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

TSB-A-91(24)C
Corporation Tax
November 14, 1991

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C910805C

On August 5, 1991, a Petition for Advisory Opinion was received from Pressure Vessel Service, Inc., 11001 Harper Avenue, Detroit, Michigan 48213.

The issue raised by Petitioner, Pressure Vessel Service, Inc., is whether it is subject to tax under Article 9-A of the Tax Law because it is the record title holder of a parcel of real property in New York State.

Petitioner is a Michigan corporation. It does not conduct business in New York, has not applied for authority to do so and is not authorized to conduct business in New York.

PVS Chemicals, Inc. (New York) (hereinafter "PVS-NY") is a wholly owned subsidiary of Petitioner incorporated in Michigan and qualified to conduct business in New York.

On or about October 1, 1981, PVS-NY purchased a portion of a chemical manufacturing facility from Allied Chemical Corporation (now, Allied-Signal) located in Buffalo, New York (hereinafter "Plant"). PVS-NY has owned and operated the Plant since the time of this purchase. The Plant is operated primarily for the production of sulfuric acid.

Sometime after its purchase of the Plant, PVS-NY decided that it would purchase an adjacent parcel from Allied. This transfer of approximately seven acres occurred in 1987 (hereinafter "Parcel"). Recently, a portion of the Parcel was offered for sale and a contract for the same was entered into with a third-party. Upon the proposed purchaser's examination of title to the Parcel it determined that Petitioner, not PVS-NY, was the owner of record. As such, the purchaser determined that Petitioner had not filed franchise tax returns with New York State and, thus, the title to the Parcel was encumbered. Record ownership by Petitioner of the Parcel was an inadvertent mistake which was not discovered until the examination of title for the recent proposed transfer. In fact, it was intended by Petitioner and PVS-NY, that the latter would hold record title upon the transfer from Allied in 1987, just as it had upon the prior transfer of the Plant in 1981. Not only would this form of ownership be consistent but it would accurately reflect the fact that PVS-NY was the owner and operator of the Plant and the Parcel and Petitioner did not conduct any business in New York.

All incidents of ownership of the Parcel remained in PVS-NY from the time of its purchase from Allied until the present. For example, PVS-NY has reported the Parcel as an asset on its New York State Franchise Tax Report from and after its acquisition in 1987.

In addition, PVS-NY, has paid all local real estate taxes levied upon the Plant and Parcel.

Section 209.1 of the Tax Law imposes a franchise tax on foreign corporations for the privilege of doing business, or of employing capital, or of owning or leasing property in New York State in a corporate or organized capacity, or of maintaining an office in New York State for all or any part of each of its fiscal or calendar years.

Section 1-3.2(d) of the Business Corporation Franchise Tax Regulations (hereinafter "Regulations") provides that "[t]he owning or leasing of real or personal property within New York State constitutes an activity which subjects a foreign corporation to tax. Property held as a nominee for the benefit of others creates taxable status "

It has been held that where a partnership bought a number of vacant lots in New York City and title to the lots was registered in the name of a foreign corporation to obscure from neighboring property holders the true owner of the lots, such foreign corporation was holding property as nominee for the partnership and was subject to tax under Article 9-A until the foreign corporation was dissolved. Eugene Strasser, Adv 0p Comm T & F, September 1, 1988, TSB-A-88(18)C.

Likewise, in Babson Bros. Co. of New York Inc., Adv Op Comm T & F, September 1, 1988, TSB-A-88(19)C, the Petitioner entered into a joint venture agreement to purchase real property whereby the Petitioner purchased it for and on behalf of the Venture and took title to the property as nominee for the members of the Venture. As a New York corporation, the Petitioner was held subject to tax for all taxable years until it was dissolved.

In Highmount Medical Building Inc., Adv Op Comm T & F, May 7, 1991, TSB-A-91(12)C, a corporation was organized in New York specifically to meet the requirements of a lending institution so that a group of doctors could obtain a mortgage to erect a medical building and immediately after the mortgage was obtained the property was to be conveyed back to the partners and the corporation dissolved. Through an oversight, the corporation was not dissolved until several years later. It was held that the corporation was subject to tax for the years it was incorporated.

Herein, PVS-NY already owned the Plant and the subsequent purchase of the Parcel, contiguous real estate, was intended for its ownership and benefit. It was never the intention of either Petitioner or PVS-NY that Petitioner would hold title to Parcel as nominee for the benefit of PVS-NY. The record title was an unintended inadvertent mistake contrary to the intention of the parties to the transaction.

Since in the instant case the record title was in the name of Petitioner as the result of an unintended inadvertent mistake, it is distinguishable from Eugene Strasser, supra where the corporation held title as nominee to obscure the true ownership from the neighboring property holders; Babson Bros., supra where the corporation entered into a joint venture to purchase and hold title to property as nominee for the members of the joint venture; and Highmount, supra

where the corporation was specifically formed to hold title as nominee for the partners so they could obtain a mortgage.

Accordingly, Petitioner did not hold the property as a nominee for the benefit of others as contemplated in section 1-3.2(d) of the Regulations and therefore Petitioner is not subject to the franchise tax under Article 9-A of the Tax Law for the taxable years that it held legal title to Parcel.

DATED: November 14, 1991

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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