STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C951018A

On October 18, 1995, a Petition for Advisory Opinion was received from Avoca Natural Gas Storage, Mackey Road, Avoca, New York 14809.

The issues raised by Petitioner, Avoca Natural Gas Storage, are (1) whether the corporate partners of Petitioner are subject to franchise tax under sections 183 and 184, or under section 186 of the Tax Law as a result of Petitioner's gas storage business, and (2) whether Petitioner is subject to tax under section 186-a of the Tax Law on its receipts attributable to the storage of gas and receipts from incidental sales of gas.

Petitioner is a New York general partnership formed for the purpose of developing, constructing, owning and operating an underground natural gas storage facility located near the town of Avoca in western New York State (the "Project"). The Project will provide high deliverability gas storage services to wholesale gas users in the northeast marketplace.

The sole business of Petitioner is the development, construction, ownership, operation and maintenance of the Project. Petitioner's partners are four separate and unrelated corporations. The business activities of three of the corporate partners, generally, are limited to their involvement in Petitioner. The fourth corporate partner, which holds an 11 percent interest in Petitioner, also holds interests in other energy businesses.

The Project will consist of several underground storage caverns that collectively will be able to store a large quantity of natural gas (approximately 5 billion cubic feet, and the Project may be expanded in the future.) The Project also will include facilities to handle the gas to be stored at the facility, including compression, dehydration, filtration/separation and metering equipment. The gas handling facility also will include all necessary piping, controls and electrical components.

Petitioner has entered into gas storage service agreements for a substantial portion of the Project's storage capacity, and anticipates entering into agreements for the entire capacity of the storage caverns prior to the time the Project is placed in service. Petitioner expects that its gas storage customers will be gas distribution utilities, wholesale gas suppliers, and industrial users, who will utilize the Project's storage to balance supply and demand for gas. The Project expects to have contracts with customers for long-term storage service covering periods of 15 to 20 years. The long-term storage service contracts generally provide for the payment of four charges: (i) a monthly deliverability charge, (ii) a commodity injection charge, (iii) a commodity withdrawal charge, and (iv) a compressor fuel charge, all of which relate directly to the storage of gas at the Project.

The Project site is traversed by an interstate gas pipeline, which is owned by a company unrelated to Petitioner or any of its partners. The Project will connect to the interstate gas pipeline (the "Interconnection"), and will include piping to transport gas to and from its storage facility, a distance of only a few hundred yards.[1]

Under the gas storage agreements with its customers, the gas to be stored at the Project is made available at the point of Interconnection with the interstate gas pipeline. That is, gas that a customer desires to store will be withdrawn from the interstate gas pipeline at the Interconnection and piped into the gas storage facility, and gas to be redelivered to a customer will be injected into the interstate gas pipeline at the same point of Interconnection. The Project's gas storage customers will be responsible for arranging pipeline transportation beyond the Interconnection point for all gas delivered to or from the Project's storage facility. Accordingly, Petitioner will not transport gas along the interstate pipeline, but will transport gas only the few hundred yards between the Interconnection with the interstate pipeline and its storage facility.

Petitioner anticipates taking title to and selling natural gas stored at the facility only on a very limited basis, if at all, because virtually all gas to be stored at the Project, including "base gas" (which is necessary to fill the storage caverns to a sufficient degree to permit volumes of gas to be injected and withdrawn from the Project on an operational basis) will be owned by the Project's customers. The only cases where the Project might acquire title to gas and make limited sales of gas are in connection with: (i) Petitioner's acquisition of gas initially for testing the Project's storage caverns for which Petitioner expects to be reimbursed by the gas customers, and (ii) Petitioner's acquisition of gas from customers to be used as fuel for the Project's compressors (approximately two percent of the volume of gas stored at the facility). If the Project elects to use other sources of fuel for its compressors, such as electricity, Petitioner may sell the compressor gas to which it is entitled or, alternatively, charge its customers an additional amount for the compressor fuel in lieu of receiving gas. Even if Petitioner were to obtain and subsequently sell the compressor fuel, the amount of revenue from these sales would be only a small percentage of the revenue it expects to receive from its storage service (less than 10 percent).

The Project is regulated by the Federal Energy Regulatory Commission ("FERC") as a market-based rate facility, and has received FERC approval of its rates. Because the Project is subject to the jurisdiction of and supervision by the FERC, the Project will not be subject to rate or tariff supervision by the New York State Department of Public Service.

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[1]Affiliates of two gas storage customers of the Project are expected to construct additional "lateral" pipelines to connect the Project to their own interstate pipeline systems. These lateral pipelines will be constructed on right of ways acquired by the customers' pipeline affiliates, and will interconnect with the Project at the Project site, near to the Interconnection point with the existing pipeline. The lateral pipelines will be constructed, owned and operated by the customers' pipeline affiliates; neither the Project nor the partners will own or operate these pipelines.

Section 209.1 of Article 9-A of the Tax Law imposes an annual franchise tax on domestic or foreign corporations for the privilege of exercising a corporate franchise, doing business, employing capital, owning or leasing property in a corporate or organized capacity, or maintaining an office in New York State. Section 209.4 of the Tax Law, provides that a corporation liable to tax under sections 183 through 186 of Article 9 of the Tax Law is not subject to tax under Article 9-A of the Tax Law.

Sections 183 and 184 of the Tax Law impose annual franchise taxes on a domestic or foreign corporation formed for or principally engaged in the conduct of a transportation or transmission business. The tax is imposed for the privilege of exercising its corporate franchise, doing business, employing capital, owning or leasing property in a corporate or organized capacity or maintaining an office in New York State.

Section 186 of the Tax Law imposes an annual franchise tax on a corporation, joint stock company or association "formed for or principally engaged in the business of supplying . . . gas, when delivered through mains or pipes . . . " The tax is imposed for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity in New York State and is based, in part, upon gross earnings from all sources within New York State.

To determine the classification and proper taxability of a corporation under either Article 9 or Article 9-A, an examination of the nature of the corporation's activities is necessary, regardless of the purpose for which the corporation was organized. See Matter of McAllister Bros., Inc. v Bates, 272 AD 511, 517 (3rd Dept. 1947). Ordinarily, a corporation is deemed to be principally engaged in the activity from which more than 50 percent of its receipts are derived. See, e.g., Re Joseph Bucciero Contracting Inc., Adv Op St Tax Comm, July 23, 1981, TSB-A-81(5)C.

Every partner in a partnership is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership. Partnership Law, §20.1. Each partner acts as agent of the other partners. 16 NY Jur 2d, Business Relationships, §1378. For purposes of Articles 9 and 9-A of the Tax Law, each partnership item of income, capital, gain, loss or deduction has the same source and character in the hands of a partner as it has in the hands of the partnership.

In interpreting section 209.1 of the Tax Law, section 1-3.2(a)(5) of the Business Corporation Franchise Tax Regulations sets forth a general rule which holds that if a partnership is exercising any of the privileges of section 209.1, then all of its corporate general partners are subject to the tax imposed by Article 9-A. The same interpretation was made for purposes of Article 9 of the Tax Law in The Partners of Buffalo Telephone Company, Adv Op Comm T & F, February 22, 1989, TSB-A-89(3)C. The Advisory Opinion held that where a partnership is engaged in a telephone business in New York State, each corporate partner is also engaged in a telephone business in New York State. Therefore, each corporate partner that is principally engaged in the telephone business is subject to tax under sections 183 and 184 of Article 9.

In this case, Petitioner is a New York general partnership formed for the purpose of developing, constructing, owning, operating and maintaining an underground natural gas storage facility located in New York State and will provide high deliverability gas storage services to wholesale gas users in the northeast. Therefore, Petitioner is doing business in New York State and the corporate partners of Petitioner are subject to tax under Article 9-A of the Tax Law, unless the corporate partners are subject to tax under sections 183 and 184 or under section 186 of the Tax Law.

Petitioner receives revenues consisting of four charges for the storage of gas at the Project on behalf of its customers. The four charges are for monthly deliverability, commodity injection, commodity withdrawal and compressor fuel. Petitioner receives no revenue for the transportation of gas. Petitioner does not transport gas through a pipeline, except for the few hundred yards necessary to move the customers' gas between the nearby Interconnection point and Petitioner's gas storage facilities. This transportation is undertaken solely in connection with the Project's function as a gas storage facility. Accordingly, Petitioner is not deemed to be principally engaged in the conduct of a transportation or transmission business as contemplated under sections 183 and 184 of the Tax Law.

Petitioner states that it anticipates owning natural gas stored at the Project and making sales of the gas only on a very limited basis, if at all. The only sales of gas Petitioner might have pertain to (i) its acquisition of gas used for testing the Project's storage caverns and its receipt of reimbursement for such gas, and (ii) its potential sale of compressor gas it obtains from customers that is not needed to fuel compressors. Petitioner states that it expects that its receipts from the sale of gas would be less than 10 percent of its revenues and the receipts from customers for its gas storage service will exceed 50 percent of its revenues. Therefore, Petitioner is not deemed to be principally engaged in the business of supplying gas through mains or pipes as contemplated under section 186 of the Tax Law.

Accordingly, since Petitioner is not principally engaged in a transportation or transmission business, none of the corporate partners of Petitioner are deemed to be principally engaged in a transportation or transmission business pursuant to sections 183 and 184 of the Tax Law because of Petitioner's activities. Further, since Petitioner is not engaged in the business of supplying gas through mains or pipes, none of the corporate partners of Petitioner are deemed to be principally engaged in the business of supplying gas through mains or pipes pursuant to section 186 of the Tax Law because of Petitioner's activities.

Therefore, with respect to Issue "1", the corporate partners of Petitioner would not be subject to tax under sections 183 and 184 or under section 186 of the Tax Law because of the activities of Petitioner. However, it is possible that a corporate partner of Petitioner is subject to tax under sections 183 and 184 or under section 186 of the Tax Law if the other activities of the corporate partner in addition to the activities of Petitioner would make the corporate partner principally engaged in an activity that is taxable under sections 183 and 184 or under section 186 of the Tax Law. Where a corporate partner of Petitioner is not subject to tax under sections 183 and 184 or under section 186 of Article 9 of the Tax Law, the corporate partner is subject to tax under Article 9-A of the Tax Law because of Petitioner's activities.

Section 186-a of the Tax Law imposes a tax on the furnishing of utility services. The tax is imposed on a utility which is not subject to the supervision of the New York State Department of Public Service, if it "sells gas ... delivered through mains [or] pipes ... or furnishes gas ... by means of mains [or] pipes ... regardless of whether such activities are the main business of such person or are only incidental thereto .... " The tax imposed under section 186-a of the Tax Law is imposed in addition to the franchise tax imposed under Article 9-A or under sections 183 and 184 or under section 186 of the Tax Law. For purposes of section 186-a of the Tax Law, the terms "utility" and "person" include a partnership.

The tax imposed under section 186-a of the Tax Law is equal to three and one-half percent of the gross operating income of a utility not subject to the supervision of the Department of Public Service. Gross operating income means and includes "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. . . ."

In this case, since Petitioner is not subject to the supervision of the New York State Department of Public Service, the tax imposed under section 186-a would be based on Petitioner's gross operating income.

With respect to Issue "2", Petitioner's gas storage business is not an activity that is subject to tax under section 186-a of the Tax Law. Therefore, the receipts from Petitioner's gas storage business would not be includable in its gross operating income. However, where Petitioner sells the gas that it owns for ultimate consumption or use in New York State, Petitioner is subject to the tax imposed under section 186-a, and the receipts from these sales for ultimate consumption or use in New York State are included in Petitioner's gross operating income.

DATED: March 25, 1996

s/DORIS S. BAUMAN
Director
Technical Services Bureau

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