

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

TSB-A-90(12)C
Corporation Tax
May 16, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z891204C

On December 4, 1989, a Petition for Advisory Opinion was received from Petroleum Sales and Service, Inc., 300 Ohio Street, Buffalo, New York 14204.

The issue raised by Petitioner, Petroleum Sales and Service, Inc., is whether a subsidiary corporate structure, or a corporation related by common stockholder ownership, will enable the separate companies to be treated separately in respect to imposition of Article 13-A and Article 9-A of the Tax Law.

Petitioner was organized in New York State in 1930 and has operated exclusively within New York State from its inception. Petitioner is presently subject to Article 13-A. Petitioner has received a Certificate of Taxability under Article 13-A effective March 1, 1985. For New York State franchise tax purposes pursuant to section 208.9(b)(4) of Article g-A, Petitioner is required to add back the Article 13-A tax to which it is subject.

Petitioner's operations are vertically integrated. Outside of its trucks and retail tanks, Petitioner has no storage capacity. Petitioner's operations consist of wholesale distribution of motor vehicle fuels generally utilizing its own trucks; ownership and operation of retail gasoline service stations; and rental of retail stations to independent operators. As such, it is subject to the Article 13-A tax based upon sales to 1) independent retail service stations, 2) nonindependently operated service stations and 3) other independent wholesalers.

Because of competitive economies, purchasing may be made, in any given period, exclusively within New York State or from other Article 13-A importers; exclusively from outside New York State or from non-13-A entities; or some combination of the above. Pricing modulation has to be employed to weigh the relative price advantage of either domestic or nondomestic sources. This is due to the fact that the industry practice is to quote a unit price per gallon exclusive of any Article 13-A tax which is separately invoiced by Article 13-A import suppliers.

During 1989, Petitioner found that based upon its purchasing practices it had been almost exclusively purchasing from domestic suppliers and had done very little importation. Given this environment it was determined that it might be advisable to revoke its Article 13-A status and cease any importation and thereby eliminate the additional franchise tax imposed via addition of tax liability incurred as an Article 13-A corporation. Though currently Petitioner is importing very little, Petitioner anticipates that future economics may dictate resumption of import purchasing. Petitioner proposes to form a new corporation,

NEWCO, which would be established concurrently with Petitioner's revocation of its Article 13-A status. NEWCO itself would duly register and qualify as an Article 13-A corporation. NEWCO's primary purpose would be to handle any future importation as may be required.

Fundamentally, this ruling request is made in order to establish definitely whether a subsidiary corporate structure, or a corporation related by common stockholder ownership, will enable the separate companies (Petitioner and NEWCO) to be treated separately in respect to imposition of the Article 13-A tax and the Article 9-A franchise tax. There is contemplated various operational integration and/or segregation which may be employed. Set forth therein are assumptions regarding future operations (Item I and Item II) which demand inquiry in order to answer the basic question set forth and to establish practices which may or may not be employed in order to preserve the intended benefit from an alternative corporate structure. Finally, Item III sets forth questions regarding the general application of Article 13-A.

Item I. The following factual scenario is presented. NEWCO would be established as a separate legal entity, and duly registered as an Article 13-A importer. However, NEWCO would employ no personnel, nor have any property titled in its name. Separate cash accounts, sales invoicing, purchase invoicing, record keeping, etc. would be performed by Petitioner's personnel for NEWCO's operations. NEWCO's sole function would be to execute purchases of imported gasoline which would be sold predominately to Petitioner (as a non-13-A corporation) for resale and to nonrelated Article 13-A wholesalers. Petitioner will charge NEWCO for management and administrative services. These services will include fuel purchase ordering and invoicing, customer sales invoicing, vendor payments, tax reporting and record keeping functions performed by Petitioner's personnel.

Under these circumstances, the following questions are directed for separate answers.

- a) Whether a parent/subsidiary corporate structure (with Petitioner as parent and NEWCO as subsidiary) will be recognized as separate and distinct operations for Article 13-A and Article 9-A tax purposes.

For purposes of both Article 13-A and Article 9-A, Petitioner and Newco will be recognized as separate and distinct operations as long as Newco maintains separate books and records. However, for purposes of Article 9-A, combined reporting may be required pursuant to section 211.4 of Article 9-A.

- b) Whether a brother/sister corporate structure will be recognized as separate and distinct operations for Article 13-A and Article 9-A, tax purposes.

Same answer as I a) above.

- c) If NEWCO made sales to Petitioner at a price equivalent to its cost, would the answers to I a) and I b) above be the same?

Yes.

- d) If the purchaser was NEWCO and delivery was made to Petitioner's facilities or to Petitioner's customer F.O.B. destination by a common carrier whose freight bill is paid by the seller - would this be considered importing by Petitioner?

No.

- e) What if Petitioner picked up NEWCO's purchase of product from an independent out-of-state supplier (non-13-A corporation) with its own truck and Petitioner and NEWCO had a written agreement that risk of loss and title did not pass to Petitioner until the product was pumped into Petitioner's domestic tanks or delivered to New York situs customers of Petitioner - would this be considered importing by Petitioner?

No. Title did not pass until product was situated in New York. However, Newco would have to prove that it retained title until the product was delivered to the New York site. In this situation, Petitioner is considered a common carrier. Therefore, Petitioner should prepare a standard freight bill and charge Newco accordingly.

Item II. The following factual scenario is presented in the alternative. NEWCO would receive the trucking operations of Petitioner in a tax-free reorganization. Drivers and dispatching personnel would be employed by NEWCO. Any purchasing by either company would be picked up by NEWCO's trucks and all deliveries would be handled by NEWCO's trucks. Sales of NEWCO's imported gasoline to Petitioner's retail operations would be invoiced to Petitioner at prevailing retail pricing plus a delivery charge as would be the case in retail sales to any independent retail service station. Where Petitioner utilizes NEWCO's trucks for any purpose (purchasing or retail sales delivery), a standard freight bill will be prepared and charged to Petitioner. Petitioner will charge NEWCO for management and administrative services.

These services will include fuel purchase ordering and invoicing, customer sales invoicing, vendor payments, tax reporting and other administrative and record keeping functions to be performed by Petitioner's personnel. Separate cash accounts, accounting records and purchase and sales records will be maintained for NEWCO's operations.

Under these circumstances, the following questions are directed for separate answers.

- a) Whether a parent/subsidiary corporate structure (with Petitioner as parent and NEWCO as subsidiary) will be recognized as separate and distinct operations for Article 13-A and Article 9-A tax purposes.

Same answer as I a) above.

- b) Whether a brother/sister corporate structure will be recognized as separate and distinct operations for Article 13-A and Article 9-A tax purposes.

Same answer as I a) above.

- c) If NEWCO made sales to Petitioner at a price equivalent to its cost, would answers to II a) and II b) remain the same?

Yes.

- d) Whereas legal, operational and record keeping functions are segregated, if the trucks transferred to NEWCO remained registered to Petitioner and/or bore the logo of Petitioner would answers to II a) and II b) remain the same?

Yes, if the trucks are owned by Newco and Newco's books and records reflect such ownership and depreciation. It is irrelevant whose logo is on the trucks. If the trucks are carried on the books and records of Petitioner, Petitioner would become a common carrier when it transports the product owned by Newco. In such situation Petitioner should prepare a standard freight bill and charge Newco accordingly.

Item III. The following general questions regarding application of Article 13-A are directed for separate answers.

- a) Could Petitioner as a non-13-A corporation sell to exempt residential customers and apply for a refund of the Article 13-A tax charged to Petitioner by Article 13-A suppliers in respect to such residential sales.

No. However, Petitioner may furnish Article 13-A suppliers with a residential use certificate with respect to residential sales.

- b) Could Petitioner as a non-13-A corporation sell to exempt New York State governmental organizations and apply for a refund of the Article 13-A tax charged to Petitioner by Article 13-A suppliers in respect to such exempt sales.

No. Under Article 13-A, there is no exemption on sales made to governmental agencies. (See TSB-M-83(22)C).

- c) If Petitioner as a non-13-A corporation purchases product from a nonrelated registered Article 13-A corporation from an out-of-state source and that product is delivered to Petitioner F.O.B. destination by the seller directly so that title does not pass to Petitioner until the fuel is pumped into Petitioner's tanks or Petitioner's customers' tanks, would this be considered importing by Petitioner?

No.

- d) Assuming that the seller in III c) was the related new Article 13-A corporation (NEWCO), would this be considered importing by Petitioner?

No.

- e) If delivery were to Petitioner or to its customer F.O.B. destination by a common carrier whose freight bill is paid by the seller (who is a registered Article 13-A corporation) - would this be considered importing by Petitioner?

No.

- f) Assuming that the seller in III e) was the related new Article 13-A corporation (NEWCO), would this be considered importing by Petitioner?

No.

- g) In III e), if the seller charges Petitioner freight as a separately stated invoice item, would the answer be the same?

Yes.

- h) In III e), if the common carrier's freight bill was invoiced to and paid by Petitioner but risk of loss and title was still F.O.B. destination, would the answer be the same?

Yes.

- i) What if Petitioner picked up the product out-of-state with its own truck and the seller (who is a registered Article 13-A corporation) and Petitioner had a written agreement that risk of loss and title did not pass to Petitioner until Petitioner pumped the product into its domestic tanks or delivered it to its New York situs customer - would this be considered importing by Petitioner?

No. However, since this is an unusual situation, the seller would have to prove that it retained legal title until the product was pumped into Petitioner's domestic tanks or delivered to the New York site of Petitioner's customers. In this situation, Petitioner is considered a common carrier when it picks up the seller's product outside New York and delivers it into New York. Petitioner should prepare a standard freight bill and charge the seller accordingly.

- j) Assuming that the seller in III i) was the related new Article 13-A corporation (NEWCO), would this be considered importing by Petitioner?

Same answer III i) above.

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- k) If Petitioner was a non-13-A corporation, would they be allowed to charge the Article 13-A tax as a separately stated item on their invoice to customers, as follows "Cost of Gross Receipts Tax"?

Yes.

DATED: May 16, 1990

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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