

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

TSB-A-07(1)C
Corporation Tax
February 23, 2007

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C051128B

On November 28, 2005, a Petition for Advisory Opinion was received from McDermott, Will & Emery LLP, 340 Madison Avenue, New York, NY 10017.

The issue raised by Petitioner, McDermott, Will & Emery LLP, is whether a bank subsidiary's election to be taxed under Article 9-A of the Tax Law pursuant to the grandfather provision in section 1452(d) of the Tax Law remains valid after the conversion of the subsidiary to a Delaware corporation.

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

Corporation X was incorporated in State A in 1980. It has been qualified to do business in New York State since 1981 and, since that time, has reported and paid corporation franchise tax under Article 9-A of the Tax Law. Corporation X made the one-time election under section 1452(d) of the Tax Law, on or before the due date for filing its return for its 1985 taxable year, to continue being subject to taxation pursuant to Article 9-A of the Tax Law instead of Article 32 of the Tax Law. Corporation X has not revoked that election and it has not engaged in any transactions or activities that would cause the revocation of that election. Since it first made that election, it has always been principally engaged in activities that may be properly conducted by a corporation taxable under Article 9-A of the Tax Law.

For administrative efficiency reasons, Corporation X is contemplating converting from a State A corporation to a Delaware corporation pursuant to Delaware Law. Mechanically, the conversion would be effected by filing a certificate of conversion and a certificate of incorporation with Delaware.

Petitioner states that the content of the Charter and Bylaws of Corporation X will remain the same after the conversion, except to the extent required to be changed due to differences in State A and Delaware corporate law, and Corporation X will continue to use the same name. Under Delaware Law, such conversion will not affect any of the obligations or liabilities incurred by Corporation X prior to its conversion. All of Corporation X's rights, privileges, and powers; all of its property; and all of the debts due to Corporation X will remain the rights, privileges, powers, property, and debts of Corporation X. The rights of Corporation X's creditors will remain unchanged after the conversion. In addition, under Delaware Law, Corporation X will not need to wind up its affairs as a result of the conversion, and the conversion will not cause a dissolution of Corporation X. All of Corporation X's operations at each of its current business locations will continue uninterrupted and will remain the same after the conversion. Accordingly, after the conversion, Corporation X will continue to be principally engaged in activities that may be properly conducted by a corporation taxable under Article 9-A

of the Tax Law. Finally, Petitioner states that for federal income tax purposes, Corporation X will continue to file all its tax returns under the same federal employer identification number and upon the same reporting dates or reporting periods as were required prior to its conversion.

Applicable law and regulations

Section 265 of the Delaware General Corporations Law provides, in part:

Conversion of other entities to a domestic corporation.

(a) As used in this section, the term "other entity" means ... a foreign corporation.

(b) Any other entity may convert to a corporation of this State

* * *

(d) Upon the effective time of the certificate of conversion to corporation and the certificate of incorporation, the other entity shall be converted to a corporation of this State and the corporation shall thereafter be subject to all of the provisions of this title, except that notwithstanding § 106 of this title, the existence of the corporation shall be deemed to have commenced on the date the other entity commenced its existence in the jurisdiction in which the other entity was first created, formed, incorporated or otherwise came into being.

(e) The conversion of any other entity to a corporation of this State shall not be deemed to affect any obligations or liabilities of the other entity incurred prior to its conversion to a corporation of this State or the personal liability of any person incurred prior to such conversion.

(f) When an other entity has been converted to a corporation of this State pursuant to this section, the corporation of this State shall, for all purposes of the laws of the State of Delaware, be deemed to be the same entity as the converting other entity. When any conversion shall have become effective under this section, for all purposes of the laws of the State of Delaware, all of the rights, privileges and powers of the other entity that has converted, and all property, real, personal and mixed, and all debts due to such other entity, as well as all other things and causes of action belonging to such other entity, shall remain vested in the domestic corporation to which such other entity has converted and shall be the property of such domestic corporation and the title to any real property vested by deed or otherwise in such other entity shall not revert or be in any way impaired by reason of this chapter; but all rights of creditors and all liens upon any property of such other entity shall be preserved unimpaired, and all debts, liabilities and duties of the other entity that has converted shall remain attached to the corporation of this State to which such other entity has converted, and may be enforced against it to the same extent as if

said debts, liabilities and duties had originally been incurred or contracted by it in its capacity as a corporation of this State. The rights, privileges, powers and interests in property of the other entity, as well as the debts, liabilities and duties of the other entity, shall not be deemed, as a consequence of the conversion, to have been transferred to the domestic corporation to which such other entity has converted for any purpose of the laws of the State of Delaware.

(g) Unless otherwise agreed for all purposes of the laws of the State of Delaware or as required under applicable non-Delaware law, the converting other entity shall not be required to wind up its affairs or pay its liabilities and distribute its assets, and the conversion shall not be deemed to constitute a dissolution of such other entity and shall constitute a continuation of the existence of the converting other entity in the form of a corporation of this State.

* * *

Section 1450(a) of the Tax Law provides that “The word ‘taxpayer’ means a corporation or association subject to a tax imposed by this article [Article 32].”

Section 1452(d) of the Tax Law provides, in part:

Corporations taxable under article nine-a. Notwithstanding the provisions of this article, all corporations of classes now or heretofore taxable under article nine-a of this chapter shall continue to be taxable under article nine-a, except: ... (3) banking corporations described in paragraph nine of subsection (a) of section fourteen hundred fifty-two. Provided, however, that a corporation described in paragraph three of this subsection which was subject to the tax imposed by article nine-A of this chapter for its taxable year ending during nineteen hundred eighty-four may, on or before the due date for filing its return (determined with regard to extensions) for its taxable year ending during nineteen hundred eighty-five, make a one time election to continue to be taxable under such article nine-A. Such election shall continue to be in effect until revoked by the taxpayer. In no event shall such election or revocation be for a part of a taxable year.

Section 16-2.5(j)(3) of the Banking Corporation Franchise Tax Regulations provides:

Any corporation described in paragraph (1) of this subdivision which was subject to the tax imposed by article 9-A of the Tax Law for its taxable year ending during 1984 may, on or before the due date for filing its return (determined with regard to extensions of time for filing) for its taxable year ending during 1985, make a one-time election to continue to be taxable under article 9-A. Such election shall continue to be in effect until revoked by the taxpayer. In no event shall such election or revocation be for a part of a taxable year. The election is made by the filing of a tax return pursuant to article 9-A of

the Tax Law and the revocation is made by the filing of a tax return pursuant to article 32 of the Tax Law.

Opinion

In *McDermott, Will & Emery*, Adv Op Comm T&F, November 6, 2003, TSB-A-03(12)C, the issue was whether a corporate taxpayer's election pursuant to section 1452(d) of the Tax Law would continue following a proposed merger transaction. Since the corporate taxpayer would not be the surviving entity after the contemplated merger transaction, the taxpayer would cease to exist, and following *Pendex Real Estate Corp*, Adv Op Comm T&F, January 27, 1999, TSB-A-99(10)C, the election made by the taxpayer would also cease.

In this case, it is not clear whether Corporation X will continue to exist as a State A corporation. For purposes of this Opinion, it is assumed Corporation X will remain a State A corporation until it is dissolved in State A. In addition, a second corporation with all of the rights and obligations of Corporation X will be created in Delaware under Delaware Law. Since the State A Corporation X may continue to exist as a State A corporation until it dissolves, the Delaware corporation would not be the corporation that made the election pursuant to section 1452(d) of the Tax Law to continue to be subject to tax under Article 9-A of the Tax Law. The Delaware corporation will be a new taxpayer under section 1450(a) of the Tax Law. Accordingly, the election made by the State A Corporation X pursuant to section 1452(d) of the Tax Law was not made by the Delaware Corporation X and will not carry over to the Delaware Corporation X.

DATED: February 23, 2007

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