New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-01(7)C
Corporation Tax
January 10, 2001

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C001114F

On November 14, 2000, a Petition for Advisory Opinion was received from Celcom Communications Corporation of Albany II, c/o SBC Communications Inc., 175 E. Houston, Room 8-H-60, San Antonio, Texas 78205.

The issues raised by Petitioner, Celcom Communications Corporation of Albany II, are:

1. Whether the liquidation of Petitioner into its parent company would be considered the payment of a dividend for purposes of computing tax under section 183 of the Tax Law.

2. Whether the conversion of Petitioner to a single member limited liability company ("SMLLC") owned by the parent would be considered the payment of a dividend for purposes of computing tax under section 183 of the Tax Law.

3. Whether the treatment of a liquidating dividend under section 183 differs depending on whether section 332 of the Internal Revenue Code ("IRC") (under liquidations) or 368 of the IRC (under reorganizations) applies.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner is a utility subject to tax under section 183 of Article 9 of the Tax Law, and is a subsidiary within a corporate group. The corporate group needs to reconfigure its corporate structure to become better aligned with future business plans. To this end, one of the following two methods will be employed for restructuring:

(a) liquidating Petitioner into its parent, or

(b) converting Petitioner into a SMLLC which would then be treated as a branch of its parent.

For federal income tax purposes, both method (a) and method (b) above will likely result in a liquidating dividend from a complete liquidation of a subsidiary under section 332 of the IRC.

Discussion

The provisions of Article 9 of the Tax Law are not federally conformed. Therefore, while the treatment of an item under the provisions of the IRC may be considered, the determination of

the treatment of such item for purposes of section 183 is made using the definitions contained in such section, including case law in the area, and applying generally accepted accounting principles.

Section 183 of Article 9 of the Tax Law provides for a franchise tax on transportation and transmission corporations based on the net value of issued capital stock employed in New York State. The franchise tax required to be paid under section 183 is the highest tax computed by the following three methods:

1. Allocated value of issued capital stock multiplied by the tax rate of 1.5 mills.

2. Allocated value of issued capital stock on which dividends are paid at a rate of 6 percent or more multiplied by the tax rate of .375 mills for each 1 percent of dividends paid. The rate of 1.5 mills is applied to capital stock on which dividends are not paid or are paid at a rate of less than 6 percent.

3. Minimum tax of $75.

The phrase "dividends paid" is not defined in section 183 of the Tax Law. However, historically, distributions in complete or partial liquidation of corporations have not been construed to constitute the payment of "dividends" where they are in redemption for stock interests. The Supreme Court of the United States stated in Hellmich v Hellman, 276 US 233, 237, that the term "dividends" in the sense in which it is "generally understood and used, refers to the recurrent return upon stock paid to stockholders by a going corporation in the ordinary course of business which does not reduce their stock holdings and leaves them in a position to enjoy future returns upon the same stock."

This basic concept of the distinction between the declaration and payment of "dividends" and payments in liquidation of a corporation by distribution of its assets has been recognized and followed by the New York courts with respect to corporate taxation. With respect to former section 182 of Article 9 of the Tax Law, as in effect for taxable year 1913, which provided a franchise tax on corporations, and imposed a tax similar to the tax imposed under section 183, the Appellate Division of the New York State Supreme Court commented on the meaning of the word "dividends" in People ex rel Ridgewood Land & Improvement Co, v Saxe et al, (174 App Div 344, 348, affd 219 NY 637). The Appellate Division stated:

> The tax is "for the privilege of doing business or exercising its corporate franchises in this State" (§182), and when it refers to the "dividends made or declared upon the par value of the capital stock," the statute refers naturally to the dividends growing out of the use of the capital stock, and has no reference to the action of the corporation in distributing its capital to its stockholders when all of the debts have

> been paid and the purposes of the incorporation are at an end. This view becomes certain when we read the provisions of section 28 of the Stock Corporation Law (Consol. Laws, chap. 59; Laws of 1909, chap. 61), which provides that "The directors of a stock corporation shall not make dividends, except from the surplus profits arising from the business of such corporation, nor divide, withdraw or in any way pay to the stockholders, or any of them, any part of the capital of such corporation, or reduce its capital stock except as authorized by law... But this section shall not prevent a division and distribution of the assets of any such corporation remaining after the payment of all its debts and liabilities upon the dissolution of such corporation or the expiration of its charter," etc. The Legislature forbids the making of dividends except from the surplus profits arising from the business of such corporation, and speaks intelligently of the "division and distributions of the assets," and these two statutes, dealing with the power to make dividends and the taxation of the capital stock based upon the making or declaring of dividends, are to be understood as using the word "dividends" in the same sense, unless the context clearly points to the contrary. (Perkins v Smith, 116 NY 441.)

In this case, Petitioner will either be liquidated into its parent, or be converted into a SMLLC that is owned by its parent. Petitioner states that for federal income tax purposes either transaction will result in a liquidating dividend under section 332 of the IRC which provides that "no gain or loss shall be recognized on the receipt by a corporation of property distributed in complete liquidation of another corporation."

Based on Hellmich, supra, and Ridgewood, supra, a liquidating dividend resulting from either the liquidation of Petitioner into its parent, or the conversion of Petitioner into a SMLLC owned by its parent, whereby Petitioner will be dissolved, will not constitute a "dividend" for purposes of computing the tax imposed under section 183 of the Tax Law. Further, the treatment of a liquidating dividend under section 183 will not differ whether the provisions of section 332 or section 368 of the IRC apply for federal income tax purposes.

DATED: January 10, 2001

/s/
Jonathan Pessen
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Technical Services Division

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