

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

TSB-A-93 (11) C
Corporation Tax
May 25, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C930325A

On March 25, 1993, a Petition for Advisory Opinion was received from Livingston, Wachtell & Co., CPA's 1140 Avenue of the Americas, New York, New York 10036.

The issue raised by Petitioner, Livingston, Wachtell & Co., concerns the filing requirements and computation of tax under Article 9-A of the Tax Law with respect to the proposed corporate reorganization as described herein.

Corporation A was incorporated under Article 2 of the New York Stock Corporation Law over 50 year ago. It is subject to tax under Article 9-A of the Tax Law. It has a taxable year ending July 31 and files a corporate franchise tax report annually.

The Board of Directors and the shareholders of A desire A to reincorporate in Delaware by means of a statutory merger under section 907 of the New York Business Corporation Law and section 252 of the Delaware General Corporation Law in order to place the corporation under the corporate law of Delaware. In accordance with this, the Board of Directors of A proposes adopting a plan of merger as follows:

Corporation B has recently been organized in Delaware under the General Corporation Law. It has an authorized stock structure identical to A's with the same classes and number of shares of stock and the same par values, voting and dividend rights. It also has a taxable year ending July 31.

Upon approval of the merger by A's Board of Directors and its shareholders and by B's Board of Directors, a certificate of merger will be filed with the Secretary of State in New York in compliance with section 907 of the New York Business Corporation Law, and an agreement of merger or certificate of merger will be filed with the Secretary of State of Delaware in compliance with section 252 of the Delaware General Corporation Law. To effectuate the merger, B will issue all its authorized shares of stock to A in exchange for the assets owned by A, and A will be merged into B; B will survive the merger. Each share of stock held by the A shareholders will be converted by operation of law into a share of B stock of the same class and with the same par value, voting and dividend rights.

The merger will be considered tax-free pursuant to section 368(a)(1)(F) of the Internal Revenue Code and will take place at the close of business on June 30, 1993. After the merger, B will be subject to tax under Article 9-A of the Tax Law and will file a corporation franchise tax report annually.

Section 209.1 of the Tax Law imposes a franchise tax on every corporation for the privilege of exercising its corporate franchise, or 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. Every corporation shall pay the franchise tax annually upon the basis of the corporation's entire net income base, or upon such other basis as may be applicable.

Section 211.1 of the Tax Law provides that every taxpayer which ceases to exercise its franchise or to be subject to the tax imposed by Article 9-A of the Tax Law shall transmit to the Commissioner of Taxation and Finance a report on the date of such cessation or at such other time as the Commissioner may require covering each year or period for which no report was theretofore filed.

Section 2-3.1 of the Business Corporation Franchise Tax Regulations (hereinafter "Regulations"), provides that a domestic corporation is required to pay a tax measured by the entire net income base (or other applicable basis) up to the date on which it ceases to possess a franchise.

Section 208.9 of the Tax Law defines "entire net income" as the total net income from all sources, which shall be presumably the same as the entire taxable income (but not alternative minimum taxable income) which the taxpayer is required to report to the United States Treasury Department, except as modified pursuant to such section 208.9 and 210.3(d) and (e) of the Tax Law.

There is no modification or adjustment for a transaction treated as a reorganization pursuant to section 368(a)(1)(F) of the Internal Revenue Code. Therefore, for New York State franchise tax purposes, such reorganization would be treated the same as it is treated for federal income tax purposes. However, pursuant to section 211.1 of the Tax Law, a taxpayer which ceases to be subject to tax is required to file a report on the date of cessation. If the date a taxpayer ceases to be subject to tax is not the last day of its taxable year for federal income tax purposes, the taxpayer is required to file two short period reports for purposes of Article 9-A of the Tax Law, even though only one return is required for federal income tax purposes.

Accordingly, if A's change in form from a New York State chartered corporation to B, a Delaware corporation, is a tax-free reorganization under section 368(a)(1)(F) of the Internal Revenue Code, such reorganization will be a tax-free reorganization for New York State franchise tax purposes under Article 9-A. However, for the federal taxable year A changes from a New York State chartered corporation to B, a Delaware corporation, A will cease to exercise its New York franchise and will cease to be subject to tax under Article 9-A, and B will be subject to tax under Article 9-A when it begins to do business in New York State. Therefore, two short period reports will be required for New York State franchise tax purposes even though only one return will be required for federal income tax purposes. Pursuant to section 211.1 of the Tax Law, A will be

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required to file a short period report for the period from the beginning of its federal taxable year, August 1, 1993, up to the date A will cease to exercise its New York franchise, June 30, 1993, and, pursuant to section 2.3-1 of the Regulations, A must compute and pay its tax measured by the entire net income base or other applicable base for such short period.

Further, B will be required to file a short period report from the date B will begin to do business in New York State, July 1, 1993, to the end of its federal taxable year, July 31, 1993, and B must compute and pay its tax measured by the entire net income base or other applicable base for such short period.

DATED: May 25, 1993

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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