Application of
Connecticut Utility Companies Tax
to Gas Marketers

Contents

I. Introduction

A paper on the Connecticut Utility Companies Tax was assigned after a gas marketer asked for a DRS Legal Division Ruling. Gas marketers sell natural gas but usually arrange for other companies to deliver it. This paper was asked to:

1) Serve as a “white paper” on the Utility Companies Tax generally so that its impact on energy and electricity production can be fully understood, and
2) Address the issues raised in a gas marketer’s recent DRS Legal Division Ruling Request, but without making recommendations or conclusions.

A. White Paper Aspects

The “white paper” part of this assignment was taken to mean that this document should be a textbook-like primer, based on an impartial review of the Utility Companies Tax from a legal point of reference. Thus, this document explains how the tax works, identifies ambiguities within the statutory framework, and identifies incongruities between the imposition statute and the Department of Public Utility Control (DPUC) registration statute on which liability for the tax hinges. This document also points out incongruities among the imposition, deduction and apportionment provisions within the tax itself. This document looks at such issues as:

1. **Who is subject to the tax?** Who must register for the tax? What sales form the basis for the registration requirement and thus, the scope of the tax?
2. **What is subject to the tax?** When is there a sale of natural gas in Connecticut? If title passes in Connecticut? If the gas is delivered in Connecticut? If the destination of the gas is Connecticut? And is there any real difference between delivery and destination in this context? What do the deduction and apportionment provisions mean? Can they be reconciled?

Another significant ”white paper” issue goes to the kind of tax the Utility Companies Tax is. Is it more like a sales tax, so that sales tax concepts, definitions and caselaw are the better framework for analyzing the tax? Or is more like an income tax, so that income tax concepts, definitions and caselaw are the better framework for analyzing the tax?

What kind of tax the Utility Companies Tax is goes also to the commerce clause issue. What commerce clause–substantial nexus–physical presence requirements apply? Do the physical presence requirements of use tax collection cases like *Quill* apply? Do the *de minimis* rules from *Wrigley* apply? As these questions hint, the issue of what kind of tax the Utility Companies Tax is goes to the heart of both the statutory construction issues and the commerce clause issue.

Because who is subject to tax turns on who must register with DPUC, the state’s authority to regulate sales of natural gas becomes a fourth “white paper” issue. This topic is also relevant for purposes of trying to reconcile the incongruities between the scope and the measure of the tax.

B. Ruling Request Aspects

The Ruling Request aspects of this task were considered impartially. This document makes no recommendations or conclusions about Energy Trading’s liability for the tax.

The gas marketer that asked for the Ruling, Energy Trading, proposes that its sales are not within the measure of the tax, and that it lacks substantial nexus with Connecticut so that the commerce clause prevents Connecticut from imposing the Utility Companies Tax on it. Energy Trading also proposes that, if it is subject to tax, it should use the deduction and apportionment statutes at the same time to calculate the tax. That position is contrary to the tax return instructions.

C. How this Document is Organized

This white paper covers how the Utility Companies Tax applies specifically to gas marketers, although other types of entities are subject to the tax. This document examines the tax by separating its scope—*who* is subject to it—from its measure—*what* is subject to it.

Determining the scope and measure of the tax is largely a matter of statutory construction. So, the *who* and *what* sections mostly cover the ambiguities and incongruities within and among the statutes, and present possibilities for resolving them. The white paper aspects of this document are presented first within these sections because they provide the necessary foundation for examining the gas marketer's Ruling Request.

The commerce clause issue that Energy Trading raises is addressed in a separate section. However, different constructions of the operative statutory phrases can present commerce clause issues, so constitutional considerations are mentioned earlier as they arise

Finally, the author has tried to present the information the reader needs to consider the immediate and long range consequences of various decisions about who and what the tax applies to. At the same time, the author recognizes that this information is convoluted and often overwhelming. Accordingly, the issues of what kind of tax the Utility Companies Tax is and the state's authority to regulate sales of natural gas are mentioned as considerations where relevant throughout the body of the paper, but presented in more detail as separate sections in the Appendix so that they may be considered separately.

II. Background

A. Connecticut Taxation of Natural Gas Suppliers

Natural gas suppliers, also known as *gas marketers*, became subject to the Utility Companies Tax in 1995 as an indirect result of changes in federal law. During the early 1990s, a series of deregulation proceedings by the federal government allowed the natural gas industry to restructure. When the rules for gas companies changed, natural gas users could buy the gas from one company (a natural gas supplier) and have another company, the *local distribution company* (LDC), distribute or transport it.

LDCs are those companies that were the original utility companies, which used to be the only companies that were subject to the Connecticut Utility Companies Tax.

Natural gas suppliers became subject to the Utility Companies Tax because of DPUC-backed legislation that took gross earnings from natural gas sold by a supplier but delivered by an LDC out of the measure of the LDC's tax. In reaction, DRS proposed that the Utility Companies Tax be drawn to apply to natural gas suppliers too, so that the sales of natural gas by natural gas suppliers didn't then escape the tax and inadvertently give suppliers a competitive advantage.

B. Ruling Request Background

1. Issues

Through Deloitte and Touche, an out-of-state natural gas supplier, Energy Trading, submitted a Ruling Request asking, given the nature of its business:

- Whether Energy Trading must register for and comply with the Utility Companies Tax?
- If Energy Trading is subject to the Utility Companies Tax, what is the proper method for determining Connecticut gross earnings subject to tax?

The gist of Energy Trading's arguments is such that the first issue is really better framed as asking if the Utility Companies Tax, as applied to Energy Trading, violates the commerce clause because Energy Trading lacks substantial nexus with Connecticut. As to the second issue, Energy Trading proposes that it may both exclude sales to end users outside Connecticut *and* apportion its gross income, *and* exclude from the numerator of its apportionment fraction the sales of gas to end users in Connecticut when title passes outside Connecticut.

2. Energy Trading

Energy Trading is PG&E Energy Trading-Power, LP, a wholly-owned indirect affiliate of PG&E National Energy Group, Inc. (NEG).[1] NEG is owned by PG&E Corporation. Energy Trading has its headquarters in Houston, Texas.[2]

Energy Trading's principal business is the wholesale purchase and resale of electricity, some of which takes place in Connecticut. Energy Trading's principal business is not manufacturing, selling or distributing gas or steam to be used for light, heat or power, and Energy Trading is not a Connecticut local gas distribution company or a municipal utility. One of Energy Trading's secondary businesses is buying and selling natural gas to electric generators.[3]

> ***Energy Trading currently has at least one employee based in Connecticut, "so that it will likely be subject to Connecticut's taxing jurisdiction."*** [4]

This statement is set out because it can establish that Energy Trading has substantial nexus for commerce clause purposes.

3. Lake Road

Energy Trading plans to sell natural gas to an electric generator, Lake Road Generating Company, LP (Lake Road). Lake Road owns a natural gas fired power plant in Killingly, CT. Lake Road is another wholly owned indirect affiliate of NEG.

Lake Road plans to buy natural gas from Energy Trading and use it at Lake Road to generate electricity. Lake Road will not distribute, transmit or sell natural gas in Connecticut. Lake Road may take title to the gas it buys from Energy Trading inside or outside Connecticut. Lake Road will take possession of the gas wherever title passes. Lake Road will arrange for its own transportation of the gas from wherever title passes, to Lake Road's "burner tip." [5]

Energy Trading will not need an LDC to transport gas to the Lake Road facility. Lake Road's electric generation facility is near an interstate pipeline,[6] and Lake Road has a lateral pipeline "spur" that runs from the main interstate pipeline directly to the Lake Road facility.[7]

4. PG&E ET

PG&E ET refers to Energy Trading and PG&E Energy Trading-Gas Corporation collectively. Both companies are headquartered in Houston, Texas.

PG&E ET markets and trades natural gas, energy, capacity, and ancillary services, fuel and fuel services such as transport and storage, emission allowances, weather derivatives, and other related products through over-the-counter and futures markets across North America.

PG&E ET buys electric power from PG&E Corporation affiliates and the wholesale market. *PG&E ET* buys natural gas from producers, marketers, and other parties. Energy Trading then schedules, transports, and resells these commodities, either to third parties or to other PG&E Corporation affiliates (except Pacific Gas and Electric Company, the California utility). Energy Trading also provides risk management services to PG&E Corporation's other businesses (except Pacific Gas and Electric Company) and to unaffiliated wholesale customers.[8]

5. National Energy Group (NEG)

NEG is PG&E Corporation's National Energy Group. NEG owns Energy Trading and Lake Road.

NEG bills itself as one of the nation's leading competitive power producers. It has natural gas facilities that connect major producing regions to some of the fastest-growing markets in North America, and operates one of the top energy trading businesses in the country. NEG owns 30 power plants in 10 states; can transport 2.7 billion cubic feet of natural gas a day from supplies in Western Canada; and interconnects to 6 natural gas pipelines.[9]

6. PG&E Corporation

PG&E Corporation owns PG&E National Energy Group, Inc. (NEG); Pacific Gas and Electric Company (the California utility, and one of the largest gas and electric utilities in the country); and Pacific Venture Capital, LLC.

PG&E Corporation is one of the largest U.S. transporters of Canadian natural gas. The company markets energy services and products throughout North America through NEG. PG&E Corporation has operations in 21 states. It has 30 power plants in operation and two plants under construction.[10]

7. Deloitte & Touche

Deloitte & Touche submitted the Ruling Request on behalf of Energy Trading. Deloitte & Touche bills itself as having one of the largest energy trading and marketing consulting practices among its competitors. Deloitte & Touche’s energy and utilities industry practice includes its Energy Trading and Marketing consulting practice, an energy practice, and independent power producer practice, and a public utilities practice.

C. Natural Gas Industry Background

While the next logical step ordinarily might be to review the Utility Companies Tax, about one paragraph into it most readers will start to wonder about how the gas industry works.

Thus, a synopsis of the gas industry and its evolution is a useful backdrop for reviewing the tax. Moreover, it is essential to have some understanding of how the industry works when applying the abstract principles of commerce clause and statutory construction issues to the equally abstract (at least for the average reader) notion of energy production.

1. About Natural Gas

Natural gas is used in residential, commercial, industrial and vehicle applications. In residential settings, it is used to run furnaces, air conditioning, water heaters and for cooking. Natural gas is used for heating and cooling in commercial settings and for cogeneration in industrial settings. It is also used to fuel vehicles.

One advantage of using natural gas instead of oil or electricity is price. Natural gas prices tend to be stable throughout the year, lower than electricity, and more stable than oil. Other advantages of natural gas are that it does not require a tank or deliveries. The advantages of natural gas vehicles are billed as being clean burning, less polluting and more economical then conventionally fueled vehicles.[11]

Whether it is used for residential, commercial or industrial purposes, natural gas is known as being cleaner and more environmentally friendly than other types of fossil fuels.[12] For example, American coal-powered plants pump 2.3 billion tons of CO2 into the air each year – twice as much as the amount that cars emit. In contrast, a natural gas plant emits only one third as much carbon dioxide as even the newest, most efficient conventional coal plant.[13]

2. Then: The Old Gas Industry

Traditionally, the natural gas industry was made up of three distinct segments: producers, interstate pipelines, and LDCs. For the most part, producers sold their gas to the pipelines, which resold it to utilities, which in turn provided local distribution to consumers. Consequently, the local utility companies nearly always were the ones that sold natural gas directly to consumers. [14]

This market structure was possible mostly because the Natural Gas Act of 1938[15] did not require interstate pipelines to offer transportation services to third parties who wanted to ship gas. As a result, "interstate pipelines [were able] to use their monopoly power over gas transportation to create and maintain monopsony[16] power in the market for the purchase of gas at the wellhead and monopoly power in the market for the sale of gas to LDCs."[17]

Because of congressional and regulatory developments, however, a new market structure evolved that allows consumers, including large industrial end users, to buy gas from producers and independent marketers rather than from LDCs, and pay pipelines separately for transportation.[18]

3. Natural Gas Policy Act of 1978

When Congress enacted the Natural Gas Policy Act of 1978[19], it took a first step toward increasing competition in the natural gas market. That act was designed to phase out regulation of wellhead prices charged by producers of natural gas, and to "promote gas transportation by interstate and intrastate pipelines" for third parties.[20] Pipelines were reluctant to provide common carriage, however, when doing so would displace their own sales.[21]

4. 1985 Open Access Rule

In 1985, the Federal Energy Regulatory Commission (FERC) went further and promulgated an "open access" rule that encouraged pipelines to offer gas transportation services by providing incentives.[22]

Under the system of open access to interstate pipelines that emerged in the mid 1980s, larger industrial end users started to bypass utilities' local distribution networks by constructing their own pipeline spurs to interstate pipelines.[23]

Then and now, bypass poses a problem for LDCs, because when large end users leave the system, the same fixed costs have to be spread over a smaller customer base. States responded, as Ohio did in 1986, by adopting mechanisms that allowed industrial end users in Ohio to buy natural gas from producers or independent marketers, pay interstate pipelines for interstate transportation, and pay LDCs for local transportation. That kept some income from large industrial customers within the utility system and offset at least some of the costs that otherwise would have had to have been passed on to residential consumers.[24]

5. 1992 Unbundling Rule

This evolution culminated in 1992 with FERC's Order No. 636. Order No. 636 required all interstate pipelines to "unbundle" their transportation services from their own natural gas sales and to provide common carriage services to buyers from other sources that wished to ship gas. However, FERC did not go so far as to *require* intrastate pipelines to provide local transportation services to insure that gas sold by producers and independent marketers could get all the way to the point of consumption.[25]

6. Now: Captive Market Emerges

Now the LDCs' core market is a "captive" market of small, residential users. Captive markets are not defined by geography, but by economics. Captive markets are made up of residential consumers who need "bundled benefits" and whom natural gas marketers generally do not serve.

Gas marketers tend not to do business with the public because small residential sales are not very profitable. Instead, gas marketers selectively contact large industrial end users based on their potential for being profitable customers.[26]

Additionally, small residential consumers don't have the high volume requirements needed for it to make sense to invest in the transaction costs of individual purchases on the open market. Buying gas service from marketers requires considerable time and expertise. Its benefits are likely to exceed its costs only for consumers who purchase very large quantities of gas.[27]

Finally, small residential consumers cannot readily bear the risk of losing a fuel supply in harsh natural or economic weather. If their gas supply is interrupted, either because the price goes so high they can't afford it, or because supply is down, or because the marketer somehow miscalculates its operations, residential consumers are stuck. They cannot switch temporarily to other fuels, and so they must endure cold homes if their gas supply is interrupted. Gas service disruptions lasting just a few days can cause severe health risks to captive end users.[28]

Consequently, "the large core residential customer base is bound to the LDC in what currently appears to be a natural monopoly relationship."[29]

7. Demand Outpaces Supply

According to a recent *New York Times* article, natural gas currently provides about one-fourth of the country's power and is on its way to becoming the country's fuel of choice.[30] The US Energy Department projects a 45 percent increase in gas consumption by 2015.[31]

Energy Department projections say our reliance on natural gas will sharply increase because nearly all new power plants are now planning to be fired by natural gas.[32] Utility companies have been switching to natural gas from coal since the late 1970s, because natural gas was plentiful, more efficient and less of an environmental problem than coal is.[33]

While demand for natural gas is on the rise, supply is not, although a drilling boom is currently underway. Current drilling trends are on track to include the drilling of about 18,000 gas wells this year, a 60 percent increase over 1999 and more than in any year since 1982, near the height of the energy crisis. For all the new drilling though, gas production is only barely creeping up, and not enough to meet the increasing demand. In the last year, natural gas production was up not much more than 2 percent.[34]

According to people in the gas industry, the biggest reason that gas production is lagging so far behind drilling is that most of the gas fields now open are old, with returns that diminish steadily, year after year. Just to maintain current production levels, the industry has to increase production per well by about 23 percent a year, a rate that is the driving force behind the increase in drilling. Much of our natural gas comes from South Texas. Production also has been booming in the Rockies, including parts of Colorado, Montana, New Mexico, Utah and Wyoming. [35]

8. Connecticut's Natural Gas Market

The federal deregulation proceedings of the early 1990s resulted in a partially deregulated natural gas market in Connecticut. Right now, Connecticut law allows only commercial and industrial customers to buy natural gas from natural gas suppliers. Residential customers still buy their natural gas from their LDC. On the other hand, commercial and industrial customers in Connecticut can buy gas from natural gas suppliers, but still have their LDC continue to deliver the gas, in an arrangement known as "firm transportation service."

According to the Connecticut Natural Gas company, the Connecticut DPUC is investigating the possibility of an open, competitive natural gas supply market for all consumers in the state, including residential customers.[36]

III. How the Utility Companies Tax Works

Two statutes make up the Utility Companies Tax, Chapter 212 of the Connecticut General Statutes: Conn. Gen. Stat. §§12-264 and 12-265. Conn. Gen. Stat. §12-264 imposes the Utility Companies Tax, to which the gross earnings of gas, electric, and power companies, including municipal gas and electric utilities, are subject. The third statute that is relevant for purposes of this white paper and the Ruling Request is Conn. Gen. Stat. §16-258a. Together, these three statutes define who and what is subject to the Utility Companies Tax.

In short, if someone sells natural gas to an end user in this state, §16-258a requires them to register with DPUC. Conn. Gen. Stat. §12-264(a)(3) subjects anyone who must register with DPUC under §16-258a to the Utility Companies Tax. Anyone who is subject to the Utility Companies Tax must register with DRS to pay the tax.

Natural gas suppliers register with DRS by filing Form REG-1, *Application for Tax Registration Number.* Once registered with DRS, the natural gas supplier must file Form UCT-212, *Municipal Electric Companies, Gas Marketers and Municipal Gas Utilities – Gross Earnings Tax Return,* each calendar quarter on or before the last days of January, April, July and October of each year.[37]

Additionally, LDCs may not distribute gas for a supplier unless the supplier is registered with registered with DRS for the Utility Companies Tax.[38] Moreover, if a natural gas supplier that is not required to register with DPUC does so anyway, it must also register with DRS.[39]

How Conn. Gen. Stat. §§12-264, 12-265 and 16-258a interrelate is described in more detail below. The full text of these statutes appears in the Appendix.

A. Anyone who sells natural gas to end users in this state must register with DPUC.

The DPUC registration statute, Conn. Gen. Stat. §16-258a, requires anyone who sells natural gas to an end user in the state to register with DPUC. This statute applies to gas marketers, which DPUC now calls "natural gas suppliers." So, anyone who must register with DPUC under Conn. Gen. Stat. §16-258a is subject to the Utility Companies Tax.

Conn. Gen. Stat. §16-258a requires each person who *sells natural gas to an end user in the state* to register with DPUC by filing Form NGSR, *Natural Gas Seller Registration Form*.[40] For purposes of this white paper and the Ruling Request, the relevant part of Conn. Gen. Stat. §16-258a, as amended by 2001 Conn. Pub. Acts 49, is:

> 16-258a. Registration of natural gas sellers.
>
> (a) Each person that sells natural gas to an end user in the state and is not

(1) a gas company, as defined in section 16-1,

(2) a municipal gas utility established under chapter 101 or any other gas utility owned, leased, maintained, operated, managed**[,]** or controlled by any unit of local government under any general statute or any public or special act, or

(3) a gas pipeline or gas transmission company subject to the provisions of chapter 208,

shall register with the Department of Public Utility Control prior to making any such sale by filing a form supplied by said department.

B. The Utility Companies Tax applies to natural gas suppliers that must register with DPUC under Conn. Gen. Stat. §16-258a.

Natural gas suppliers that sell natural gas in Connecticut to an end user have been subject to the Utility Companies Tax since July 1, 1995.[41] Natural gas suppliers are subject to tax because of Conn. Gen. Stat. §12-264(a)(3). That provision imposes the tax on companies that need to register with DPUC under Conn. Gen. Stat. §16-258a.

For purposes of this white paper and the Ruling Request, the relevant part of Conn. Gen. Stat. §12-264 is "(a) Each . . . (3) company required to register pursuant to section 16-258a shall pay a quarterly tax upon gross earnings from such operations in this state . . . Gross earnings from such operations under subdivision (3) of this subsection shall be gross income from the sales of natural gas. . ."

C. For natural gas suppliers, the tax is on gross income from the sales of natural gas in this state.

Conn. Gen. Stat. §12-264(a)(3) also establishes the measure of the tax, for purposes of this white paper and the Ruling Request. That provision subjects anyone required to register pursuant to §16-258a to a quarterly tax on their *gross earnings from such operations in this state*. For these purposes, gross earnings from such operations means *gross income from the sales of natural gas*. Again, the statutory language is:

"(a) Each . . . (3) company required to register pursuant to section 16-258a shall pay a quarterly tax upon gross earnings from such operations in this state . . . Gross earnings from such operations under subdivision (3) of this subsection shall be gross income from the sales of natural gas. . ."

D. Deduction and Apportionment Provisions

Additionally, the Utility Companies Tax contains a deduction provision for out-of-state sales at Conn. Gen. Stat. §12-265(b)(1)(F), and an apportionment provision for gas marketers at Conn. Gen. Stat. §12-265(b)(2)(B)(ii).

Conn. Gen. Stat. §12-265(b)(1)(F) allows companies subject to the Utility Companies Tax to deduct from their gross earnings all sales of natural gas to a user or entity located outside the state.

Conn. Gen. Stat. §12-265(b) provides:

(1) Each company and municipal utility included in section 12-264 other than an electric distribution company, as defined in section 16-1, included in subsection (c) of section 12-264, shall

be taxed at the rate of five per cent upon the amount of gross earnings in each taxable quarter from operations, except as set forth in subsection (c) or (d) of this section [reduced rates for natural gas and steam used directly in a manufacturing production process] and except that each company and municipal utility manufacturing, selling or distributing gas or electricity to be used for light, heat or power shall be taxed at the rate of four per cent upon the amount of gross earnings in each taxable quarter allocable to residential service, but deduction shall be made of gross earnings . . .

(F) from all sales of natural gas to a user or entity located outside the state.

The apportionment provision relevant to natural gas suppliers is at Conn. Gen. Stat. §12-265(b)(2)(B)(ii). The statute provides that:

(2) Gross earnings for any taxable quarter, for the purposes of assessment and taxation, shall be as follows:

(B) in the case of *a company* or municipal utility *carrying on business or operations a part of which is outside of this state*,

(i) such portion of the amount of gross earnings from operations determined under the provisions of section 12-264 as is represented by the ratio of the number of miles of water or steam pipes, gas mains or electric wires operated by such company or municipal utility within this state on the first day and on the last day of the calendar year immediately preceding to the total number of miles of water or steam pipes, gas mains or electric wires operated by such company or municipal utility on said dates; or

(ii) *in the case of a company required to register pursuant to section 16-258a*, such portion of the amount of gross earnings from operations determined under the provisions of section 12-264 as is represented by the *ratio of the sales in this state to end users during such quarter to the total sales everywhere to end users during such quarter* [emphasis added].

E. In Sum

To get a good understanding of who and what is subject to the Utility Companies Tax, one must combine the DPUC registration and tax imposition statutes and the definitions they contain. Read together then, these registration and tax provisions mean that, for natural gas suppliers:

(Scope: *Who* is subject to the tax)

Each person who sells natural gas to an end user in the state must pay a quarterly tax upon gross income from the sales of natural gas in this state.

(Measure: *What* is subject to the tax)

IV. *Who* is Subject to the Utility Companies Tax?

Determining *who* is subject to the Utility Companies Tax, that is, determining the scope of the tax, is largely a matter of statutory construction of the DPUC registration statute because that is what the imposition statute hinges on.

As explained above in *How the Tax Works*, the *scope* of the tax is *each person who sells natural gas to an end user in the state*. (In contrast, the measure of the tax *is gross income from sales of natural gas in this state*.) Keep in mind that the way Connecticut taxes natural gas suppliers is such that anyone who sells natural gas to an end user in the state must register with DPUC.

Anyone who must register with DPUC is subject to the Utility Companies Tax. Anyone who is subject to the tax must register with DRS to pay the quarterly tax.

This subject covers the three issues of statutory construction that the DPUC registration statute presents:

1. What must be *in the state*?
   - Must only the end user be in Connecticut?
   - Must only the sale be in Connecticut?
   - May either the sale or the end user must be in Connecticut?
   - Or must both the sale and the end user be in Connecticut?
2. What is a *sale*?
3. What is an *end user*?

These terms are not defined in the DPUC registration statute.

A. What the Statute Says

The DPUC registration requirement, in Conn. Gen. Stat. §16-258a, provides that

(a) *Each person that sells natural gas to an end user in the state* and is not

(1) a gas company, as defined in section 16-1,

(2) a municipal gas utility established under chapter 101 or any other gas utility owned, leased, maintained, operated, managed **[**,**]** or controlled by any unit of local government under any general statute or any public or special act, or

(3) a gas pipeline or gas transmission company subject to the provisions of chapter 208,

shall register with the Department of Public Utility Control prior to making any such sale by filing a form supplied by said department [emphasis added*]*.

B. What must be *in the state*?

1. Only the end user must be "in the state."

Legislative history, DRS interpretations, and *Texaco v. Groppo* support an argument that:

1. *In the state* modifies only end user, and therefore
2. Natural gas suppliers whose customers use the natural gas in Connecticut are subject to the tax, regardless of where the sale is made, and
3. In the context of retail sales of natural gas, the gas is used where it is delivered, so
4. The delivery and destination points for the sale overlap.

Legislative History

Conn. Gen. Stat. §16-258a[42] was enacted by 1995 Conn. Pub. Acts 114, §§1, 5, effective July 1, 1995. In 1998, Public Act 218 amended Conn. Gen. Stat. §16-258a to move the phrase "in the state."

Under the old statute, *in the state* modified sales*.* The old language required registration for each corporation, company, association, joint stock association, partnership or person, or lessee thereof*, which sells natural gas in the state to an end user* … In contrast, the new language requires registration for each corporation, company, association, joint stock association, partnership or person, or lessee thereof, *which sells natural gas to an end user in the state…*

Section 1 of 1998 Conn. Pub. Acts 218 repealed Section 16-258a and substituted in this language in its place:

Each corporation, company, association, joint stock association, partnership or person, or lessee thereof, which sells natural gas **[in the state]** to an end user **IN THE STATE** and is not

(1) a gas company, as defined in section 16-1,

(2) a municipal gas utility established under chapter 101 or any other gas utility owned, leased, maintained, operated, managed, or controlled by any unit of local government under any general statute or any public or special act, or

(3) a gas pipeline or gas transmission company subject to the provisions of chapter 208, shall register with the Department of Public Utility Control prior to making any such sale by filing a form supplied by said department.

Senate Bill 495

Senate Bill 495 became 1998 Conn. Pub. Acts 218.[43] Section 1 of the bill moved the phrase "in this state." Significantly, section 2 of the bill added the deduction from gross earnings of all sales of natural gas to a user or entity located outside the state, now in §12-265(b)(1)(F).

Representative Martinez

Representative Martinez remarked about the bill to the House of Representatives on May 6, 1998: "What this bill will have affect [sic] is clarifying that *all out of state sales for natural gas by Connecticut's local distribution companies fall within the exemption from the Connecticut gross receipts tax* [emphasis added]. These out of sales tax are made by the LCDs [sic] to unload surplus of gas supply and have the effect of lowering the cost of gas for Connecticut rate payers..."

It is not clear whether Representative Martinez's remarks are on only the second section of the bill, which added the deduction from gross earnings of all sales of natural gas to a user or entity located outside the state, now in §12-265(b)(1)(F).

Connecticut Natural Gas

Additionally, in oral testimony on SB 495 to the Energy and Technology Committee, Edna Karanian, Vice President of Energy Services for Connecticut Natural Gas Corporation, stated:

". . . we all know that there are marketers not paying the Connecticut gross receipts tax, even though they are for their Connecticut sales. In that regard, we fully support SB 495, *which exempts LDCs that are making sales outside of Connecticut, to not pay the Connecticut gross receipts tax on those sales as marketers are not required to do that now* [emphasis added]."[44]

In Ms. Karanian's written testimony on the same point, she states:

…Finally, we all know that not all marketers are paying Connecticut Gross Receipts Tax on their Connecticut sales, which creates inefficiency as well as a state revenue loss. In that regard, we also support Senate Bill 495 *which clarifies that an LDC selling gas for delivery out of state is exempt from paying Connecticut GRT as marketers currently are* [emphasis added]."[45]

These comments suggest that the legislation intended to clarify that the tax is on gross income only from natural gas sales when the end user is in this state; that moving the phrase *in this state* to modify *end user* rather than sales in Conn. Gen. Stat. §16-258a complemented that intent; and that there may be an assumption that in retail sales – when natural gas is sold to an end user--the gas is used or consumed where it is delivered.

DRS Interpretations

DRS interprets the Utility Companies Tax as being imposed on natural gas suppliers that sell to Connecticut end users. Of those DRS documents indexed under the Utility Companies Tax, those relevant to this issue are the instructions to Form UCT-212 and Ruling No. 2000-6.

DRS Form Instructions

The instructions to Form UCT-212, *Municipal Utilities, Gas Marketers and Local Gas Distribution Companies Gross Earnings Tax Return,* show that DRS's position has been that it is the end user, not the sale, that must be *in this state.*

UCT-212 filers are instructed at Line 12 to state their gross earnings from sales of natural gas to users or entities located outside Connecticut—but only if those earnings were included in the amount reported on Line 6. People don't usually talk about *sales* being *located* somewhere, but they do talk about *people* being *located* somewhere.

Ruling No. 2000-6

Ruling 2000-6, on separately billed natural gas delivery and sales charges, speaks in terms of charges by LDCs and gas marketers to end users. For example, the ruling concluded that:

> When a local gas distribution company separately bills *end users* for the delivery of natural gas and a gas marketer separately bills the *end users* for the sale of the gas, the total charges by the gas company to the *end users* are required to be included in the gas company's gross earnings that are subject to the Connecticut Utility Companies Tax, and the total charges by the gas marketer to the *end users* are required to be included in the gas marketer's gross earnings that are subject to Utility Companies Tax. If the gas marketer is the payment agent, the difference computed by subtracting the charges by the gas company to the gas marketer for the transportation services from the total charges reflected on the single bill that the gas marketer will send to the *end user* are included in the gas marketer's gross earnings. The charges by the gas company to the gas marketer for the transportation services are included in the gas company's gross earnings. If the gas company is the payment agent, the difference computed by subtracting the charges by the gas marketer to the gas company for the gas from the total charges reflected on the single bill that the gas company will send to the *end user* are included in the gas company's gross earnings. The charges by the gas marketer to the Gas Company for the gas are included in the gas marketer's gross earnings.[46]

Texaco v. Groppo

Texaco v. Groppo addressed what "in this state" modified for purposes of the petroleum products gross earnings tax as it stood in before it was amended in 1982. At issue was whether the petroleum products gross earnings tax applied to sales in Connecticut of petroleum products that were delivered in Connecticut but marketed and distributed in states other than Connecticut. To resolve this issue, the Connecticut Supreme Court adopted a destination test rather than a delivery test. The court declined to construe §12-587 (rev. to 1981) to determine the taxability of petroleum product sales according to the place at which the products are *delivered* rather than the place of their ultimate *destination*.

Even though the statute contained a cross reference to §12-218, the function of which was to attribute an appropriate portion of a multistate corporation's income to Connecticut for tax purposes, and even though the court noted that the cross reference raised a possible ambiguity, the court chose not to construe §12-587 as measuring the taxability of the plaintiff's sales by the place of delivery to out-of- state purchasers rather than by the place of destination. The Supreme Court did not agree that the cross-reference to §12-218 contained in the final sentence of §12-587 trumped the straightforward description of taxable transactions contained in the first sentence of §12-587.

For the period at issue, Conn. Gen. Stat. 12-587 provided that any petroleum company engaged primarily in the refining and distribution of petroleum products and that distributes such products to wholesale and retail dealers for marketing and distribution *in this state* shall pay a quarterly tax of two percent of gross earnings in each taxable quarter derived by such company from the sale of petroleum products *in this state*.

Conn. Gen. Stat. 12-587 further provided that "gross earnings" are those earnings from the sale of petroleum products to which the sales factor is applied under Conn. Gen. Stat. 12-218(3).

Conn. Gen. Stat. 12-218(3)(b) (rev. to 1981) provided that the third fraction (of the apportionment formula for corporation business tax) represents the part of the taxpayer's gross receipts from sales or other sources during the income year, including receipts from sales of tangible property if the property is delivered or shipped to a purchaser *within this state*.[47]

Strictly construing the imposition statute against DRS, the court concluded that the phrase "in this state" modified "marketing and distribution" and not "wholesale and retail dealers" as DRS proposed. The court found that the statute plainly attaches the modifier "in this state" to the words "marketing and distribution" rather than to the words "wholesale and retail dealers," and that there was no authority for the transposition of statutory language.

The court recognized that the cross-reference to §12-218 raises a possible ambiguity with respect to the intended coverage of §12-587. However, it found that the phrase "delivered or shipped to a purchaser within this state" is hardly an unambiguous direction to tax sales to purchasers who are not within this state. Indeed, the court noted that the uniform holding of courts in other state interpreting essentially identical language has been that the *destination* of the goods, and *not their delivery point*, is dispositive.[48]

The trial court concluded that the statute, like UDITPA, unambiguously determines the taxability of gross earnings by reference to the place where goods are *delivered* to the purchaser rather than by the place of their ultimate destination—although the trial court attached no significance of the passage of title in Connecticut. The Supreme Court explained that the trial court relied on a contrary regulation of the Multistate Tax Commission, an agency that issues regulations interpreting the Uniform Division of Income for Tax Purposes Act, 7A U.L.A. (1978). The trial court noted that §12-218 corresponds to §16(a) of the uniform act, but it recognized that this state has neither adopted the uniform act in its entirety nor become a signatory of the Multistate Tax Compact, under which the Multistate Tax Commission issues its regulations.

2. *"In the state"* does not modify only *end user:* Arguments for Alternative Interpretations.

If Conn. Gen. Stat. §16-258a (and thus, Conn. Gen. Stat. §12-264(a)(3)) is not interpreted to mean that the tax is imposed on only those natural gas suppliers who sell to Connecticut end users, then the tax must apply either to natural gas suppliers who:

- Make sales in Connecticut, regardless of where the end user is;
- Make sales in Connecticut to end users in Connecticut; or
- Either make sales in Connecticut *or* make sales anywhere to end users in Connecticut.

Only the sale must be in the state: The tax applies to natural gas suppliers who make sales in Connecticut, regardless of where the end user is.

Given the *Texaco v. Groppo* opinion and the legislative history of Conn. Gen. Stat. §16-258a, an argument that the phrase *in the state* modifies *sales* instead of *end user* is weak at best.

Either the sale or the end user can be in this state: The tax applies to natural gas suppliers who make either make sales in Connecticut or make sales anywhere to end users in Connecticut.

Likewise, given *Texaco v. Groppo,* saying that either the sale *or* the end user must be in the state is a strained construction of the statute. There is nothing in the phrase *each person that sells natural gas to an end user in the state* to suggest that there is an option for what *in the state* modifies.

However, sound health/safety/welfare arguments exist that a state may regulate sales of natural gas made in the state to end users anywhere (assuming the natural gas is present in the state) *and* sales of natural gas made anywhere to end users in the state. (See two US Supreme Court cases, *General Motors v. Tracy* and *Heublein v. South Carolina*, which explain states' authority to regulate certain classes of business based on health, safety and welfare concerns. Working notes on these cases are included in the Appendix.)

Both the sale and the end user must be in this state: Tax applies to natural gas suppliers who make sales in Connecticut to end users in Connecticut.

This alternative argument is plausible in the grammatical sense, but there is no support for it in legislative history, DRS interpretations, *Texaco v. Groppo*, other case law, or other states' approaches.

Moreover, by narrowly interpreting the registration statute as applying *only* to natural gas suppliers who make sales of natural gas in Connecticut to Connecticut end users, the state would forfeit health, safety, and welfare protections. Connecticut would relinquish the ability to regulate gas that is sold in the state to end-users elsewhere.

C. How is *sale* defined?

Depending on what *in the state* modifies (only *end user;* only *sale; end user* and *sale; or end user* or *sale),* what a *sale* is could be an open issue for purposes of who is subject to the tax.

The usual alternatives for determining when and where a sale takes place are the:

- Delivery point;
- Destination point;
- Place where title, possession, and risk of loss pass.

Consideration must be given to whether destination, delivery, or the place where ownership or possession transfer define when there is a *sale to an end user in the state,* and thus, when the DPUC registration requirement applies. But even these criteria for *sale* are not clear-cut in the context of retail sales of natural gas, and how those terms are defined can generate new constitutional issues. Moreover, it is not obvious that sales and selling, for purposes of the DPUC registration statute, should be defined by tax rules.

Details about using destination, delivery, or the place ownership or possession transfer as the definitions for *sale* for purposes of the Utility Companies Tax appear in the section on *what* is subject to tax, where that discussion seems more proper.

D. How is *end user* defined?

Because the Utility Companies Tax is imposed on someone who sells natural gas to an end user in the state, the question of what an *end user* is arises. Neither the tax nor the registration statute defines *end user*.

However, given the history on states' authority to regulate in this area, use of the term *end user* may derive from DPUC's authority to regulate natural gas suppliers that make retail sales in Connecticut—sales in Connecticut to consumers, as opposed to sales for resale—and make them register. A line of cases exists on the authority of states' to regulate retail sales, and on distinctions between regulating wholesale sales and retail sales. For example, *General Motors Corp. v. Tracy,* 519 US 278 (1996), "recognizes the powerful state interest in regulating all *in-state gas sales directly to domestic consumers buying at retail* [emphasis added]."[49]

It could also be that because the tax is keyed to the registration requirement, the term "end user" became integrated into descriptions of the scope and measure of the Utility Companies Tax.

> ***The term* end user *could indicate that the registration requirement, and therefore the tax, applies to companies that sell directly to Connecticut customers who will consume the gas in Connecticut.***

This interpretation, coupled with the *GM v. Tracy* statement above, could also support an argument that the tax applies to companies that make in-state sales to Connecticut consumers.

Additionally, because "in the state" was moved to follow "end user" instead of "sell," it is easy to conclude that the legislature meant that if someone intends to sell to Connecticut end users, they need to register with DPUC. But, the criteria for where a *sale* or *selling* takes place may be of little import in the DPUC registration statute because DPUC likely has authority to regulate anyone who makes retail sales of natural gas to Connecticut buyers, regardless of where the sale is. (See *GM v. Tracy*, discussed in the Appendix.)

If it doesn't matter where the sale takes place for DPUC registration purposes, it may be that the tax may be imposed legitimately on people who make retail sales of natural gas to Connecticut buyers only when *sale* is defined so as to establish the substantial nexus that the commerce clause requires.

E. What kind of tax is the Utility Companies Tax?

Finally, is the Utility Companies Tax more like a sales tax or an income tax?

What kind of tax the Utility Companies Tax is, is important for resolving the statutory construction issues and the commerce clause issue. If it's more like a sales tax, then we could import sales tax concepts, definitions, and caselaw (like *Quill*) and use them to construe the scope and the measure of the tax. If it's more like an income tax, then we could import *income tax* concepts, definitions and case law (like *Wrigley* and other PL 86-272 cases) to construe the scope and the measure of the tax.

This matter is presented in the Appendix to this document.[50]

F. Is Energy Trading within the Scope of the Tax?

1. Is Energy Trading Subject to §16-258a?

If Energy Trading must register pursuant to Conn. Gen. Stat. §16-258a, it appears to be within the scope of the Utility Companies Tax. Energy Trading does not propose that it does not sell natural gas to an end user in the state, and thus is outside the scope of the tax. Because the author was asked to assume that Energy Trading is within the scope of the tax, there is no further discussion of how §16-258a might be construed to apply, or not apply, to Energy Trading.

2. May Connecticut require Energy Trading to register with DRS as a condition of registering with DPUC?

Related to whether Energy Trading must register with DPUC is whether Energy Trading may be required to register first with DRS. The DPUC and DRS registration requirements have evolved in parallel over the last few years, but they have not necessarily been actively coordinated. For natural gas suppliers, registering with DRS for purposes of the Utility Companies Tax has become a prerequisite for registering with DPUC.[51] This raises the issue of whether requiring registration with DRS first is reasonably related to any legitimate state purpose, or whether it is just a way to raise revenue. See working notes on *Heublein v. South Carolina*, in the Appendix, for more on this concept.

On the other hand, if *selling natural gas to an end user in Connecticut* is defined so that substantial nexus with Connecticut is inherent in that activity, then the seller is subject to the tax, and arguably, requiring DRS registration first is merely an administrative convenience to which Connecticut is entitled.

V. *What* is Subject to the Utility Companies Tax?

The Utility Companies Tax requires those within its scope to pay a quarterly tax upon *gross income from the sales of natural gas in this state*. Accordingly, the first issue of statutory construction concerning the measure of the tax is, when is there a sale of natural gas in this state?

A. When is there a sale of natural gas in this state?

This question sounds almost like the same statutory construction question that came up in the DPUC registration statute, but the two phrases are different. Recall that to determine *who* is subject to tax, we need to determine when someone makes a *sale to an end user in the state*. In contrast, to determine *what* is subject to tax, we need to determine when there is a *sale of natural gas in this state.*

The Utility Companies Tax does not define *sale* for purposes of defining the measure of the tax. A *sale* could be defined by:

- Delivery point;
- Destination point; or the
- Place where title, possession, and risk of loss transfer from seller to buyer.

Additionally, those choices turn in part on whether a sales tax or an income tax is the better analogy for the Utility Companies Tax, either as a whole or just as applied to natural gas suppliers.

For practical purposes, certainly it would be easier to comply with the tax if *sale* were defined the same way for purposes of the registration statute and the *scope* of the tax, as it is for the imposition statute and the *measure* of the tax. However, those definitions don’t have to be the same because the rules for whom a state can regulate and what a state can tax are different.

States face more barriers to taxing a company that makes out-of-state sales of natural gas to in-state end users than they do to regulating them. States may regulate on the basis of health, safety and welfare interests of their in-state end users. Whether a state may tax solely on the basis of the company’s customer, the end user, being in the state is another question entirely. In the sales and use tax context, the answer has been “no,” unless the seller has some physical presence. In the income tax context, cases like *Wrigley, Moorman and Altray* show that the answer is less clear.

By talking about where title passes when it sells natural gas, Energy Trading suggests that sale be defined by the place where ownership and possession transfer. If sale were defined that way, tax liability could be somewhat easily manipulated. The buyer and seller could arrange their transactions so that title and possession to the gas transfer outside Connecticut, and the sale would not be subject to tax.

The other two primary alternatives are the delivery and destination tests. In this context, though, those tests may not be distinct. DRS takes the position that a sale of natural gas is in Connecticut when the end user is in Connecticut. That could be based on the delivery test—because we’re talking about retail sales, which are made to the end user—or the destination test—because the ultimate destination of the gas is the end user. With retail sales of natural gas, there may be a *de facto* presumption that the place where the gas is delivered is the place where it will be used. If so, there's no distinction between the delivery and destination tests in this context.

B. How do we know when there's a sale of natural gas in this state?

Following are some different viewpoints on using the delivery point, the destination point, and the place where title, possession, and risk of loss pass to determine when there is a sale when that term is not defined by statute. Some of these excerpts show how statutory construction issues and constitutional issues can be intertwined, since construing phrases in certain ways can present constitutional problems.

1. Delivery Point

The sale of natural gas could be construed to take place at its delivery point: the point where the natural gas is delivered.

Caselaw

As the Oklahoma Supreme Court noted in *Koch Fuels v. Oklahoma*, 862 P2d 471 (October 26, 1993), a state may impose a *sales tax* on a transaction when the FOB delivery point is within that state. The Oklahoma tax statute [68 O.S.Supp.1984 §1352(L)] required a transfer of property "in this state," and such was the case here. The transaction thus fit within the category of transactions subject to a sales tax.[52]

The Oklahoma Supreme Court determined that the point of delivery or destination of the goods as a criterion for imposing a sales tax is derived from and consistent with the jurisprudence of sales and conflicts of law. The Oklahoma Supreme Court found an example in *United States v. R.P. Andrews & Co.,* 207 U.S. 229, 240, 28 S.Ct. 100, 52 L.Ed. 185 (1907), where the United States Supreme Court explained:

> (1) that delivery of goods by a consignor to a common carrier, for account of a consignee, has the same effect as delivery to such consignee, and
>
> (2) that when a purchaser of goods directs their delivery for his account to a designated carrier, the latter becomes the agent of the purchaser, and delivery to such carrier is a legal delivery to the purchaser.
>
> [These principles] have also been recognized in the context of the jurisprudence of the Uniform Commercial Code and conflict of laws.[53]
>
> Under the Restatement (Second) Conflict of Laws, §191 comment d (1971), "in an FOB contract, the place of delivery ordinarily is that where under the terms of the contract the seller is to deliver the goods to the carrier FOB." This result is consistent with Article 2 Sales in the Uniform Commercial Code, *but there are exceptions to this rule*. *Koch Fuels, Inc. v. State of Oklahoma*, 862 P2d 471 (October 26, 1993), footnote 8 (emphasis added).[54]

Delivery Point Can Establish Nexus

Koch shows how statutory construction issues and constitutional issues can be intertwined.

The Oklahoma Supreme Court in *Koch* runs through a number of due process or commerce clause cases in which the US Supreme Court looked to the place where the goods were delivered and used that location to find nexus. For example:

- The place of delivery (FOB Salt Lake City, Utah) was used to invalidate an Idaho tax in *American Oil Co. v. Neill,* 380 U.S. 451, 458, 85 S.Ct. 1130, 14 L.Ed.2d 1 (1965). *American Oil Co.* was a due process clause challenge and, as the *Koch* court notes, the analysis for such is distinct from a commerce clause challenge. While both require a nexus, the type of nexus sufficient to tax has become different for each clause due to the flexible approach in a due process analysis under *International Shoe Co. v. Washington (1945)* and its progeny. *Koch Fuels, Inc. v. State of Oklahoma*, 862 P2d 471 (October 26, 1993), footnote 6, also citing *Quill*.) [55]

- Place of delivery was used in *McGoldrick v. Berwind-White Coal Mining Co.,* 309 U.S. 33, 60 S.Ct. 388, 84 L.Ed. 565 (1940) to validate a New York City sales tax when an out-of-state seller maintained an office in New York City and delivered the goods in New York City. Then, in *McLeod v. J.E. Dilworth Co.,* 322 U.S. 327, 64 S.Ct. 1023, 88 L.Ed. 1304 (1944) the court invalidated an Arkansas tax where the goods were shipped by common carrier from Tennessee (FOB Memphis) to buyers in Arkansas, with title passing upon delivery of the goods to the carrier in Tennessee before the goods arrived in Arkansas. [56]
- In *State Tax Commission v. Pacific States Cast Iron Pipe Co.,* 372 U.S. 605, 83 S.Ct. 925, 10 L.Ed.2d 8 (1963) the court explained that where delivery was made and title transferred at place of manufacture, that State could assess a sales tax although the goods were then shipped out-of-state.[57]

Steelcase; Uniform Commercial Code

In the sales tax case of *Steelcase, Inc. v. Allan A. Crystal, Commissioner of Revenue Services*, 238 Conn. 571(1996), the Connecticut Supreme Court looked to the Uniform Commercial Code to determine when and where tangible personal property was *delivered*. Among other sources, it cited the rule in 3A J. Sutherland, Statutory Construction (5th Ed. 1992) §66.03, that commercial usage is the proper referent in interpreting tax laws.

Steelcase's terms and conditions of sale in the transactions at issue provided that delivery was to be "FOB factory." It is widely accepted that this delivery term means that delivery takes place when the seller places the goods into the possession of a common carrier at the seller's place of business. Thus, under the terms of Steelcase's sales contracts, delivery took place at its plant in Michigan, where Steelcase placed the goods in the possession of a common carrier. Accordingly, Steelcase did not deliver the goods in Connecticut and, therefore, did not make a retail sale within the meaning of §12-407(3).

Moreover, *Steelcase* explained that there are also settled meanings for certain delivery terms used in contracts for the sales of goods. "The contract of the parties may be wholly silent on the place for delivery. Section 2-308 generally fills this gap with the seller's place of business as the place for delivery. Often, however, the gap will only be partial. In an important class of cases, the contract will either require or authorize the seller to ship the goods, but will not require the seller to deliver them at a particular destination. The most common of these contracts are those which include the symbols 'FOB seller's plant' or 'FOB seller's city.' The place of delivery in such contracts (and those that include equivalent language) is the place where the facilities of the seller's carrier are located, for the seller must 'put the goods into the possession of the carrier.'"[58]

The *Steelcase* court was persuaded that the questions of whether delivery occurred and, if so, when it occurred under §12-407(3) should be determined according to these well settled commercial principles. The Court recalled that it has, "on a number of occasions ... looked to the [UCC] as a fruitful source of analogy." *New England Yacht Sales, Inc.* v. *Commissioner of Revenue Services*, 198 Conn. 624, 630, 504 A.2d 506 (1986). (trial court properly looked to UCC and common law antecedents to determine when title to property passed for purposes of imposition of sales and use tax); 3A J. Sutherland, Statutory Construction (5th Ed. 1992) §66.03 (commercial usage proper referent in interpreting tax laws). In the present case, commercial law principles provide specific guidance on the meaning of delivery and the place of delivery in the context of sales of goods. The act operates on such commercial transactions and with respect to such commercial parties who, it must be expected, rely on the conventional meaning and implications of delivery terms.

Furthermore, the court explained that legislature is deemed to be aware of the settled meanings of terms in related areas of law when it enacts a statute. Cf. *Perkins* v. *Freedom of Information Commission*, 228 Conn. 158, 169-70, 635 A.2d 783 (1993). In the absence of compelling evidence to the contrary, the *Steelcase* Court did not presume that the legislature intended to depart substantially from the accepted meaning attached to delivery in the commercial arena. But, the court instructs to compare the result in *New England Yacht Sales, Inc.* v. *Commissioner of Revenue Services,* which relied UCC rules for the passage of title in sale of goods.

Montana Statute

An example of a statute that uses delivery terms to define sale is a Montana corporation income tax statute on the sales factor for sales in Montana. Montana's statute was addressed, for purposes of looking as sales of natural gas, in *The Williams Companies, Inc. and Subsidiaries v. The Department of Revenue of the State of Montana,* Montana State Tax Appeal Board, No. CT-1996-1(12/31/98).

Montana's statute provides:

15-31-311. Sales factor for sales in this state.

(1) Sales of tangible personal property are in this state if:

(a) the property is *delivered* or shipped to a purchaser, other than the United States government, within this state *regardless of the FOB point or other conditions of the sale* [emphasis added]; or

(b) the property is shipped from an office, store, warehouse, factory, or other place of storage in this state and: (i) the purchaser is the United States government; or (ii) the taxpayer is not taxable in the state of the purchaser.

(2) Sales, other than sales of tangible personal property, are in this state if:

(a) the income-producing activity is performed in this state; or

(b) the income-producing activity is performed both in and outside this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance.

2. If the Rule Were Delivery to Pipeline

If the rule were that:

- A natural gas sale is in this state if the gas is *delivered* in this state, and if
- *Delivery* is deemed to take place when gas is delivered to the international pipeline, a common carrier, and if
- Delivery to the common carrier takes place outside Connecticut,

Then:

- The sale of natural gas would be made outside Connecticut, and
- Gross income from that sale would not be subject to the Utility Companies Tax.

Conversely, if gas were delivered the gas to the pipeline in Connecticut, the sale would be made in Connecticut, and gross income from that sale would be subject to the Utility Companies Tax. However, the nature of the gas marketing business makes it unclear whether Energy Trading, which is not a gas producer, would ever in fact, deliver the gas to the pipeline.

This position could be supported by *Steelcase*, but only if delivering natural gas through a common carrier is properly analogous to delivering run-of-the-mill goods to a common carrier, and if sales tax analyses were valid.[59] But, *Texaco v. Groppo* rejected DRS's argument that the taxability of petroleum product sales turns on the place at which the products are delivered, at least for purposes of the petroleum products gross earnings tax (rev. to 1981). In that case, delivery was made when the buyers sent their own trucks or common carrier to Connecticut to get the petroleum products.

3. If the Rule Were Delivery to End User

If the rule were that:

- A natural gas sale is in this state if the gas is delivered in this state, and if
- *Delivery* is deemed to take place when gas is reaches the end user, regardless of the FOB point or where title passes, and if
- Gas is delivered to an end user in Connecticut

Then:

- Delivery would be in Connecticut, and
- The sale of natural gas would be made in Connecticut, and
- Gross income from that sale would be subject to the Utility Companies Tax.

This position is supported by legislative history and DRS interpretations, and a view that *delivery* to an end-user and *destination* are equivalent for all practical purposes.

Texaco v. Groppo supports the concept that *delivery and destination* could be equivalent. On the one hand, the Connecticut Supreme Court in that case opposed using delivery as the standard for when a sale is made. But on the other hand, the court determined taxability of petroleum product by the place of their ultimate destination, which it seemed to assume was where the product were marketed and distributed.

4. Destination Point

The sale of natural gas may be construed to take place at its destination point: where the end user is or where the end user consumes the natural gas. There is support for using *destination* as a basis for when and where a sale occurs in *Texaco v. Groppo,* a sales and use tax definition; the gross receipts factor for the Connecticut corporation business tax*;* and the UDITPA sales factor.

Texaco v. Groppo

Texaco v. Groppo adopted a destination test rather than a delivery test to determine if the petroleum products gross earnings tax applied to sales in Connecticut of petroleum products that were delivered in Connecticut but marketed and distributed in states other than Connecticut.

For the period at issue, Conn. Gen. Stat. 12-587 provided that any petroleum company engaged primarily in the refining and distribution of petroleum products and that distributes such products to wholesale and retail dealers for marketing and distribution *in this state* shall pay a quarterly tax of two percent of gross earnings in each taxable quarter derived by such company from the sale of petroleum products *in this state*.

Conn. Gen. Stat. 12-587 further provided that "gross earnings" are those earnings from the sale of petroleum products to which the sales factor is applied under Conn. Gen. Stat. 12-218(3).

Conn. Gen. Stat. 12-218(3)(b) (rev. to 1981) provided that the third fraction (of the apportionment formula for corporation business tax) represents the part of the taxpayer's gross receipts from sales or other sources during the income year, including receipts from sales of tangible property if the property is delivered or shipped to a purchaser within this state.[60]

The court recognized that the cross-reference to 12-218 raises a possible ambiguity with respect to the intended coverage of 12-587. However, the court relied on the uniform holding of courts in other states interpreting essentially identical language, which has been that the *destination* of the goods, and *not their delivery point*, is dispositive.[61]

Conn. Gen. Stat. §12-407(15)

If a sales tax is the better analogy for the Utility Companies Tax, then the definitions in the Connecticut Sales and Use Tax Act could support using *destination* as a basis for when and where a sale occurs.

Conn. Gen. Stat. §12-407(15) provides that for purposes of if a seller is obligated to collect sales tax, a *seller engaged in business in Connecticut* is someone who sells tangible personal property from outside the state to a destination within the state. Conn. Gen. Stat. §12-407(15)(A) provides that "*'engaged in business in the state'* means and includes but shall not be limited to the following acts or methods of transacting business: (i) Selling in this state, or any activity in this state in connection with selling in this state, tangible personal property for use, storage or consumption within the state…"

But, the definition of *sale* in Conn. Gen. Stat. § 12-407(2) speaks in terms of passage of title, which can be construed as part and parcel of the *delivery* test (see below).

Connecticut Corporation Business Tax

Internal Procedure (IN) 94(1), (Mar. 11, 1994) covers the history of Connecticut's corporation business tax apportionment statute.

In 94(1) notes that the General Assembly has determined that "business transacted in the state" shall be measured by the property, payroll, and gross receipts factors, with the numerator of the gross receipts factor incorporating "*destination*" sales.

The IN explains that from their inception Connecticut's apportionment provisions, embodied in §12-218 of the General Statutes, have included a three-factor formula.

> Conn. Gen. Stat. §1899 (1949) provided for an allocation fraction to be computed as the simple arithmetical mean of three fractions--tangible property, payroll, and gross receipts. Public Act 67-586 changed the method of determining the receipts to be included within the measure of the tax from an origination basis to a destination basis. The receipts factor no longer included "receipts from sales of tangible property arising from transactions chiefly negotiated and executed at a place of business within the state." Instead, receipts from sales of tangible property were to be included in the receipts factor if the property was delivered or shipped to a purchaser within this state regardless of the FOB point or other conditions of the sale.
>
> In conclusion, the standard apportionment formula manifests the General Assembly's judgment that the property, payroll and gross receipts factors are reliable indices of business transacted in the State, by which a corporation's net income is to be measured. Further, Connecticut's criteria for apportionment are modeled on UDITPA Section 3 and in adopting such criteria the General Assembly expressly intended to conform with UDITPA principles. Similarly, the principles of §12-221a are rooted in the parallel UDITPA provision (Section 18). Therefore, like other states' discretionary statutes, §12-221a should be invoked only when the standard apportionment factors are not reliable indices of business transacted in Connecticut so that income attributed to Connecticut by the standard apportionment formula is inequitable.[62]

New York and Other Corporation Business Taxes

Support for using destination point as a criterion for *sale* exists also in a memorandum of the New York Division of Budget. That memorandum approved of a bill that would change NY Tax Law §210.3(a)(2)(A), in response to contentions by New York manufacturing corporations that they were at a competitive disadvantage because *most states used a 100% destination sales factor*, whereas New York companies were taxed in New York on a 50% origin basis and then again on a 100% destination basis for goods shipped out of New York. The memo says that:

> There has been a strong trend among the states towards use of a sales factor based on destination. Currently, about two-thirds of the 39 states with corporate income taxes, plus the District of Columbia, have a sales factor using destination only. Many of these states adopted the 100% destination basis when they enacted the Uniform Division of Income for Tax Purposes Act, drafted by the MCCUSL, or the Multistate Tax Compact, drafted by the Council of State Governments." (*Id.*) . . . As clearly stated by the Division of Budget, "[u]nder this bill *all sales of goods* that are *shipped or delivered* to customers within the state would be allocated to the state." [Emphasis added].[63]

5. Delivery Point = Destination Point

Koch Fuels v. Oklahoma and a Massachusetts regulation suggest that in some contexts the delivery test and destination test are the same for all practical purposes. If that is true in the case of retail sales of natural gas, then saying that sales of natural gas are defined by delivery point is the same as saying that they are defined by destination point.

Koch Fuels v. Oklahoma

Koch Fuels v. Oklahoma is a sales tax case involving the sale of oil, delivered by common carrier, to an Oklahoma company. Koch was the seller. In this case, the Oklahoma court found that the destination of Koch's oil was West Tulsa, Oklahoma, *where title and possession changed from seller to buyer* – also the delivery point. The Oklahoma court determined that the point of delivery and the transfer of title and possession occurred in Oklahoma under the terms of the contract and the applicable commercial law.

The fact that buyer *consumed* the oil outside of Oklahoma did not immunize from taxation Koch's sale to the buyer within Oklahoma. The shipment of the oil by the buyer to a point outside of Oklahoma was not part of the sale.

The court found that the oil was first in the physical possession of the carrier as agent for Koch, and once the inventory change was made, the oil was in the physical possession of the carrier as agent for the buyer [citing *United States v. R.P. Andrews & Co., supra, Universal Features Advertising Co. v. Pettit.]* The court noted that Koch, the seller, appeared to recognize that delivery of the oil to its customer occurred, since it used a purchase order as the basis for invoicing the customer for payment.[64]

Massachusetts Regulation

Not only does Massachusetts Regulation 830 CMR 63.38.1 (on apportionment of income for corporation tax purposes) combine the concepts of destination and delivery, it succeeds at combining all the criteria alternatives – delivery, destination, possession and ownership. That regulation provides in (9)(c)1:

Destination Sales**.** Sales are in Massachusetts if the property is ***delivered*** or shipped to a purchaser in Massachusetts ***regardless of the FOB point or other condition of sale*** [emphasis added]. Tangible property is deemed to have been shipped or delivered to a purchaser within Massachusetts if:

a. a shipment by carrier to the purchaser terminates in Massachusetts, even if the purchaser subsequently transfers the property to another state. A shipment terminates in Massachusetts if the purchaser takes actual possession and control of the property in Massachusetts unless the vendor can substantiate that all of the following conditions are met:
    i. the purchaser does not maintain any physical location or place of business in Massachusetts;
    ii. the purchaser removes the property from Massachusetts immediately upon its receipt;
    iii. no use is made of the property in Massachusetts other than transshipment;

iv. the vendor maintains records showing the property's actual destination. In general, a purchaser's affidavit, provided at the time of sale and accepted by a vendor in good faith, will constitute adequate documentation if it specifically describes the tangible property received from the vendor, states the destination of the property, and attests to the conditions in 830 CMR 63.38.1(9)(c)1.a.i-iii.

b. the property is **delivered** directly by the vendor to the possession and control of the purchaser or its agent within Massachusetts unless the vendor can substantiate that all the conditions in 830 CMR 63.38.1(9)(c)1.a.i-iv. have been met; or

c. the property is **delivered** to the possession and control of the purchaser by the vendor or by a carrier outside of Massachusetts, if the property is immediately transshipped to Massachusetts, and the state of transshipment is not the destination state under the rules in 830 CMR 63.38.1(9)(c)1.a.i-iii . . .

6. If the Rule Were Destination Point

If the rule were that:

- A natural gas sale is in this state if the *destination* of the gas is Connecticut, and if
- The *destination* is the place where the end user is, and if
- An end user in Connecticut buys the gas,

Then:

- The destination of the gas would be Connecticut, and
- The sale of natural gas would be made in Connecticut, and
- Gross income from that sale would be subject to the Utility Companies Tax.

This position is supported by legislative history, DRS interpretations, and the dominant income tax apportionment rule for gross receipts, and a *superficial* reading of *Texaco v. Groppo,* because the court determined that taxability of petroleum product turned on the place of their ultimate destination, which it seemed to equate with where the product were marketed and distributed.

Texaco v. Groppo could be distinguished as not applicable to an analysis of the Utility Companies Tax as applied to natural gas suppliers, because in *Texaco, marketing and distribution in this state* was the basis for the imposition of the tax. And again, in the context of retail sales of natural gas, *delivery versus destination* could be a distinction without a difference.

7. Passage of Title, Possession, Risk of Loss

The sales tax definition of *sale* in Conn. Gen. Stat.§12-407(2), which speaks in terms of transfer of title, could be used to support a similar definition of *sale* for purposes of the Utility Companies Tax – especially if the Utility Companies Tax is determined to have the practical effect of a sales tax.

Connecticut Sales Tax

Sec. 12-407(2). Definitions—Sale & Selling, provides that "*sale*" and "*selling*" mean and include:

> Any *transfer of title*, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration;
>
> any withdrawal, except a withdrawal pursuant to a transaction in foreign or interstate commerce, of tangible personal property from the place where it is located for delivery to a point in this state *for the purpose of the transfer of title*, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of the property for a consideration.

8. If the Rule Were Passage of Title, Possession, Risk of Loss

If the rule were that:

- A natural gas sale is in this state if any combination of transfer of title to, possession of, risk of loss of the gas takes place in Connecticut, and if
- The seller and buyer arrange for title to, possession of, risk of loss of the gas to transfer in Connecticut,

Then:

- The sale of natural gas would be made in Connecticut, and
- Gross income from that sale would be subject to the Utility Companies Tax.

This position could be supported by saying that even though the tax is on the seller rather than the user, with respect to natural gas suppliers the Utility Companies Tax is analogous to a sales tax, and the definition of *sale* in Conn. Gen. Stat. § 12-407(2) may be properly borrowed.

Koch Fuels v. Rhode Island, which found that it was not error for the trial court to find that a Rhode Island tax (the structure of which is similar to the Utility Companies Tax) was akin to a sales tax, could be used as support for this conclusion. *Koch Fuels, Inc. v. Rhode Island* is discussed in the section entitled *What Kind of Tax is the Utility Companies Tax?*

C. How do the deduction and apportionment provisions interrelate?

1. Overview

DRS reconciles the apportionment provision (sales in Connecticut over sales everywhere) with the deduction provision for out of state sales by interpreting them as mutually exclusive. If both provisions apply, the taxpayer must choose one or the other. This position emerges only in the instructions to the tax return, Form UCT-212.

In contrast, Energy Trading proposes that both provisions apply concurrently. That is, Energy Trading would start with its gross income from sales everywhere and subtract the gross income from all the out of state sales (and how they're defined is still open) to get its gross income from Connecticut sales. Then, Energy Trading would take its apportionment fraction (gross income from Connecticut sales divided by gross income from sales everywhere), and multiply it by its gross income from Connecticut sales. The product would be the amount of Energy Trading's gross income subject to the tax.

On the one hand, the statutes say nothing about have to choose between deducting out-of-state sales or apportioning. On the other hand, the statutes say nothing about doing both at the same time. Taken separately, the deduction provision and the apportionment provision are good ways of determining income connected with the state. Applying both concurrently, however, is not a logical approach to determine and tax income connected with the state.

2. Deduction Provision

Statute

Conn. Gen. Stat. §12-265(b)(1)(F) allows companies subject to the Utility Companies Tax to deduct from their gross earnings all sales of natural gas to a user or entity located outside the state.

Legislative History

Section 2 of Senate Bill 495 (which became 1998 Conn. Pub. Acts 218, see endnotes) added the deduction from gross earnings of all sales of natural gas to a user or entity located outside the state, now in §12-265(b)(1)(F).

Representative Martinez

It is unclear whether Representative Martinez's remarks on 1998 Senate Bill 495, described above, went to the first or second section of the bill. (The first section moved "in this state" in the DPUC registration statute).

Representative Martinez explained that the point of the bill was to clarify that "all out of state sales for natural gas *by Connecticut's local distribution companies* fall within the exemption from the Connecticut gross receipts tax [emphasis added]."

It could be that the changes in section 1 of Public Act 98-218, to §16-258a, were intended to parallel the change in section 2, to §12-265(b)(1), and that both the registration requirement and the tax turn on end users in being Connecticut.

Connecticut Natural Gas

CNG's testimony on SB 495, also described above, shows that CNG thought that the bill *"exempts LDCs that are making sales outside of Connecticut, to not pay the Connecticut gross receipts tax on those sales as marketers are not required to do that now* [emphasis added].*"*[65]

In Ms. Karanian's written testimony on the same point, she states:

"…Finally, we all know that not all marketers are paying Connecticut Gross Receipts Tax on their Connecticut sales, which creates inefficiency as well as a state revenue loss. In that regard, we also support Senate Bill 495 *which clarifies that an LDC selling gas <u>for</u> <u>delivery</u> out of state is exempt from paying Connecticut GRT as marketers currently are* [emphasis added]."[66]

These comments could suggest that the point of the deduction provision was to ensure that the tax is on gross income only from natural gas sales *when the end user is in this state*.

Comments Could Imply Presumption

These comments also could be interpreted as there being a *de facto* presumption that in the context of retail sales of natural gas, the gas is at its ultimate destination where it is used, and it is used where it is delivered. Thus, the ultimate *destination* of the natural gas is the same as the *delivery* point.

DRS Interpretations

DRS interprets the Utility Companies Tax as being imposed on natural gas suppliers that sell to Connecticut end users, and as being measured by gross income from sales to end users in Connecticut. The instructions to Form UCT-212, and Ruling No. 2000-6 show DRS's position.

DRS Form Instructions

The instructions to Form UCT-212, *Municipal Utilities, Gas Marketers and Local Gas Distribution Companies Gross Earnings Tax Return,* show that DRS's position has been that it is the end user, not the sale, that must be *in this state.*

UCT-212 filers are instructed at Line 12 to state their gross earnings from sales of natural gas to users or entities located outside Connecticut—but only *if* those earnings were included in the amount reported on Line 6. People don't usually talk about *sales* being *located* somewhere, but they do talk about *people* being *located* somewhere.

Why there would be an option for including sales of natural gas to out of state end users at line 6 is unclear.

Ruling No. 2000-6, Separately billed natural gas delivery and sales charges

Ruling 2000-6, on separately billed natural gas delivery and sales charges, speaks in terms of charges by LDCs and gas marketers to end users. For example, the ruling concluded that:

> When a local gas distribution company separately bills end users for the delivery of natural gas and a gas marketer separately bills the end users for the sale of the gas, *the total charges by the gas company to the end users are required to be included in the gas company's gross earnings that are subject to Connecticut Utility Companies Tax*, *and the total charges by the gas marketer to the end users are required to be included in the gas marketer's gross earnings that are subject to Utility Companies Tax …* [emphasis added].[67]

3. Apportionment Provision

Statute

The apportionment provision relevant to natural gas suppliers is at Conn. Gen. Stat. §12-265(b)(2)(B)(ii). The statute provides that:

> (2) Gross earnings for any taxable quarter, for the purposes of assessment and taxation, shall be as follows:
>
> (B) in the case of *a company* or municipal utility *carrying on business or operations a part of which is outside of this state*,
>
> (i) such portion of the amount of gross earnings from operations determined under the provisions of section 12-264 as is represented by the ratio of the number of miles of water or steam pipes, gas mains or electric wires operated by such company or municipal utility within this state on the first day and on the last day of the calendar year immediately preceding to the total number of miles of water or steam pipes, gas mains or electric wires operated by such company or municipal utility on said dates; or
>
> (ii) *in the case of a company required to register pursuant to section 16-258a*, such portion of the amount of gross earnings from operations determined under the provisions of section 12-264 as is represented by the *ratio of the sales in this state to end users during such quarter to the total sales everywhere to end users during such quarter*.

Legislative History

1995 Conn. Pub. Acts 359, effective July 13, 1995, added new subparagraph (B)(ii) regarding companies required to register under Conn. Gen. Stat. §16-258a. That act also amended subsection (b) to reverse some of the changes enacted in PA 95-114 and to add new subparagraph (E) to subdivision (1) regarding sales for resale of gas to companies registered under Conn. Gen. Stat. §16-258a.

Public Act 95-359 was House Bill 6498, *An Act Concerning Technical Changes to the Sales and Use Taxes.*

Representative Schiessl remarked on the Utility Companies Tax aspects of the bill to the House of Representatives on June 7, 1995. He stated:

> Sections 13 through 15 address an issue that came up yesterday. We enacted a statute earlier in the session that related to the taxation of marketers of natural gas and the bill worked its way through both Chambers, found its way to the Governor's desk and in a pre-signing screening, there were some technical problems revealed by the Department of Revenue Services, obviously the agency that has to implement this new change in the law.
>
> If you don't recall the bill, the idea was there were out of state natural gas marketers who were selling, going under contract to purchase natural gas with Connecticut businesses and they were not imposing Connecticut tax because they were an out of state business, although they were using the pipelines of our companies in order to deliver their product.

> And so, these changes in sections 13 through 15 clarify who is subject to the utility company's tax on natural gas and the measure of the tax.
>
> Section 14, which is effective 7/1/96, reiterates the new language in Section 13 and these changes are included in this amendment in order to afford the Governor the opportunity to sign the previously enacted bill into law.
>
> These are the changes included in this amendment, and I would urge adoption at this time…[68]

Also on June 7, 1995, Senator Nickerson remarked to the Senate on Amendment A to the bill. He stated:

> The balance of the bill relates to a glitch in an Act undertaken earlier this session, namely Public Act 95-144 [114?], which pertains to the application of gross earnings tax on independent marketers of natural gas. In order to achieve an appropriate result, it redefines gross earnings for that group of people, to mean gross earnings with regard to the sale of natural gas.[69]

DRS Interpretation

Special Notice 95(9)

In SN 95(9), *1995 Legislative Amendments Affecting the Utility Companies Tax* (7/20/95), DRS said merely that 1995 Conn. Pub. Acts 359, §16, provides that, in the case of a marketer of natural gas registered with the DPUC, gross earnings, as determined under Conn. Gen. Stat. §12-264(a), are to be apportioned based on the ratio of sales in Connecticut to end users during the taxable quarter to total sales everywhere to end users during such quarter.

DRS Form Instructions

The instructions to Form UCT-212, *Municipal Utilities, Gas Marketers and Local Gas Distribution Companies Gross Earnings Tax Return*, explain that

Gross earnings may only be apportioned if:

- *Part of your operations or business is conducted outside of Connecticut;*
- The amount on Line 8 does not include sales for resale to non-Connecticut public service companies or non-Connecticut municipal utilities; and
- *You are not claiming deductions on Line 12 of this return.*

Filers who apportion their gross earnings complete Lines 15 and 16 of the return. The instructions to line 15 explain how LDCs, utilities and gas marketers are to compute their respective apportionment fractions:

Gas marketers: Compute an apportionment fraction (expressed as a percentage carried to six decimal places). The numerator is gross earnings from *sales to end users located in Connecticut* during the calendar quarter, and the denominator is gross earnings from *sales to end users located inside and outside Connecticut during the calendar quarter*.

Local gas distribution companies and municipal (gas or electric) utilities: Compute an apportionment fraction (expressed as a percentage carried to six decimal places). The numerator is the miles of gas mains or electric wires (municipal electric utilities only) operated in Connecticut on the first and last day of the preceding calendar year. The denominator is the total miles of gas mains or electric wires operated (municipal electric utilities only) inside and outside Connecticut on the first and last day of the preceding calendar year.

Purpose of Apportionment Provisions

The purpose of apportionment is to estimate that amount of income of an interstate business that is attributable to a state. Apportionment formulas are used when you can't precisely define how much income is generated in a given state. Most states with a corporate income tax employ formulary apportionment to ascertain their just proportion of the profits earned by a unitary business entity within their respective jurisdictions.[70]

Although the terms "allocation" and "apportionment" are often used interchangeably in respect of the division of income among various jurisdictions, "allocation" properly refers to the "attribution of a particular type of income to a designated state, [and] 'apportionment' refers to the division of the tax base by formula."[71] Although an apportionment formula may not apportion income perfectly, it is said that the constitution does not require "mathematical exactitude," only a "rough approximation."[72]

4. Reconciling the Deduction and Apportionment Rules

DRS reconciles the deduction and apportionment provisions by allowing natural gas suppliers to apportion only if they do not deduct sales to out of state end users. The instructions to Form UCT-212 reflect this DRS position.

If the Utility Companies Tax is Like an Income Tax

For the Utility Companies Tax to have the practical effect of an income tax, the deduction provision for *sales of natural gas to a user or entity located outside the state* would have to be ignored. Natural gas suppliers would have to calculate their tax by apportioning their income according to their income from sales of natural gas to users or entities located in Connecticut and their income from sales of natural gas to end users everywhere.

The tax could be characterized as being determined by a one-factor apportionment rule.

If the Utility Companies Tax is Like a Sales Tax

For the Utility Companies Tax to have the practical effect of a sales tax, the apportionment provision would have to be ignored. Natural gas suppliers would have to calculate their tax by deducting from their *gross earnings from such operations* those gross earnings from *sales of natural gas to a user or entity located outside the state.*

There is no need for an apportionment provision in a tax imposed on in-state sales because we can tell what sales are attributable to the state – we just deduct the sales to out of state end users. Thus, it is illogical for a sales tax type of tax to have an apportionment provision.

Texaco v. Groppo

Texaco v. Groppo involved a similar issue, in addressing the measure of the petroleum products gross earnings tax. Conn. Gen. Stat. §12-587 (Rev. to 1981) provided that any petroleum company which is engaged primarily in the refining and distribution of petroleum products and distributes such products to wholesale and retail dealers for marketing and distribution in this state shall pay a quarterly tax at the rate of two per cent of gross earnings in each taxable quarter derived by such company from the sale of petroleum products in this state ... For purposes of sections 12-587 to 12-602, inclusive . . . 'gross earnings' are those earnings from the sale of petroleum products to which the sales factor is applied under subdivision (3) of section 12-218…"

Conn. Gen. Stat. §12-218(3)(b) (Rev. to 1981) provided in pertinent part:

> The third fraction shall represent the part of the taxpayer's gross receipts from sales or other sources during the income year . . . including receipts from sales of tangible property if the property is delivered or shipped to a purchaser within this state . . .

The Supreme Court found that DRS's "reliance on the cross reference to §12-218 raised *a possible ambiguity* with respect to the intended coverage of §12-587. The Supreme Court did not agree with DRS's position that the cross-reference to §12-218 contained in the final sentence of §12-587 trumped the straightforward description of taxable transactions contained in the first sentence of §12-587, and the court resolved this possible ambiguity in favor of the taxpayer:

It is not clear whether the cross reference had the broad objective of defining all aspects of the transactions that are taxable under §12-587 or the narrower objective of determining the interstate allocation of those transactions insofar as they trigger §12-218.

Such a latent ambiguity must ordinarily be resolved in favor of the taxpayer, as we have noted above, because the issue remains the imposition of tax liability rather than entitlement to an exemption or a deduction. The plaintiff, accordingly, still prevails.

D. Does Energy Trading have gross income from the sales of natural gas in this state?

Because the measure of the tax is *gross income from sales of natural gas in this state, w*hether Energy Trading has *gross income from sales of natural gas in this state* depends on when there is a *sale in this state*. Whether Energy Trading has *sales in this state* depends on what criteria are used to determine when a sale is made, using either:

- Delivery test;
- Destination test;
- Passage of title, possession, and risk of loss.

Those alternatives were discussed above. Additionally, those choices turn in part on whether a sales tax or an income tax is the better analogy for the Utility Companies Tax.

1. Delivery to Pipeline

If:

- A natural gas sale is in this state if the gas is delivered in this state, and if
- *Delivery* is deemed to take place when gas is delivered to the international pipeline (a common carrier), and if
- Energy Trading delivers the gas to the international pipeline outside Connecticut,

Then:

- Delivery would be outside Connecticut, and
- The sale of natural gas would be made outside Connecticut, and
- Gross income from that sale would not be subject to the Utility Companies Tax.

Conversely, if Energy Trading delivered the gas to the pipeline in Connecticut, the sale would be made in Connecticut, and gross income from that sale would be subject to the Utility Companies Tax. However, the nature of the gas marketing business makes it unclear whether Energy Trading, which is not a gas producer, would ever in fact, deliver the gas to the pipeline.

This position could be supported by *Steelcase*, but only if delivering natural gas through a common carrier is properly analogous to delivering run of the mill goods to a common carrier. But, *Texaco v. Groppo* rejected DRS's argument that the taxability of petroleum product sales turns on the place at which the products are delivered, for purposes of the petroleum products gross earnings tax (rev. to 1981). In that case, delivery was made when the buyers sent their own trucks or common carrier to Connecticut to get the petroleum products.

2. Delivery to End User

If:

- A natural gas sale is in this state if the gas is delivered in this state, and if
- *Delivery* is deemed to take place when gas is reaches the end user, regardless of the fob point or where title passes, and if
- Energy trading delivers the gas an end user in Connecticut (which presumably lake road is)

Then:

- Delivery would be inside Connecticut, and
- The sale of natural gas would be made inside Connecticut, and
- Gross income from that sale would be subject to the Utility Companies Tax.

This position is supported by legislative history and DRS interpretations, and a view that *delivery* to an end user and *destination* are equivalent. On the one hand, the Connecticut Supreme Court in *Texaco v. Groppo* opposed using delivery as the standard for when a sale is made. But on the other hand, the court determined taxability of petroleum product by the place of their ultimate destination, which it seemed to assume was where the product were marketed and distributed.

3. Destination

If:

- A natural gas sale is in this state if the destination of the gas is Connecticut, and if
- The destination is the place where the end user is, and if
- Energy Trading sells the gas to an end user in Connecticut (which presumably Lake Road is)

Then:

- The destination of the gas would be Connecticut, and
- The sale of natural gas would be made in Connecticut, and
- Gross income from that sale would be subject to the Utility Companies Tax.

This position is supported by legislative history, DRS interpretations, and the dominant income tax apportionment rule for gross receipts, and a superficial reading of *Texaco v. Groppo,* where the court determined that taxability of petroleum product turned on the place of their ultimate destination, which it seemed to equate with where the product were marketed and distributed. *Texaco v. Groppo* could be distinguished as not applicable to an analysis of the Utility Companies Tax as applied to natural gas suppliers, because in *Texaco, marketing and distribution in this state* was the basis for the imposition of the tax. And again, in this context *delivery versus destination* could be a distinction without a difference.

4. Passage of Title, Possession, Risk of Loss

If:

- A natural gas sale is in this state if any combination of transfer of title to, possession of, risk of loss of the gas takes place in Connecticut, and if
- Energy Trading transfers title to, possession of, risk of loss of the gas to Lake Road in Connecticut,

Then:

- The sale of natural gas would be made in Connecticut, and

- Gross income from that sale would be subject to the Utility Companies Tax.

This position could be supported by saying that even though the tax is on the seller rather than the user, with respect to natural gas suppliers the Utility Companies Tax is analogous to a sales tax, and thus it is proper to borrow the definition of *sale* in Conn. Gen. Stat. § 12-407(2). *Koch Fuels v. Rhode Island*, which found that it was not error for the trial court to find that a Rhode Island tax (the structure of which is similar to the Utility Companies Tax) was akin to a sales tax, also could be used as support for this conclusion.

E. How Does Energy Trading Calculate the Tax?

1. Does the Deduction Provision Apply?

If Energy Trading has sales of natural gas to a user or entity located outside the state, then the deduction provision in Conn. Gen. Stat. §12-265(b)(1)(F) applies to Energy Trading. Whether Energy Trading does have such sales is a fact that was not expressly stated in the Ruling Request.

2. Does the Apportionment Provision Apply?

If Energy Trading *carries on business or operations a part of which is outside of this state*, then the apportionment provision in at Conn. Gen. Stat. §12-265(b)(2)(B)(ii) applies to Energy Trading, but only if Energy Trading does not deduct its sales of natural gas to a user or entity located outside the state on Line 12 of Form UCT-212. This exception is in accordance with DRS's interpretation, as expressed in the instructions to Form UCT-212.

Whether Energy Trading does *carry on business or operations a part of which is outside of this state*, is a fact that was not been expressly stated in the Ruling Request.

3. Must Energy Trading Choose either the Deduction or the Apportionment Provision?

Support for the proposition that either the deduction provision or the apportionment provision is found in DRS's interpretation of the statutes, as expressed in the instructions to Form UCT-212.

DRS has reconciled the deduction and apportionment provisions by taking the position that while both provisions may apply, filers may not use both provisions to calculate their tax. The author is not aware of any internal documents explaining how this conclusion was reached.

4. May Energy Trading Use the Deduction and Apportionment Provisions Simultaneously?

If both the deduction provisions apply independently, and it is determined that DRS's position (that the filer may choose to use either rule) is incorrect, the only other way to interpret the statutes is that both provisions apply simultaneously.

Legislative history does not support a proposition that both provisions apply simultaneously. As discussed above, the remarks to the House and the Senate on HB 6498 (which became PA 95-359) reveal that the apportionment provision was drafted and enacted quickly. Nothing in the legislative history of the apportionment provision shows that the legislature intended for the tax to be determined by applying the apportionment provision only to income from in-state sales, however sales are ultimately determined.

On the other hand, *Texaco v. Groppo* could support a conclusion that both provisions apply simultaneously. *Texaco v. Groppo,* arguably with more legislative history on its side, resolved comparably conflicting provisions in favor of the taxpayer after concluding that the burden was on DRS in the case of an imposition statute.

VI. Commerce Clause Issue

A. Does the Utility Companies Tax Violate the Substantial Nexus Requirement of the Commerce Clause as Applied to Energy Trading?

Although the Ruling Request does not frame the issues this way, the gist of Energy Trading's arguments is such that the first issue is better framed as asking if the Utility Companies Tax, as applied to Energy Trading, violates the commerce clause because Energy Trading lacks substantial nexus with Connecticut.

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the U.S. Supreme Court established a four prong test to determine if a state tax violates the commerce clause. The Court ruled that a state may impose a tax on income derived from interstate commerce only if the tax:

1) is imposed on an activity with a substantial nexus with the taxing state;

2) is fairly apportioned;

3) Does not discriminate against interstate commerce, and;

4) is fairly related to the services provided by the state.

Because sales of natural gas have been until recently wholly intrastate transactions, commerce clause issues did not ordinarily arise. Thus, readily available material on this subject is scarce, Additionally, the author has been instructed not to make any outside inquiries on this matter. Consequently, the discussion in this section is brief.

B. Rule

The nexus analysis for due process clause challenges is distinct from the nexus analysis for commerce clause challenges. While both clauses require nexus, the type of nexus sufficient to tax has become different for each clause due to the flexible approach in a due process analysis under *International Shoe Co. v. Washington (1945)* and its progeny.[73] The commerce clause requires more than minimal nexus for a state to impose collection burdens on a vendor.[74]

The commerce clause requires a taxing state to have *substantial nexus* with an out of state business to impose *use tax collection and remittance duties* [emphasis added].[75] *Quill* preserved the bright line physical presence rule that was set out in *Bellas Hess*. For purposes of having *a use tax collection and remittance duty*, substantial nexus requires a finding of physical presence in the taxing state.[76] According to *Quill, a* state may not impose a *use tax collection duty* on an out of state vendor whose only connection with the state is through a common carrier or the US mail.

While *Quill* said that the physical presence bar to state taxation persists in the commerce clause, because *Quill* was a use tax collection case, it is not clear that this requirement applies across the board to any type of tax. As Richard Tomeo put it, for purposes of the commerce clause, the Supreme Court has indicated that a corporation must have "substantial nexus" with the taxing state in order to be subject to a tax obligation, which, *at least in the sales and use tax context, requires physical presence*. The degree and regularity of physical presence has been left unsettled by the Supreme Court and continues to be a subject for dispute in litigation.[77]

According to *Quill,* the physical presence requirement may turn on the presence in the taxing state of a small sales force, plant or office.[78] Additionally, the continuous physical presence of offices and employees in a taxing state is sufficient to impose a use tax collection duty even though the instate presence is unrelated to the transaction being taxed.[79] Some states have found that *more than* a slightest presence is sufficient.[80] Others have found that the slightest presence is not sufficient to establish a substantial nexus.[81] The test seems to be whether the taxpayer's connections with the state substantial enough to legitimate the state's exercise of power over it.[82]

C. Open Issues

In this context, the issues to be resolved then are:

- Whether this issue should be analyzed using commerce clause analyses of *income tax* cases, or whether it should be analyzed using commerce clause analyses of *sales tax* cases. Do the nexus rules from the *Quill* line of cases on use tax collection liability apply? Do nexus rules from income tax cases apply? Like the statutory construction questions, the nexus question begs the question of what kind of tax is the Utility Companies Tax, after all?
- Whether the commerce clause requires physical presence on the part of a natural gas supplier for the imposition of the Utility Companies Tax;
- If the commerce clause does require physical presence for the Utility Companies Tax to be validly imposed of a natural gas supplier, the degree and regularity of physical presence that is required.

D. Analysis

1. Energy Trading's Connecticut Employee

Even if the commerce clause - substantial nexus - physical presence requirement from *Quill* applies for the Utility Companies Tax to be validly imposed on natural gas suppliers, Energy Trading is likely to have it.

Energy Trading says that it currently has at least one employee based in Connecticut, "so that it will likely be subject to Connecticut's taxing jurisdiction."[83] Having an employee in Connecticut plainly satisfies the physical presence requirement.

2. Property in Connecticut

Additionally, Energy Trading also says that title to the natural gas may pass from Energy Trading to Lake Road either in Connecticut or outside Connecticut. Therefore, when title to the natural gas passes to Lake Road in Connecticut, Energy Trading will own the gas while it is in Connecticut, and therefore Energy Trading will have property in Connecticut.

3. Is a Pipeline Equivalent to the US Mail?

Although it does not expressly say so, Energy Trading's claim that it lacks substantial nexus with Connecticut (and therefore its gross income from natural gas sales may not be taxed) assumes that selling natural gas through a common carrier pipeline is no different than a mail order sales delivered by US mail or another common carrier. This is an important point, and from what the author can tell, possibly a venture into uncharted territory. [84]

Depending on the details of Energy Trading's activities in Connecticut, the Rhode Island Supreme Court's analysis in *Koch Fuels, Inc. v. Rhode Island* may apply. In that case the Rhode Island Supreme Court found that Koch's activities amounted to more than mere "communication with its customers in the State by mail or common carrier."

The Court noted that Koch shipped approximately 25.6 million gallons of oil into Rhode Island over the course of three years with a total value of approximately $18 million. It retained total control over the shipments of oil throughout delivery. Koch retained title, possession, and risk of loss over the oil up until the point it reached the flange in Providence. Koch was in continuous contact and control with both the common carrier and the buyer and was in a position to cancel the delivery if the buyer did not meet contract performance. Although Koch did not own the vessels that carried its fuel oil into Rhode Island, Koch's fuel oil represented the entire and exclusive cargo of the vessel. On the basis of Koch's complete control over the oil shipments, the exclusive nature of the common carrier's contract, the unique nature of the cargo, and the fact that the sales were consummated upon delivery in Rhode Island, the court concluded that Koch's activities created in practical effect a physical presence within this state. Given Koch's physical presence in Rhode Island, the court agreed with the District Court's conclusion that Koch had sufficient contact with the state to satisfy the substantial-nexus requirement of the *Complete Auto* test.[85]

4. Does DPUC Registration Confer Nexus?

It is an open question whether substantial nexus would exist if Energy Trading had *no* offices, employees or property in Connecticut (because it transferred title, possession and risk of loss outside the state) and its only connections with the state were its registration with DPUC under §16-258a, and its customer in Connecticut. It is worth noting that under *Heublein v. South Carolina*, Connecticut could possibly require natural gas suppliers to have an employee in the state, as long as it advanced a legitimate health/safety/welfare issue and were not merely an attempt to subject the company to tax. If indeed the commerce clause test is whether the taxpayer's connections with the state substantial enough to legitimate the state's exercise of power over it,[86] then some of the rationale for a state's authority to regulate natural gas suppliers might be used to answer that question. (See notes on *GM v. Tracy,* in the Appendix.)

VII. Glossary

1. **Commission**

   As used in these regulations, "commission" means the public utilities commission of the state of Connecticut. 16-271-1. Definitions.

2. **Common carrier**

   1. **Transp.** (in federal regulatory and other legal usage) a carrier offering its services at published rates to all persons for interstate transportation. 2. a public service or public utility company, as a telephone or telegraph company, engaged in the transmitting of messages for the public. Also called *"carrier."* http://www.allwords.com

3. **Company**

   16-271-1. Definitions. As used in these regulations, "company" includes every corporation organized under the laws of this state, or of any other state, or of the United States, which holds a certificate of public convenience and necessity issued under the provisions of the Federal Natural Gas Act, approved June 21, 1938, as it now reads, or may hereafter be amended, *for the purpose of constructing and operating a natural gas pipe line in this state*;

4. **Customer**

   16-11-2. The term "customer" means any person, firm, partnership, company, corporation, municipality, cooperative, organization, government agency, or similar organization supplied with gas service by any gas company.

5. **FOB**

   Free on board some location (for example FOB shipping point; FOB destination). Free to buyer to the point stated. The invoice price includes delivery at seller's expense to that location. Title to goods usually passes from seller to buyer at the FOB location. *Black Law Dictionary, 5th Edition,* citing UCC §2-219(1).

6. **Gas company**

   Conn. Gen. Stat. §16-1(a)(9) provides that "[g]as company" includes every person owning, leasing, maintaining, operating, managing or controlling mains, pipes or other fixtures, in public highways or streets, for the transmission or distribution of gas for sale for heat or power within this state, or engaged in the manufacture of gas to be so transmitted or distributed for such purpose, but shall not include a municipal gas utility established under chapter 101 or any other gas utility owned, leased, maintained, operated, managed or controlled by any unit of local government under any general statute or any public or special act;

7. **Gas company**

   16-11-1. The term "gas company," when used in the regulations, includes every corporation, company, association, joint stock association partnership or person, or lessee thereof, owning, leasing, maintaining, operating managing or controlling mains, pipes or other fixtures, in public highways or street for the transmission or distribution of gas not in excess of an internal gas pressure of two hundred pounds per square inch gauge for sale for light, heat or power with this state, or engaged in the manufacture of gas to be so transmitted or distribute for such purpose. (Effective March 31, 1964.)

8. Gas main

16-11-4. The term "main" means a gas pipe, owned, operated or maintained by a gas company, but does not include "gas service."

9. Gas marketer

Gas marketer means “natural gas supplier.” See AN 2001(01).

10. Gas pipe line

16-271-1. Definitions . As used in these regulations, "gas pipe line" means any gas pipe line which is subjected to, or is intended to be subjected to, an internal gas pressure in excess of two hundred pounds per square inch above atmospheric pressure.

Gas pipelines are considered *common carriers.* See *General Motors v.Tracy.*

11. Gas service

16-11-5. The term "gas service" means the piping and appurtenances which connect a gas main with the inlet connections of a gas meter on a customer's premises.

12. Marketer of Natural Gas

means any corporation, company, association, joint stock association, partnership or person, or lessee thereof, which sells natural gas and is not (1) a gas company as defined in Conn. Gen. Stat. §16-1, (2) a municipal gas utility established under chapter 101 of the Connecticut General Statutes or any other gas utility owned, leased, maintained, operated, managed, or controlled by any unit of local government under any Connecticut General Statute or any public or special act, or (3) a gas pipeline or gas transmission company subject to the provisions of chapter 208 of the Connecticut General Statutes. 1995 Conn. Pub. Acts 114, §1. SN 95(9), *1995 Legislative Amendments Affecting The Utility Companies Tax.*

13. Monopsony

A condition of the market where there is onely one buyer for a particular commodity.

14. Municipal Utility

means any Connecticut municipality or department or agency thereof, or Connecticut district, manufacturing, selling or distributing gas or electricity to be used for light, heat or power, including each foreign municipal electric utility as defined in Conn. Gen. Stat. §12-59 and given authority to engage in business in this state pursuant to the provisions of Conn. Gen. Stat. §16-246c. Conn. Gen. Stat. §12-264(a). SN 95(9), *1995 Legislative Amendments Affecting The Utility Companies Tax* (7/20/95).

15. Natural Gas Supplier

Gas marketer. See AN 2001(01).

16. Public Service Company

means a public service company, as defined in Conn. Gen. Stat. §16-1(a)(4). 1995 Conn. Pub. Acts 114, §1. SN 95(9), *1995 Legislative Amendments Affecting The Utility Companies Tax.*

17. Public Utility Company

means any company the principal business of which is manufacturing, selling or distributing gas, electricity or steam to be used for light, heat or power, but does not include a municipal utility.

Conn. Gen. Stat. §12-264(a). SN 95(9), *1995 Legislative Amendments Affecting The Utility Companies Tax.*

18. Self-generation facility

For purposes of the fee, a “self-generation facility” is a facility that generates electricity, that is owned or operated by an entity that is not an electric distribution company or an electric supplier, and that operates in parallel with other generation on the distribution system of an electric distribution company and that reduces or eliminates the purchase of electricity through the distribution network. (Sec. 69 , Act 28, Laws 1998)

19. Standard code

16-271-1. Definitions. As used in these regulations, "standard code" means the latest edition of the American Standard Code for pressure piping promulgated by the American Standards Association of New York. All terms used herein shall have meanings as defined in the standard code.

VIII. Appendix

A. Statutes

1. 12-264. Tax on gross earnings. Registration of gas sellers. Return.

(a) Each

(1) Connecticut municipality or department or agency thereof, or Connecticut district, manufacturing, selling or distributing gas or electricity to be used for light, heat or power, in this chapter and in chapter 212a called a "municipal utility",

(2) company the principal business of which is manufacturing, selling or distributing gas or steam to be used for light, heat or power, including each foreign municipal electric utility, as defined in section 12-59 and given authority to engage in business in this state pursuant to the provisions of section 16-246c, and

(3) company required to register pursuant to section 16-258a

shall pay a quarterly tax upon gross earnings from such operations in this state.

Gross earnings from such operations under subdivisions (1) and (2) of this subsection shall include

(A) all income classified as operating revenues by the Department of Public Utility Control in the uniform systems of accounts prescribed by said department for operations within the taxable quarter and, with respect to each such company,

(B) all income classified in said uniform systems of accounts as income from merchandising, jobbing and contract work,

(C) income from nonutility operations,

(D) revenues from lease of physical property not devoted to utility operation, and

(E) receipts from the sale of residuals and other by-products obtained in connection with the production of gas, electricity or steam.

Gross earnings from such operations under subdivision (3) of this subsection shall be gross income from the sales of natural gas.

Gross earnings of a gas company, as defined in section 16-1, shall not include income earned in a taxable year commencing prior to January 1, 2002, from the sale of natural gas or propane as a fuel for a motor vehicle.

No deductions shall be allowed from such gross earnings for any commission, rebate or other payment, except a refund resulting from an error or overcharge and those specifically mentioned in section 12-265.

Gross earnings of a company as described in subdivision (2) of this subsection shall not include income earned in any taxable quarter commencing on or after July 1, 2000, from the sale of steam.

(b)

(1) Each such company and municipal utility shall, on or before the last day of January, April, July and October of each year, render to the Commissioner of Revenue Services a return on forms prescribed or furnished by the commissioner and signed by its treasurer or the person performing the duties of treasurer, or by an authorized agent or officer, specifying

(A) the name and location of such company or municipal utility,

(B) the amount of gross earnings from operations for the quarter ending with the last day of the preceding month,

(C) the gross earnings from the sale or rental of appliances using water, steam, gas or electricity and the cost of such appliances sold, cost to be interpreted as net invoice price plus transportation costs of such appliances,

(D) the gross earnings from all sales for resale of water, steam, gas and electricity, whether or not the purchasers are public service corporations, municipal utilities, located in the state or subject to the tax imposed by this chapter,

(E) the number of miles of water or steam pipes, gas mains or electric wires operated by such company or municipal utility within this state on the first day and on the last day of the calendar year immediately preceding, and

(F) the number of miles of water or steam pipes, gas mains or electric wires wherever operated by such company or municipal utility on said dates. Gas pipeline and gas transmission companies which do not manufacture or buy gas in this state for resale in this state shall be subject to the provisions of chapter 208 and shall not be subject to the provisions of this chapter and chapter 212a.

(2) No person, firm, corporation or municipality that is chartered or authorized by this state to transmit or sell gas within a franchise area shall transmit gas for any person that sells gas to be used for light, heat or power to an end user or users located in this state, unless such seller has registered with the Department of Revenue Services for purposes of the tax imposed under this chapter. The provisions of this subdivision shall not apply to the transmission of gas for any seller that is a gas company, as defined in section 16-1, municipal gas utility established under chapter 101 or any other gas utility owned, leased, maintained, operated, managed or controlled by any unit of local government under any general statute or any public or special act, or a gas pipeline or gas transmission company subject to the provisions of chapter 208.

(3) The Commissioner of Revenue Services may make public the names and addresses of each person that sells gas to be used for light, heat or power to an end user or users located in this state and has registered with the Department of Revenue Services for purposes of the tax imposed under this chapter, and that is not a gas company, as defined in section 16-1, a municipal gas utility established under chapter 101 or any other gas utility owned, leased, maintained, operated, managed or controlled by any unit of local government under any general statute or any public or special act, or a gas pipeline or gas transmission company subject to the provisions of chapter 208.

(c)

(1) Each electric distribution company, as defined in section 16-1, providing electric transmission services, as defined in said section 16-1, or electric distribution services, as defined in said section 16-1, shall pay a quarterly tax upon its gross earnings in each calendar quarter at the rate of (A) eight and one-half per cent of its gross earnings from providing electric transmission services or electric distribution services allocable to other than residential service and (B) six and eight-tenths per cent of such gross earnings from

providing electric transmission services or electric distribution services allocable to residential service.

(2) For purposes of this subsection, gross earnings from providing electric transmission services or electric distribution services shall include

(A) all income classified as income from providing electric transmission services or electric distribution services by the Department of Public Utility Control in the uniform system of accounts prescribed by said department and

(B) the competitive transition assessment collected pursuant to section 16-245g, the systems benefits charge collected pursuant to section 16-245l, and the assessments charged under sections 16-245m and 16-245n. Such gross earnings shall not include income from providing electric transmission services or electric distribution services to a company described in subsection (c) of section 12-265.

(3) Each electric distribution company shall, on or before the last day of January, April, July and October of each year, render to the Commissioner of Revenue Services a return on forms prescribed or furnished by the commissioner and signed by its treasurer, or the person performing the duties of treasurer, or of an authorized agent or officer, with such other information as the Commissioner of Revenue Services deems necessary.

(d) The tax imposed by this chapter is due and payable to the Commissioner of Revenue Services quarterly on or before the last day of the month next succeeding each calendar quarter.

(1949 Rev., S. 1950; 1951, S. 1112d; 1961, P.A. 604, S. 14; 1963, P.A. 2, S. 1; P.A. 73-442, S. 7; P.A. 74-329; P.A. 75-486, S. 29, 69; P.A. 76-114, S. 11, 21; P.A. 77-614, S. 139, 162, 610; P.A. 80-482, S. 20, 348; P.A. 84-458, S. 1, 2; P.A. 94-101, S. 1, 3; May Sp. Sess. P.A. 94-4, S. 12, 85; P.A. 95-114, S. 2, 3, 5; 95-160, S. 64, 69; 95-172, S. 1, 2, 4; 95-359, S. 14, 15, 19; P.A. 96-205, S. 1, 3; P.A. 98-28, S. 54, 117; 98-244, S. 13, 35; P.A. 99-173, S. 43, 44, 65; P.A. 00-174, S. 27, 56, 83.)

History:

- 1961 act included municipal utilities and steam companies, and changed dates for annual return and for computing mileage of pipes, mains and wires;
- 1963 act specified gross earnings provision applied to all sales for resale to any public service corporation or municipal utility;
- P.A. 73-422 included foreign municipal electric utilities and specified "Connecticut" municipalities and districts;
- P.A. 74-329 made technical changes;
- P.A. 75-486 substituted public utilities control authority for public utilities commission;
- P.A. 76-114 revised section so that tax charged on quarterly rather than annual basis, effective July 1, 1976, and applicable to gross earnings in calendar quarter commencing January 1, 1977, and each calendar quarter thereafter;
- P.A. 77-614 substituted commissioner of revenue services for tax commissioner and division of public utility control within the department of business regulation for public utilities control authority, effective January 1, 1979;
- P.A. 80-482 made division of public utility control a separate department and deleted reference to abolished department of business regulation;
- P.A. 84-458 added exemption for systems of water works which do not fall within the definition of water company in section 16-1, effective June 11, 1984, and applicable with respect to calendar quarters commencing July 1, 1984, and thereafter;

- P.A. 94-101 divided section into Subsecs. (a) and (b) and further divided Subsec. (a) into Subdivs. and added provision re sale of natural gas as a fuel for a motor vehicle, effective July 1, 1994, and applicable to calendar quarters commencing on or after that date;
- May Sp. Sess. P.A. 94-4 deleted provision which had exempted certain companies operating water works but which are not water companies as defined in Sec. 16-1 from provisions of this chapter and chapter 212a, effective July 1, 1996, and applicable to calendar quarters commencing on or after said date;
- P.A. 95-114 divided Subsecs. (a) and (b) into Subdivs., changing former Subdivs. of Subsec. (a) to Subparas., and adding Subdiv. (3) re companies required to register pursuant to Sec. 16-258a and amended Subsec. (b)(4), expanding sales for resale to all purchasers, effective July 1, 1995;
- P.A. 95-160 changed effective date of May Sp. Sess. P.A. 94-4, S. 12 to July 1, 1997, and applicable to calendar quarters commencing on or after that date; P.A. 95-172 excluded income earned from the sale of propane as a fuel for motor vehicles from gross earnings of a gas company prior to January 1, 2000, effective July 1, 1995, and applicable to calendar quarters on or after that date;
- P.A. 95-359 amended Subsec. (a) to provide that gross earnings from operations under Subdiv. (3) shall be gross income from sales of natural gas and made technical changes, effective July 13, 1995;
- P.A. 96-205 amended Subsec. (a) to exempt sales of steam on or after July 1, 2000, effective July 1, 1996;
- P.A. 98-28 amended Subsec. (a)(2) by deleting reference to companies manufacturing, selling or distributing electricity, added new Subsec. (c) requiring electric distribution companies to pay gross earnings tax and added new Subsec. (d) concerning when tax is due and payable, effective January 1, 2000, and applicable to calendar quarters commencing on or after January 1, 2000;
- P.A. 98-244 amended Subsec. (b) to eliminate notarization requirement, effective June 8, 1998, and applicable to calendar quarters commencing on or after October 1, 1998;
- P.A. 99-173 amended Subsec. (a) to extend sunset from January 1, 2000, to January 1, 2002, effective June 23, 1999;
- P.A. 00-174 amended Subsec. (b) to designate existing provisions as Subdiv. (1), to add Subdiv. (2) re registration of sellers of gas and to add Subdiv. (3) re publishing of information re sellers of gas, effective July 1, 2000, and applicable to calendar quarters commencing on or after that date, and amended Subsec. (c)(3) to delete requirement that return be under oath and add requirement that return be signed, effective July 1, 2000.

See Chapter 138c re tax credits for donations to Rental Housing Assistance Trust Fund.

See Secs. 12-268d and 12-268e re failure to pay tax when due, re fraudulent returns and re penalties.

- Effect of words "the principal business of which is". 90 Conn. 452.
- "Gross earnings" under former statute. 90 Conn. 452; 131 Conn. 1.
- Corporation operating a system of dams and gates for conservation of water for benefit of lower riparian stockholders, but not owning the water, is not taxable under this section. 92 Conn. 38. Cited. 106 Conn. 580; 134 Conn. 299.
- Since "transmission receipts" are not classified as "operating revenues" in the uniform system of accounts, or in any other accounts enumerated in this section, they are not taxable under chapter 212 of the general statutes. 169 Conn. 58.

History of statute discussed.

- 150 Conn. 578. Where plaintiff received seventy-five per cent of its gross earnings from furnishing steam for heat, this was its principal business and it was subject to the tax imposed by this section rather than to the corporate business tax on net income imposed by section 12-214.
- 151 Conn. 688. Where public utility water company which also sold produce and nursery stock claimed expenses of its orchard and nursery operations should be deducted from its gross earnings by virtue of a system of accounts prescribed by the public utilities commission, held that the statute may not be modified by a regulation of the commission and the company was not entitled to such deduction.
- 152 Conn. 674, 675. Amendments to uniform system of accounts after 1945 have no effect on tax base stated in this statute.
- 161 Conn. 145. "Gross earnings from operations" are all items contemplated by sections 600 through 615 of 1941 uniform system of accounts prescribed for electrical utilities and other receipts which fall under any of listed categories. 161 Conn. 145. Cited. 202 Conn. 583, 597.
- A combination of various factors, not conclusive individually, determine the "principal" business of a company. 26 Conn. Sup. 277, 282, 283.
- “Principle” Business - A combination of various factors, not conclusive individually, determine the "principal" business of a company. 26 Conn. Sup. 277, 282, 283.

2. §12-265(b)(1) - Deductions from Gross Earnings from Such Operations.

Conn. Gen. Stat. §12-265(b) allows companies subject to the tax to take certain deductions from their gross earnings from such operations. Conn. Gen. Stat. §12-265(b) provides:

(1) Each company and municipal utility included in section 12-264 other than an electric distribution company, as defined in section 16-1, included in subsection (c) of section 12-264, shall be taxed at the rate of five per cent upon the amount of gross earnings in each taxable quarter from operations, except as set forth in subsection (c) or (d) of this section and except that each company and municipal utility manufacturing, selling or distributing gas or electricity to be used for light, heat or power shall be taxed at the rate of four per cent upon the amount of gross earnings in each taxable quarter allocable to residential service, but deduction shall be made of gross earnings

- (A) from all sales for resale of water, steam, gas and electricity to public service corporations and municipal utilities, whether or not such purchasers are Connecticut public service corporations or Connecticut municipal utilities, and whether or not they are subject to the tax imposed by this chapter,
- (B) from any federal BTU energy tax included in adjustment clause and base-rate revenues,
- (C) from sales of appliances using water, steam, gas or electricity by each such company of the net invoice price plus transportation costs of such appliances,
- (D) of electric and gas companies, as defined in section 16-1, from energy conservation loan programs,
- (E) from all sales for resale of gas to companies registered pursuant to section 16-258a, and
- (F) from all sales of natural gas to a user or entity located outside the state.

For purposes of Conn. Gen. Stat. §12-265, “net invoice price” means invoice price less trade discounts. Conn. Gen. Stat. §12-265(a)2).

3. 12-265(b)(2) - Gross Earnings for Any Taxable Quarter – Apportionment.

Conn. Gen. Stat. §12-265(b) (2)provides:

> Gross earnings for any taxable quarter, for the purposes of assessment and taxation, shall be as follows:
>
> (A) In the case of a company or municipal utility carrying on business or operating entirely within this state, the amount of gross earnings from operations;
>
> (B) in the case of a company or municipal utility carrying on business or operations a part of which is outside of this state,
>
> - (i) such portion of the amount of gross earnings from operations determined under the provisions of section 12-264 as is represented by the ratio of the number of miles of water or steam pipes, gas mains or electric wires operated by such company or municipal utility within this state on the first day and on the last day of the calendar year immediately preceding to the total number of miles of water or steam pipes, gas mains or electric wires operated by such company or municipal utility on said dates; or
> - (ii) in the case of a company required to register pursuant to section 16-258a, such portion of the amount of gross earnings from operations determined under the provisions of section 12-264 as is represented by the ratio of the sales in this state to end users during such quarter to the total sales everywhere to end users during such quarter.

4. 12-265(c)- Rate. Deductions.

Conn. Gen. Stat. §12-265(c) provides that:

> The rate of tax on the sale, furnishing or distribution of electricity or natural gas for use directly by a company engaged in a manufacturing production process, in accordance with the Standard Industrial Classification Manual, United States Office of Management and Budget, 1987 edition, classifications 2000 to 3999, inclusive, or Sector 31, 32 or 33 in the North American Industrial Classification System United States manual, United States Office of Management and Budget, 1997 edition, shall be four per cent with respect to calendar quarters commencing on or after January 1, 1994, and prior to January 1, 1995, three per cent with respect to calendar quarters commencing on or after January 1, 1995, and prior to January 1, 1996, and two per cent with respect to calendar quarters commencing on or after January 1, 1996, and prior to January 1, 1997.
>
> The sale, furnishing or distribution of electricity or natural gas for use by a company as provided in this subsection shall not be subject to the provisions of this chapter with respect to calendar quarters commencing on or after January 1, 1997. Not later than thirty days after May 19, 1993, and thirty days after the effective date of each rate decrease provided for in this section, each electric and gas public service company, as defined in section 16-1, as amended, which does not have a proposed rate amendment under section 16-19 pending before the Department of Public Utility Control at such time, shall request the department to reopen the proceeding under section 16-19 on the company's most recent rate amendment, solely for the purpose of decreasing the company's rates to reflect the decreases required under this section. The department shall immediately reopen such proceedings, solely for such purpose.

5. Proposed 2001 Legislation

In the 2001 legislative session, DRS proposed *An Act Updating Provisions Relating To the Utility Companies' Gross Earnings Tax,* HB 6880. The legislature did not vote on the bill.

The general explanation at the end of the bill provides:

> The bill allows gas companies and suppliers to deduct from taxable gross earnings any receipts from sales of natural gas to federally designated "exempt wholesale generators." This exclusion is expected to result in a significant revenue loss and will also prelude future a revenue gain from new gas fired electric generating plants that come on line. The amount of the revenue loss is not known at this time.
>
> The other changes contained in the bill are primarily technical and conform to existing practice of the Department of Revenue Services. Therefore they result in no significant changes in revenue and provide for more efficient administration of the utilities gross earnings tax in a de-regulated environment.

OLR Summary

The Office of Legislative Research explanation offers more details.

> This bill makes various changes in the gross earnings tax on gas and electric companies, natural gas suppliers, and gas transmission and pipeline companies. It:
>
> - allows private and municipal gas companies and suppliers to deduct from taxable gross earnings any gross receipts from sales of natural gas to federally designated "exempt wholesale generators," if the generator uses the gas directly to generate electricity;
> - eliminates specific methods for gas and electric companies that do business in Connecticut and other states to apportion their taxable gross earnings to Connecticut

based on sales ratios or relative miles of transmission pipes or wires and makes conforming changes; and

- reorganizes and makes more specific the laws governing the gross earnings tax (see COMMENT).

It also eliminates obsolete language concerning (1) deductions for federal BTU energy tax payments and (2) completed phase-outs of the tax on sales to manufacturing companies and sales of steam.

EFFECTIVE DATE: July 1, 2001 and applicable to calendar quarters beginning on and after that date.

Deduction for Sales to Exempt Wholesale Generators

Under current law and the bill, gas companies must pay a quarterly 5% tax (4% on sales to residential customers) on their gross earnings from manufacturing, selling, or distributing natural gas for heat, light, or power. Certain revenues, such as those from wholesale sales, sales of appliances, and sales to out-of-state users, are exempt. This bill adds an exemption for gross revenues from natural gas sales to entities that the Federal Energy Regulatory Commission determines are exempt wholesale generators of electricity under federal law. To be exempt the generator must use the gas directly to generate electricity.

Federal law defines an "exempt wholesale generator" as an entity that, directly or through affiliates, owns, operates, or owns and operates facilities used to generate electricity. The electricity must be generated exclusively for wholesale sale or the generating facility must be leased to one or more utilities and the lease must be treated as a wholesale sale under federal law (15 USCA 79z-5a(1) and (2)).

Multistate Apportionment

Electric and gas companies, municipal utilities, and gas suppliers that are not gas distribution, pipeline, or transmission companies must allocate a share of their gross earnings to Connecticut for tax purposes if part of their business is out-of-state. Under current law, a gas or electric company must allocate gross earnings to Connecticut based on the ratio of the miles of gas mains or electric wires it operated in the state on the first and last day of the preceding calendar year to its total miles of pipes or wires. Other types of gas suppliers must allocate their earnings based on their ratio of sales to Connecticut end users during the taxable quarter to their total sales for the quarter.

This bill eliminates both allocation methods. Under the bill, the tax is still based on operations or sales in Connecticut but the exact formula for apportioning company earnings for tax purposes is not specified. The bill also eliminates companies' required quarterly reporting to the Department of Revenue Services on their miles of pipes and wires and the revenue services commissioner's authority to adjust the apportionment method when he finds it is not operating to allocate a fair proportion of a company's revenue to the state.

Comment

Inaccurate Reference

The bill replaces a provision allowing gas and electric companies to deduct payments from "energy conservation loan programs" with a more specific one allowing them to deduct payments to the economic and community development commissioner under Conn. Gen. Stat. § 16-40b(f). This reference should apparently be to Conn. Gen. Stat. § 16a-40b(f), which requires companies to pay amounts assessed by the commissioner for the Energy Conservation Loan Fund, the Home Heating System Loan Fund, and the Housing Repayment and Revolving Loan Fund.

6. 16-258a(a). Registration of natural gas sellers.

Conn. Gen. Stat. §16-258a(a) requires natural gas sellers to register with DPUC. As amended by P.A. 01-49, Conn. Gen. Stat. §16-258a provides:

(b) Each person that sells natural gas to an end user in the state and is not

(4) a gas company, as defined in section 16-1,

(5) a municipal gas utility established under chapter 101 or any other gas utility owned, leased, maintained, operated, managed**[**,**]** or controlled by any unit of local government under any general statute or any public or special act, or

(6) a gas pipeline or gas transmission company subject to the provisions of chapter 208,

shall register with the Department of Public Utility Control prior to making any such sale by filing a form supplied by said department.

7. 16-258a(b) and (c). Other Requirements for Registered Natural Gas Sellers.

Conn. Gen. Stat. §16-258a(b)and (c) establish other requirements for registered natural gas sellers. They provide:

(c) Each person registered with the department shall:

(1) Maintain a bond or other security in amount and form approved by the department, to ensure the person's financial responsibility and its supply of natural gas to end-use customers in accordance with contracts, agreements or arrangements;

(2) have a contractual relationship with an entity or entities to purchase natural gas supply;

(3) comply with the National Labor Relations Act and regulations, if applicable;

(4) comply with the Connecticut Unfair Trade Practices Act and applicable regulations; and

(5) agree to cooperate with

(A) each gas company,

(B) each municipal gas utility established under chapter 101 or any other gas utility owned, leased, maintained, operated, managed or controlled by any unit of local government under any general statute or special act,

(C) each gas pipeline or gas transmission company subject to the provisions of chapter 208,

(D) the department, and

(E) all other gas suppliers in the event of an emergency condition that may jeopardize the safety and reliability of the state's natural gas system.

(d) Each person registered with the department shall, at such times as the department requires but not less than annually, submit to the department, on a form prescribed by the department, an update of information the department deems relevant. A registered person shall notify the department at least ten days before a change in corporate structure that affects the person. Each registered person shall pay an annual registration fee to be determined by the department which shall not exceed the actual administrative costs of the department.

(e) No registration may be transferred without the prior approval of the department. The department may assess additional registration fees to pay the administrative costs of reviewing a request for such transfer.

(f) Any person who violates any provision of this section shall be subject to sanctions by the department in accordance with section 16-41, which may include, but are not limited to, the suspension or revocation of such registration or a prohibition on accepting new customers.

(P.A. 95-114, S. 1, 5; P.A. 98-218, S. 1, 3; P.A. 00-91, S. 1.)

History: P.A. 95-114 effective July 1, 1995; P.A. 98-218 moved "in the state", effective July 1, 1998; P.A. 00-91 made technical changes in existing provisions, designated existing provisions as Subsec. (a) and inserted new Subsecs. (b) to (e), inclusive, re gas registrant requirements and penalties.

B. What kind of tax is the Utility Companies Tax?

Considering definitions for the terms *sale*, *end user*, and *in this state* could mean raises the question, what kind of tax this is, anyway? Is the Utility Companies Tax more like a sales tax, so that sales tax concepts and definitions and cases like *Quill* on use tax collection duties apply? Or, is the tax is more like an income tax, so that income tax concepts and definitions, and cases like *Wrigley* and *Moorman* apply? Deciding what kind of tax the Utility Companies Tax is the starting point for deciding whether income tax rules or sales tax rules provide the better analytical framework for determining:

- Who is subject to the tax, and whom Connecticut may tax;
- What is subject to tax, and what Connecticut may tax;
- The definition of sale; and
- How the deduction rules and apportionment rules work in Conn. Gen. Stat. §12-265.

At least in commerce clause challenges to state taxing schemes, courts consider "not the formal language of the tax statute but rather its practical effect," to determine whether it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."[87]

1. The Utility Companies Tax has the practical effect of an income tax.

One may argue that the Utility Companies Tax is more like an income tax because the legal incidence of the tax is on the seller; the measure of the tax is *income;* and because the tax includes an apportionment provision.

The legal incidence of the Utility Companies Tax is on the seller of natural gas.

The legal incidence of the tax is on *sellers* of natural gas, not buyers of natural gas. Therefore, the Utility Companies Tax is not a tax on consumption.

Texaco v. Groppo, on the petroleum products gross earnings tax being measured by a petroleum company's earnings from the sale of petroleum products in this state, supports viewing the Utility Companies Tax as a tax on the seller, measured by gross earnings from certain kinds of sales.

Since direct taxes may be levied on interstate commerce, and since taxes on gross receipts are not barred by the commerce clause,[88] it is arguable that the Utility Companies Tax is a permissible tax on the privilege of conducting an interstate business in the Connecticut, permissibly measured by fairly apportioned gross earnings.

The measure of the tax is* gross income *from certain kinds of sales.

Conn. Gen. Stat. §12-264(a)(3) subjects each "company required to register pursuant to section 16-258a" to file a quarterly tax on its *gross earnings from such operations in this state*. Conn. Gen. Stat. §12-264(a) provides that *gross earnings from such operations* under Conn. Gen. Stat. §12-264(a)(3) means *gross income from the sales of natural gas*. Thus, the measure of the Utility Companies Tax is *gross income from sales of natural gas in this state.*

The recent *Greenwich Hospital* case, which likened the hospital gross earnings tax to an income tax, supports a conclusion that the Utility Companies Tax is more like an income tax.[89]

Apportionment Provision

The presence of the apportionment provision in Conn. Gen. Stat. §12-265 supports viewing the tax as having the practical effect of an income tax. Income taxes have apportionment formulas, sales tax usually don't. It could be that the apportionment provision is a one-factor apportionment formula based on income from certain kinds of sales.

Commerce Clause Implications

According to the Hellersteins, under the court's contemporary commerce clause doctrine, neither direct gross receipts taxes levied by the manufacturing or producing state, nor franchise taxes on interstate selling levied by the market states are *per se* invalid under the commerce clause.[90] In an earlier treatise, Walter Hellerstein noted that there is no commerce clause barrier to state taxation of an instate activity that is measured by the gross receipts from sales of the goods *manufactured* instate. The sales price in such cases is no more than the measure of the value of the goods manufactured, and so an appropriate measure of the value of the privilege of doing business in the state.[91]

While Hellerstein used manufacturing as an example of instate activity, the argument might be made that a tax measured by the gross receipts from sales of goods sold in the state is an appropriate measure of the value of the privilege of doing business in the state, that in turn is an appropriate measure of the value of the *market* provided by the state.

> If gross receipts taxed are fairly apportioned among the various States in which they are *generated* (Hellerstein replaced "earned or produced" in his previous edition with "generated", and perhaps the distinction is significant in this context), there can be no serious quarrel with the results of the new commerce clause approach. However, when the cases sustaining taxes measured by unapportioned gross receipts from sales outside the state of products mined, manufactured or produced in the State are coupled with more recent holdings that the same receipts may be included in full in the tax base of the state in which they are marketed, the risks of duplicative taxation are unmistakable.[92]
>
> To avoid the risk of duplicative taxation, and to foster sound fiscal policy, an equitable apportionment of the receipts in both the producing and *market states* appears to be required. Nevertheless, it is less clear than it should be whether the court's current interpretation of the commerce clause or the Due Process Clause would compel either state to provide for such apportionment . . . [93]

Accordingly, if the Utility Companies Tax is more like an income tax, commerce clause challenges to *what* is subject to tax will be evaluated at least partly in terms of whether the apportionment formula is an appropriate measure of the value of having the privilege to sell natural gas in Connecticut, and whether that privilege may be measured only by the market that Connecticut provides.

2. The Utility Companies Tax has the practical effect of a sales and use tax.

Because the Utility Companies Tax is a tax on the vendor, an argument that the tax is more like a sales tax than an income tax needs is probably best couched in terms of the tax being either "seller or vendor privilege tax" or a "sales tax on gross income."

Types of Sales Taxes

Sales taxes are excise taxes imposed on the vendor, consumer, or both. Sales taxes are generally levied on retail sales within the state of tangible personal property or specified services. Use taxes supplement sales taxes by imposing a compensating tax for the privilege of using, storing, or consuming within the state tangible personal property or specified services, the purchase of which would have been subject to the sales tax had the sale occurred within the state.

Sales taxes are generally classified, on the basis of the legal incidence of the tax, into one of three types:

1. A "seller or vendor privilege tax," where the tax is imposed on the retailer (usually on gross receipts) for the privilege of selling tangible personal property at retail within the state;

2. A "retail transaction tax," where the tax is imposed on the sales transaction itself; the latter is a hybrid tax and the legal incidence of the tax may fall on either the seller or purchaser or both; and
3. A "consumer excise tax," where the tax is imposed on the purchaser of tangible personal property within the state, *but the seller is required to collect the tax from the purchaser*.

The question of the legal incidence of the tax – upon whom is the tax imposed, whether on the seller or purchaser – is significant because it determines who can be held liable for the tax, who can sue on the tax, or who can make a claim for refund of the tax.[94]

Scope of Sales Taxes.

With respect to scope, sales taxes may be classified as a:

1. General sales tax (not confined entirely to retail sales);
2. General retail sales tax;
3. Selective sales tax, such as the limited sales tax on specified services in most states or a tax limited to specific commodities in a few states;
4. Gross proceeds or gross receipts tax (from sales and services); and
5. Gross income tax (from all transactions).

In some states, the sales tax is in the nature of an occupation tax on specified businesses. Although some sales taxes apply only to retail sales of tangible personal property, the sales tax has been extended by some states to nonretail transactions, such as leases and licensing, and to services and other specified activities.

In spite of their variations, a basic principle is maintained: the tax is on the gross amount involved in the transaction. The tax is on the selling price, in the case of consumers' sales tax, or on the gross sales or receipts in the case of the vendor's privilege tax, without deductions on account of the cost of property sold, materials used, labor, or other expenses, subject to a few exceptions. Thus, the sales tax differs from the income tax where the tax base is a net amount derived by deducting statutorily allowed costs or expenses from the gross income or gross proceeds. Thus, the proprietor of a retail dress store, which operates at a loss, is not required to pay income tax, but the vendor/seller privilege sales tax is due on the gross receipts of sales made by the store despite the fact that no profit was realized.[95]

Vendor's Privilege Tax

In the vendor's privilege tax states, the tax is usually based on the vendor's gross receipts or gross sales. The terms "gross receipts," "gross sales," or "gross proceeds," as used in most sales tax laws, mean the total of all sales made during a given period. It includes the amount received in money, credits, property, or other money's worth in consideration of sales at retail within the state without deductions for the cost of the property sold, materials used, labor or service cost, or any other expense.

Gross receipts bear no necessary relation to gross or net profits from a business. The fact that a person may conduct business at a loss does not relieve him from liability for the gross receipts tax.[96]

Sales Tax on Gross Income

A few states impose sales taxes on "gross income." Gross income taxes are based on gross income derived from all sources, unless they are imposed as occupation taxes, in which case they apply only to gross income from those sources or occupations within the terms of the taxing statute.[97]

Consumers' Sales Tax

A majority of the states impose a consumers' sales tax. Generally, the tax is levied on each retail sale; the tax is measured by the sales or selling price without deduction for the seller's costs. The buyer bears the legal burden of the tax but the seller is required to collect and remit the tax.[98]

The Utility Companies Tax is a "vendor's privilege" sales tax.

The legal incidence of the Utility Companies Tax is on natural gas suppliers, the vendors.

In a vendor's privilege type of sales tax, the tax is usually based on the vendor's gross receipts or gross sales from selling tangible personal property at retail within the state. For natural gas suppliers, the Utility Companies tax is based on *gross earnings from such operations in this state* – referring to operations from selling natural gas in this state. The DPUC registration statute, by using the term *end user,* makes the tax apply to natural gas suppliers who make retail sales.

Additionally, for the most part, the Utility Companies Tax is on the total of all natural gas sales for a given period – a calendar quarter – usually without deductions for the cost of the property sold, materials used, labor or service cost, or any other expense.

The Utility Companies Tax is a "sales tax on gross income" imposed as an occupation tax.

Sales taxes on gross income are based on gross income derived from all sources, unless they are imposed as occupation taxes, in which case they apply only to gross income from those sources or occupations within the terms of the taxing statute. The legal incidence of the Utility Companies Tax is on natural gas suppliers, but instead of being imposed on gross income from all sources, the tax is imposed only on income from sales of natural gas in this state. Thus, the Utility Companies Tax may be characterized as a sales tax on gross income that is imposed as an occupation tax.

Koch Fuels v. Rhode Island (1996)

Koch Fuels v. Rhode Island supports characterizing the Utility Companies Tax as a sales tax. Even though the legal incidence of Utility Companies Tax is on the seller, it was not error for a Rhode Island district court to characterize a Rhode Island gross earning tax on importers who sell fuel oil as a sales or use tax.[99]

The structure of the Rhode Island tax is similar to that of the Utility Companies Tax. However, the Rhode Island District Court did not expressly state that the tax at issue was analogous to a sales tax. It merely adopted commerce clause cases, like *Quill*, to analyze the commerce clause argument that the taxpayer presented.

In *Koch Fuels v. Rhode Island*, the Rhode Island Supreme Court found that:

> Section 44-41-1(a), entitled "Gross Earnings Tax of Petroleum Companies," imposes on petroleum companies "an annual tax rate of one percent (1%) of gross earnings … derived … from the *sale* of petroleum products in this state." (Emphasis added.) The term "gross earnings" is defined as "those earnings from *sales* of its tangible personal property (inventory sold in the ordinary course of business) where shipments are made to points within the state *** [but] does not include those earnings from *sales* to out-of-state customers for marketing, distribution or consumption outside this state." (Emphasis added.) Section 44-41-1(b).
>
> It is clear that although the tax at issue is defined by the Legislature as a "gross earnings" tax, its application pursuant to the statute imposes a tax upon specific sales transactions in Rhode Island. The tax mandated by the statute therefore has the practical effect of a sales or use tax. *See Complete Auto Transit,. Inc. v. Brady*, 430 U.S. 274, 279, 97 S. Ct. 1076, 1079, 51 L. Ed. 2d 326, 331 (1977) (the United States Supreme Court noted that when confronted with commerce-clause challenges of state taxes, it considered "not the formal language of the tax statute but rather its practical effect"). We are therefore of the opinion that the District Court correctly characterized the tax at issue as a sales or use tax. [100]

C. Working Notes on State Authority to Regulate Sales of Natural Gas

Under *GM v. Tracy*, 519 US 278 (1996), DPUC has authority to regulate sales to Connecticut end users, because of the health, safety and welfare issues associated with keeping a ready supply of natural gas for the state's residents.

However, it is not clear that the legislature intended the Utility Companies Tax to apply *only* to natural gas suppliers who sell natural gas to end users in Connecticut.

DPUC has the authority to regulate sales of natural gas in CT, especially because of the inherent danger of the commodity, but that assumes the product is present in Connecticut.

Even though Connecticut may have the authority to regulate sales of natural gas made in the state even though the gas may be destined for users outside the state, it is not clear that the legislature intended the Utility Companies Tax to apply only to natural gas suppliers who make sales in Connecticut, regardless of where the end user is.

GM v. Tracy "recognizes the powerful state interest in regulating all in-state gas sales directly to domestic consumers buying at retail."

Arguments related to Connecticut's ability to regulate natural gas suppliers are found in *GM v. Tracy* and can be analogized from *Heublein v. South Carolina*.

GM v Tracy supports a state's authority to regulate gas sales to the state's consumers.

Heublein v. South Carolina supports a state's authority to regulate business, in this case selling alcohol, however it chooses, as long as the state's regulation requirements are reasonably related to a legitimate state interest. In *Heublein*, South Carolina essentially forced nexus on a company as a condition of being qualified to ship alcoholic beverages into the state.

1. GM v. Tracy

GM v. Tracy decided that Ohio's differential treatment of public utilities and independent marketers as to a tax involving sales of natural gas violated neither the commerce clause nor the equal protection clause. In analyzing commerce clause and equal protection arguments against an Ohio tax, *GM v. Tracy* explains the evolution of the natural gas industry and the propriety of the states' interests in regulating it.

State regulation of gas sales to consumers serves important health and safety interests in fairly obvious ways, in that requirements of dependable supply and extended credit assure that individual domestic buyers are not frozen out of their houses in the cold months. The legitimate state pursuit of such interests is compatible with the commerce clause, *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443–444.

Almost as soon as the States began regulating natural gas retail monopolies, their power to do so was challenged by interstate vendors as inconsistent with the dormant commerce clause. While recognizing the interstate character of commerce in natural gas, the court nonetheless affirmed the States' power to regulate, as a matter of local concern, all direct sales of gas to consumers within their borders, absent congressional prohibition of such state regulation. See, e.g., *Pennsylvania Gas Co. v. Public Serv. Comm'n of N. Y.,* 252 U.S. 23, 28-31 (1920); *Public Util. Comm'n of Kan. v. Landon*, 249 U.S. 236, 245-246 (1919). At the same time, the court concluded that the dormant commerce clause prevents the States from regulating interstate transportation or sales for resale of natural gas. See, e.g., *Missouri ex rel. Barrett v. Kansas National Gas Co*., 265 U.S. 298, 307-310 (1924); *Pennsylvania v. West Virginia*, 262 U.S. 553, 596-600, reaffirmed on rehearing, 263 U.S. 350 (1923). See generally *Illinois Natural Gas Co. v. Central Ill. Public Service Co*., 314 U.S. 498, 504 -505 (1942) (summarizing prior cases distinguishing between permissible and impermissible state regulation of commerce in natural gas). Thus, the court never questioned the power of the States to regulate retail sales of gas within their respective jurisdictions. *GM v. Tracy*, 519 US 278, at 290 – 291, citing Dorner §2.06.

But, in a footnote to the preceding paragraph, the US Supreme Court elaborated on the states' authority to regulate sales of gas.

[Footnote 8] In *Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983), we rejected the bright line distinction between wholesale and retail sales drawn by these older cases and concluded that state regulation of wholesale sales of electricity transmitted in interstate commerce is not precluded by the commerce clause. Reasoning that utilities should not be insulated from our contemporary dormant commerce clause jurisprudence by formalistic judge made rules, id., at 391, we looked instead to " `the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce,' " id., at 390 (quoting *Illinois Natural Gas Co. v. Central Ill. Public Service Co*., 314 U.S. 498, 505 (1942)), to determine whether States have a sufficient interest in regulating wholesale rates within their borders, and had no problem concluding that States do indeed have such an interest, with the result that state regulation of wholesale rates is not precluded by the commerce clause (in the absence of preemptive congressional action), id., at 394-395. While the holding of *Arkansas Electric* thereby expanded both the permissible scope of state utility regulation and judicial recognition of the important state interests in such regulation, *the reasoning of the case equally implies that state regulation of retail sales is not, as a constitutional matter, immune from our ordinary commerce clause jurisprudence, and to the extent that our earlier cases may have implied such immunity they are no longer good law*. Nothing in *Arkansas Electric* undermines the earlier cases' recognition of the powerful state interest in regulating sales to domestic consumers buying at retail, however, which we reaffirm here. In addition, Arkansas Electric does not disturb the relevance of the wholesale/retail distinction for construing the jurisdictional provisions of statutes such as the NGA, which we discuss immediately below. See id., at 380, and n. 3; see also Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300 -301 (1988) ("The NGA confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale").

GM v. Tracy, 519 US 278, note 8, at 290-291 (emphasis added).

2. Heublein v. South Carolina

Heublein v. South Carolina Tax Commission, 409 US 275 (1972) upheld South Carolina's right to compel Heublein to undertake activities that took it beyond the protection of PL 86-272. South Carolina's Alcoholic Beverage Control Act allowed only registered producers of registered brands of alcoholic beverages to ship those brands of alcoholic beverages into South Carolina. South Carolina also required registered producers to have a resident representative, and allowed shipments of alcoholic beverages into the state only in care of the registered producer's resident representative. Heublein complied with these rules and had one employee in South Carolina, even though the employee arrangement served none of Heublein's business interests.

The US Supreme Court decided that South Carolina's regulation of liquor sales in the manner it chose did not evade Congress's intent in enacting PL 86-272. Further, the court declined to read PL 86-272 as prohibiting states from adopting local regulatory schemes, even when the regulation requires the producer to have more than the minimum contacts with the state for which PL 86-272 provides tax immunity.

The court also stated that regulation is an important function of local governments in our federal scheme, and that when a state enacts a regulatory scheme that serves legitimate state purposes other than assuring that the state may tax a company's income, it is not evading PL 86-272; it is pursuing permissible ends in a manner that Congress did not address—at least in PL 86-272.

> ***The Court found that South Carolina's purpose and system of regulating liquor sales were valid, and that PL 86-272 does not prohibit taxation of Heublein's South Carolina sales. The objective of South Carolina's regulation was reasonably related to legitimate state interests and not simply to provide a basis for taxing an out-of-state seller's local sales.***

It is worth noting, however, that at least part of South Carolina's basis for regulating was related to the 21st amendment to the Constitution, about which the court previously said that by virtue of its provisions a State is totally unconfined by traditional commerce clause limitations when it restricts the importation of intoxicants destined for use, distribution of consumption within its borders." *Heublein v. South Carolina,* citing *Hostetter v. Idlewild Bon Voyage Liquor Corp*., 377 US 324, 330 (1964).

IX. Endnotes

[1] Ruling Request, p1.

[2] http://www.pgecorp.com/overview/neg.html; http://www.neg.pge.com/index.html

[3] Ruling Request, p1.

[4] Ruling Request, p1.

[5] Ruling Request, p1.

[6] Gas pipelines are considered common carriers. See *General Motors v.Tracy*.

[7] Ruling Request, p2.

[8] http://www.pgecorp.com/financial/reports/1999annualreport/YearInReview/f_30nat_enrgy.html

[9] http://www.pgecorp.com/overview/neg.html; http://www.neg.pge.com/index.html

[10] http://www.pgecorp.com/overview/

[11] Connecticut Natural Gas Corporation, at http://www.cngcorp.com/natural_gas_at_work/index.html.

[12] *Supplies Lag Despite New Natural Gas Wells,* New York Times (July 22, 2001).

[13] *How Coal Got Its Glow Back,* New York Times (July 22, 2001).

[14] *GM v. Tracy*, citing as examples *Associated Gas Distributors v. FERC*, 824 F. 2d 981, 993 (CADC 1987), cert. denied, 485 U.S. 1006 (1988); Mogel & Gregg, Appropriateness of Imposing Common Carrier Status on Interstate Natural Gas Pipelines, 4 Energy L. J. 155, 157 (1983).

[15] 52 Stat. 821, 15 U.S.C. §717 et seq.

[16] *Monopsony* refers to a condition of the market where there is onely one buyer for a particular commodity.

[17] *GM v. Tracy*, citing Pierce, The Evolution of Natural Gas Regulatory Policy, 10 Nat. Resources & Env't 53, 53-54 (Summer 1995).

[18] *GM v. Tracy.*

[19] 92 Stat. 3350, 15 U.S.C. §3301.

[20] *GM v. Tracy,* citing 57 Fed. Reg. 13271 (1992).

[21] *GM v. Tracy,* citing as an example *Associated Gas Distributors v. FERC*, at 993.

[22] *GM v. Tracy,* citing Order No. 436, 50 Fed. Reg. 42408.

[23] *GM v. Tracy,* citing Fagan, From Regulation to Deregulation: The Diminishing Role of the Small Consumer Within the Natural Gas Industry, 29 Tulsa L. J. 707, 723 (1994).

[24] GM v. Tracy, citing as examples In re Commission Ordered Investigation of the Availability of Gas Transportation Service Provided by Ohio Gas Distribution Utilities to End Use Customers, No. 85-800%GA-COI (Ohio Pub. Util. Comm'n, April 15, 1986); see also generally Natural Gas Marketing and Transportation Committee, 1990 Annual Report, in Natural Resources Energy and Environmental Law, 1990 Year in Review 57, 91-92, and n. 207 (1991).

[25] *GM v. Tracy,* citing 57 Fed. Reg. 13267.

[26] *GM v. Tracy*, citing e.g., *Consolidated Edison Co. of N. Y. v. FERC,* 676 F. 2d 763, 766, n. 5 (CADC 1982).

[27] *GM v. Tracy*, citing Pierce, Intrastate *Natural Gas Regulation: An Alternative Perspective*, 9 Yale J. on Reg. 407, 409-410 (1992).

[28] GM v. Tracy, citing A. Samuels, Reliability of Natural Gas Service for Captive End Users Under the Federal Energy Regulatory Commission's Order No. 636, 62 Geo. Wash. L. Rev. 718, 749 (1994).

[29] *GM v. Tracy*, citing Darr, *A State Regulatory Strategy for the Transitional Phase of Gas Regulation*, 12 Yale J. on Reg. 69, 99 (1995).

[30] *Supplies Lag Despite New Natural Gas Wells,* New York Times (July 22, 2001).

[31] *Supplies Lag Despite New Natural Gas Wells,* New York Times (July 22, 2001).

[32] *Supplies Lag Despite New Natural Gas Wells,* New York Times (July 22, 2001).

[33] *How Coal Got Its Glow Back,* New York Times (July 22, 2001).

[34] *Supplies Lag Despite New Natural Gas Wells,* New York Times (July 22, 2001).

[35] *Supplies Lag Despite New Natural Gas Wells,* New York Times (July 22, 2001).

[36] http://www.cngcorp.com/customer_sales_service/commercial_services/deregulation_information.html

[37] Conn. Gen. Stat. §12-264(b)(1); SN 2000(13), *2000 Legislation Affecting the Utility Company Gross Earnings Tax* (9/1/00); AN 99(3), *Connecticut Registration Requirements for Gas Marketers* (6/18/99).

[38] No person or municipality that is chartered or authorized by the State of Connecticut to transmit or sell gas within a franchise area may transmit gas for a natural gas supplier that sells gas to an end user located in Connecticut unless the natural gas supplier is registered with DRS for the Utility Companies Tax. However, this rule does not apply to the transmission of gas for a natural gas supplier that is:

- A gas company, as defined in Conn. Gen. Stat. §16-1;
- A municipal gas utility established under chapter 101 of the Connecticut General Statutes;
- A gas utility owned, leased, maintained, operated, managed, or controlled by any unit of local government under any general statute or any public or special act; or
- A gas pipeline or gas transmission company that is subject to the corporation business tax.

SN 2000(13), *2000 Legislation Affecting the Utility Company Gross Earnings Tax* (9/1/00).

[39] AN 99(3), *Connecticut Registration Requirements for Gas Marketers* (6/18/99).

[40] However, the registration requirement under Conn. Gen. Stat. §16-258a does not apply to:

- Any person who is a gas company, as defined in Conn. Gen. Stat. §16-1;
- A municipal gas utility established under chapter 101 of the Connecticut General Statutes;
- Any other gas utility owned, leased, maintained, operated, managed, or controlled by any unit of local government under any general statute or any public or special act; or
- A gas pipeline or gas transmission company subject to the provisions of chapter 208 of the Connecticut General Statutes.

AN 99(3), *Connecticut Registration Requirements for Gas Marketers* (6/18/99).

[41] SN 95(9), *1995 Legislative Amendments Affecting the Utility Companies Tax* (7/20/95).

[42] Sec. 16-258a. Registration of natural gas sellers. Procedures. Penalties. [as amended by P.A. 01-49.] See Appendix.

[43] Public Act No. 98-218, An Act Concerning Taxes Related to Gas Companies (Substitute Senate Bill No. 495)

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Section 16-258a of the general statutes is repealed and the following is substituted in lieu thereof:

Each corporation, company, association, joint stock association, partnership or person, or lessee thereof, which sells natural gas **[in the state]** to an end user **IN THE STATE** and is not

(1) a gas company, as defined in section 16-1,

(2) a municipal gas utility established under chapter 101 or any other gas utility owned, leased, maintained, operated, managed, or controlled by any unit of local government under any general statute or any public or special act, or

(3) a gas pipeline or gas transmission company subject to the provisions of chapter 208, shall register with the Department of Public Utility Control prior to making any such sale by filing a form supplied by said department.

Sec. 2. **Subsection (b) of section 12-265** of the general statutes is repealed and the following is substituted in lieu thereof:

(b)

(1) Each company and municipal utility included in section 12-264 shall be taxed at the rate of five per cent upon the amount of gross earnings in each taxable quarter from operations, except as set forth in subsection (c) or (d) of this section and except that each company and municipal utility manufacturing, selling or distributing gas or electricity to be used for light, heat or power shall be taxed at the rate of four per cent upon the amount of gross earnings in each taxable quarter allocable to residential service, but deduction shall be made of gross earnings

(A) from all sales for resale of water, steam, gas and electricity to public service corporations and municipal utilities, whether or not such purchasers are Connecticut public service corporations or Connecticut municipal utilities, and whether or not they are subject to the tax imposed by this chapter,

(B) from any federal BTU energy tax included in adjustment clause and base-rate revenues,

(C) from sales of appliances using water, steam, gas or electricity by each such company of the net invoice price plus transportation costs of such appliances,

(D) of electric and gas companies, as defined in section 16-1, from energy conservation loan programs, **[and]**

(E) from all sales for resale of gas to companies registered pursuant to section 16-258a**, AS AMENDED BY THIS ACT, AND**

(F) **FROM ALL SALES OF NATURAL GAS TO A USER OR ENTITY LOCATED OUTSIDE THE STATE.**

(2) Gross earnings for any taxable quarter, for the purposes of assessment and taxation, shall be as follows:

(A) In the case of a company or municipal utility carrying on business or operating entirely within this state, the amount of gross earnings from operations;

(B) in the case of a company or municipal utility carrying on business or operations a part of which is outside of this state,

(i) such portion of the amount of gross earnings from operations determined under the provisions of section 12-264 as is represented by the ratio of the number of miles of water or steam pipes, gas mains or electric wires operated by such company or municipal utility within this state on the first day and on the last day of the calendar year immediately preceding to the total number of miles of water or steam pipes, gas mains or electric wires operated by such company or municipal utility on said dates; or

(ii) in the case of a company required to register pursuant to section 16-258a, **AS AMENDED BY THIS ACT**, such portion of the amount of gross earnings from operations determined under

> the provisions of section 12-264 as is represented by the ratio of the sales in this state to end users during such quarter to the total sales everywhere to end users during such quarter.

Sec. 3. This act shall take effect July 1, 1998.

Approved June 8, 1998

[44] Oral testimony of *Edna Karanian, VP – Energy Services, Connecticut Natural Gas Corporation,* Energy and Technology, March 3, 1998, page 000569.

[45] Written testimony of Edna Karanian, VP – Energy Services, Connecticut Natural Gas Corporation, Energy and Technology, March 3, 1998, page 000615.

[46] *Ruling* No. 2000-6 (12/11/2000) (emphasis added).

[47] *Texaco v. Groppo,* note 6.

[48] *Texaco v. Groppo*, citing Department of Revenue v. Parker Banana Co., 391 So.2d 762, 763 (Fla. App. 1980); Strickland v. Patcraft Mills, Inc., 251 Ga. 43, 45, 302 S.E.2d 544 (1983); Olympia Brewing Co. v. Commissioner of Revenue, 326 Minn. 642, 648, 326 N.W.2d 642 (1982); Dupps Co. v. Lindley, 62 Ohio St. 2d 305, 307-308, N.E.2d (1980); Pabst Brewing Co. v. Department of Revenue, 130 Wis. 2d 291, 296, 387 N.W.2d 121 (1986); see also W. Pierce, “The Uniform Division of Income for State Tax Purposes,” 35 Taxes (CCH) 747, 780 (1957); contra J. Hellerstein, State and Local Taxation (1983) ¶9.17[1], pp. 584-88.

[49] However, a footnote in *GM v. Tracy* suggests that although states’ authority to regulate retail sales may once have been immune from commerce clause scrutiny, that is no longer the case. In a footnote, the US Supreme Court said:

> While the holding of *Arkansas Electric* thereby expanded both the permissible scope of state utility regulation and judicial recognition of the important state interests in such regulation, *the reasoning of the case equally implies that state regulation of retail sales is not, as a constitutional matter, immune from our ordinary commerce clause jurisprudence, and to the extent that our earlier cases may have implied such immunity they are no longer good law*. Nothing in *Arkansas Electric* undermines the earlier cases' recognition of the powerful state interest in regulating sales to domestic consumers buying at retail, however, which we reaffirm here.

General Motors Corp. v. Tracy, 519 US 278 (1996), footnote 8.

[50] The section on *What kind of tax is the Utility Companies Tax* was prepared before the author found a 63-page law review article that discusses in detail the importance of categorizing the tax that is under scrutiny. The author has yet to fully review this article, which may elucidate this issue. See Hellerstein, MacIntyre and Pomp, *Commerce Clause Restraints on State Taxation after Jefferson Lines,* 51 Tax L. Rev. 47 (1995). See also Pomp and Oldman, *State and Local Taxation,* volume 3 at page 12-29 (2000), discussing tax consequences accompanying deregulation.

[51] See item 10 of DPUC’s Form NGSR 4.0, *Natural Gas Supplier Registration Form.*

[52] *Koch Fuels, Inc. v. State of Oklahoma*, 862 P2d 471 (October 26, 1993).

[53] *Koch Fuels, Inc. v. State of Oklahoma*, 862 P2d 471 (October 26, 1993).

[54] *Koch Fuels, Inc. v. State of Oklahoma*, 862 P2d 471 (October 26, 1993), note 8.

[55] *Koch Fuels, Inc. v. State of Oklahoma*, 862 P2d 471 (October 26, 1993).

[56] *Koch Fuels, Inc. v. State of Oklahoma*, 862 P2d 471 (October 26, 1993).

[57] *Koch Fuels, Inc. v. State of Oklahoma*, 862 P2d 471 (October 26, 1993).

[58] *Steelcase,* citing 1 J. White & R. Summers, Uniform Commercial Code (4th Ed. 1995) §3-5, p. 128; see also General Statutes §42a-2-319; *Ranger, Inc.* v. *Gildersleeve*, 106 Conn. 372, 375, 138 A. 142 (1927) (under Sales Act, delivery of goods to carrier is delivery to buyer); *Lewis* v. *Scoville*, 94 Conn. 79, 87, 108 A. 501 (1919) (same); *Alderman Brothers Co.* v. *Westinghouse Air Brake Co.*, 92 Conn. 419, 425, 103 A. 267 (1918).

[59] By the absence of case law on point, it appears to be accepted that natural gas is tangible personal property.

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60 *Texaco v. Groppo,* note 6.

61 *Texaco v. Groppo,* citing *Department of Revenue v. Parker Banana Co.,* 391 So.2d 762, 763 (Fla. App. 1980); *Strickland v. Patcraft Mills, Inc.,* 251 Ga. 43, 45, 302 S.E.2d 544 (1983); *Olympia Brewing Co. v. Commissioner of Revenue,* 326 Minn. 642, 648, 326 N.W.2d 642 (1982); *Dupps Co. v. Lindley,* 62 Ohio St. 2d 305, 307-308, N.E.2d (1980); *Pabst Brewing Co. v. Department of Revenue,* 130 Wis. 2d 291, 296, 387 N.W.2d 121 (1986); see also W. Pierce, "The Uniform Division of Income for State Tax Purposes," 35 Taxes (CCH) 747, 780 (1957); contra J. Hellerstein, State and Local Taxation (1983) ¶9.17[1], pp. 584-88.

62 (IN) 94(1), (Mar. 11, 1994).

63 *In the Matter of the Petition of Ringier America, Inc., as Successor to W. A. Krueger Co.,* NY Division of Tax Appeals, Administrative Law Judge Unit (1991), citing a memorandum of the NY Division of Budget.

64 *Koch Fuels, Inc. v. State of Oklahoma*, 862 P2d 471(October 26, 1993).

65 Oral testimony of *Edna Karanian, VP – Energy Services, Connecticut Natural Gas Corporation,* Energy and Technology, March 3, 1998, page 000569.

66 Written testimony of Edna Karanian, VP – Energy Services, Connecticut Natural Gas Corporation, Energy and Technology, March 3, 1998, page 000615.

67 *Ruling No.* 2000-6 (12/11/2000) (emphasis added).

68 Representative Schiessl (60th) remarks to the House of Representatives on June 7, 1995, at 224-225.

69 Senator Nickerson, remarks to the Senate, June 7, 1995, at 289.

70 *Caterpillar Inc. v. New Hampshire Department Of Revenue Administration, October 25, 1999, at* http://www.state.nh.us/courts/supreme/opinions/9910/caterpil.htm**,** citing *Container Corp.*, 463 U.S. at 164-65, and *Christensen, Formulary Apportionment: More Simple -- On Balance Better?,* 28 Law & Pol'y Int'l Bus. 1133, 1135 (1997).

71 Jerome R. Hellerstein & Walter Hellerstein, State Taxation I: Corporate Income and Franchise Taxes ¶ 9.01 (3d ed. 1998).

72 *Caterpillar Inc. v. New Hampshire Department Of Revenue Administration, October 25, 1999, at* http://www.state.nh.us/courts/supreme/opinions/9910/caterpil.htm**,** citing *Illinois Cent. R. Co. v. Minnesota*, 309 U.S. 157, 161 (1940).

73 *Koch Fuels, Inc. v. State of Oklahoma*, 862 P2d 471 (October 26, 1993).

74 *Quill.*

75 *Complete Auto*, 430 US at 279.

76 *Bellas Hess*, 382 US at 758.

77 Richard W. Tomeo*, Connecticut Corporation Business Tax,* Robinson & Cole LLP, at http://www.rc.com/Tax/ctcorp.pdf (emphasis added).

78 *Quill*, 504 US at 315.

79 *National Geographic,* 430 US at 560.

80 *Orvis*, 86 NY2d at 178.

81 National Geographic, 430 US at 556.

82 *Quill*, 504 us at 312.

83 Ruling Request, p1.

84 The author has not yet been able get some writings by law professor Richard J. Pierce that may elucidate this issue. Pierce has written extensively on Regulated Industries, Antitrust Law, and Administrative Law and is cited in *GM v. Tracy*, the US Supreme Court opinion that explains the evolution of the natural gas industry.

85 *Koch Fuels, Inc. v. R. Gary Clark, in His Capacity as Tax Administrator for the State of Rhode Island,* Rhode Island Supreme Court, No. 93-714-M.P., May 23, 1996.

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86 *Quill*, 504 us at 312.

87 *Quill Corp. v. North Dakota* (1992), citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

88 Hellerstein, *Corporate Income and Franchise Taxes*, ¶4.9, 1983;

89 This point can be expanded on in the next draft.

90 Jerome R. Hellerstein & Walter Hellerstein, *State Taxation I: Constitutional Limitations and Corporate Income and Franchise Taxes* ¶ 4.04[1] (3d ed. 1999 Cumulative Supplement No. 2).

91 Hellerstein, Corporate Income and Franchise Taxes, ¶4.6[1], 1983, citing *Western Live Stock v. Bureau of Revenue*, 303 US 253.

92 Hellerstein, Corporate Income and Franchise Taxes, ¶4.6[1], 1983, citing *Tyler Pipe Indus., Inc. v. Washington Department of Revenue*, 483 US 232 (1987); *Standard Press Steel Co. v. Department of Revenue*, 419 US 560 (1975).

93 Hellerstein, *Corporate Income and Franchise Taxes*, ¶4.6[1], 1983, citing for example to Hellerstein, et al., "Commerce Clause Restraints on State Taxation after *Jefferson Lines*," 51 Tax L. Rev. 47 (1995).

94 CCH-EXP, SALES-TAX-GUIDE ¶51, Gross Receipts or Gross Proceeds from Sales.

95 CCH-EXP, SALES-TAX-GUIDE ¶12, Types of Sales Taxes.

96 CCH-EXP, SALES-TAX-GUIDE ¶51, Gross Receipts or Gross Proceeds from Sales.

97 CCH-EXP, Sales-Tax-Guide ¶52, Gross Income from All Sources.

98 CCH-EXP, SALES-TAX-GUIDE ¶51, Gross Receipts or Gross Proceeds from Sales.

99 *Koch Fuels, Inc. v. R. Gary Clark, in His Capacity as Tax Administrator for the State of Rhode Island*, Rhode Island Supreme Court, No. 93-714-M.P., May 23, 1996.

100 *Koch Fuels, Inc. v. R. Gary Clark, in His Capacity as Tax Administrator for the State of Rhode Island*, Rhode Island Supreme Court, No. 93-714-M.P., May 23, 1996.