement of financial condition with Reid.

Issue 3

Assuming all trucking arrangements with other corporations related to Reid are on an arm's length basis, the answers to Issue 1 and Issue 2 will not be affected by the fact that Trading leases its trucks from both Reid and another corporation related to Reid.

Issue 4

Based on the facts presented, the answers to Issue 1, Issue 2 and Issue 3 will not be affected by the retention of an Article 12-A distributor registration by Reid, assuming all sales by Reid to other corporations related to Reid are on an arm's length basis.

DATED: December 3, 1987

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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