

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

TSB-A-95 (4) C
Corporation Tax
March 3, 1995

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C941125C

On November 25, 1994, a Petition for Advisory Opinion was received from W.R.H.R.E. Corp., c/o William H. Richardson, 40 South Washington Street, Port Washington, New York 11050.

The issue raised by Petitioner, W.R.H.R.E. Corp., is whether an inactive corporation that was dissolved by proclamation, and is the record title holder of real property in New York State, but not engaged in business, is subject to the New York State franchise tax under Article 9-A of the Tax Law.

In 1966 and 1970, William H. Richardson and Betty Richardson, his wife, as individuals, acquired two adjacent parcels of real property known as Nos. 166-168 Main Street, Port Washington, County of Nassau and State of New York (Section 5 Block 37 Lots 11 and 12 on the Nassau County tax map). The premises were and are located in a business zone under the Town of North Hempstead zoning ordinance.

At the time of acquisition, the two lots were improved by attached commercial buildings. One such building had been used by Richardson's grantor as a bicycle sales and repair shop; the other as a sign maker's shop.

Upon acquisition, Mr. Richardson converted the use of the two buildings to a restaurant and bar business. The business was conducted by Richardson through a corporate entity known as BR, Inc., doing business as The Embers. The said restaurant and bar business was conducted by Richardson until about 1980, when the business was sold. The sale of the business did not include the sale of the real property. Following the sale of the restaurant and bar business in 1980, the premises (166-168 Main Street) were rented to various individuals and entities for use as a restaurant and bar. The Richardsons had no interest in any of the entities which operated the restaurant and bar business after their tenure.

In about 1973, at which time legal and record title to the real property (166168 Main Street) was in William H. and Betty Richardson, the Richardsons proposed to borrow the sum of \$46,000 from one Frank Laber, then a Port Washington resident. The said Frank Laber had no interest in the real property or in the restaurant and bar business owned and operated by Richardson. The purpose of the loan was to acquire funds for use in making improvements to the buildings. To secure repayment of the borrowed monies, Richardson agreed to give the lender a first mortgage on the premises in the amount of \$46,000, with interest, payable monthly over twenty years.

As part of the conditions for making the loan, the lender (Frank Laber) demanded that legal title to the premises be transferred to a corporation and that the corporation execute the said mortgage. To comply with the lender's demand, a certificate of incorporation of Petitioner was filed in the office of the Secretary of State on January 16, 1973. On November 16, 1973, deeds were

executed by William H. Richardson and Betty Richardson conveying their legal title to premises 166-168 Main Street to Petitioner. Simultaneously with execution of the deeds conveying legal title to Petitioner, the corporation then executed and delivered a first mortgage on the property to Frank Laber, the lender/mortgagee.

Title to the real property (166-168 Main Street) remained in Petitioner until March 13, 1991, when the property was sold and the mortgage held by Frank Laber satisfied.

Petitioner owned no other real property.

While legal title to the property was in Petitioner, the corporation was dissolved by proclamation of the Secretary of State on December 19, 1978.

From the time the real property was acquired by Mr. and Mrs. Richardson in 1966 and 1970, until the same was sold in 1991, the property was used exclusively for the restaurant and bar business. No other business was conducted on the premises; no portion thereof was used for any other commercial purpose; no residential use of the premises was made.

Petitioner was formed solely for the purpose of holding bare legal title to the subject property during the term of the mortgage for the convenience of the mortgagee. No business was ever conducted by the corporation; the corporation never had a bank account; never kept books and records. No share certificates were issued; there was never a stockholders' meeting. No officers or directors were ever elected; no directors' meetings were held. No dividends were declared; no corporate seal was ever adopted. The corporation received no rental or other income. The corporation never filed a franchise tax return or paid a franchise tax. No Federal income tax return was ever filed. Payments of principal and interest on the first mortgage were made personally by William H. Richardson. Real estate taxes assessed to the property were paid by Mr. Richardson personally.

As stated, the Richardsons sold their restaurant and bar business in about 1980. Title to the real property remained in Petitioner, and the premises were rented to others for use as a restaurant and bar. All rent payments were made to Mr. Richardson, personally, and not to the corporation.

In 1991, the property, having been abandoned and left vacant by the last tenant, was sold to one Mitsuake Nomoto, and his wife, who are the present owners. The deed of conveyance to Mitsuake Nomoto and his wife was executed and delivered by Petitioner. The consideration for the sale, including a purchase money mortgage and note were received personally by William H. Richardson. The mortgage made by Petitioner to Frank Laber was paid and satisfied at the time of the sale to Mitsuake Nomoto.

Section 209.1 of the Tax Law imposes a franchise tax on every corporation for the privilege of exercising its 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.

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

Section 209.3 of the Tax Law provides that a dissolved corporation which continues to conduct business shall be subject to tax under Article 9-A. Section 1-2.2 of the Regulations provides further that where the activities of a dissolved corporation are limited to the liquidation of its business and affairs, the disposition of its assets (other than in the regular course of business) and the distribution of the proceeds, the dissolved corporation is not subject to tax under Article 9-A.

Therefore, a dissolved corporation that is merely a record title holder of real property located in New York State as nominee for the benefit of others, and is otherwise inactive, is not conducting business in New York State as contemplated by section 209.3 of the Tax Law. Highmount Medical Building Inc., Adv Op Comm T & F, May 7, 1991, TSB-A-91(12)C; Harold S. Sommers, Adv Op Comm T & F, March 15, 1990, TSB-A-90(9)C; Babson Bros. Co. of New York Inc., Adv Op Comm T & F, September 1, 1988, TSB-A-88(19)C.

Accordingly, for the taxable years during which Petitioner was incorporated, January 16, 1973 through December 19, 1978, Petitioner is subject to the franchise tax imposed by Article 9-A of the Tax Law, pursuant to section 209.1 of the Tax Law. After its dissolution by proclamation in December 1978, Petitioner was merely holding property as nominee for the benefit of others and was not conducting business in New York State pursuant to section 209.3 of the Tax Law. Therefore, Petitioner is not subject to tax under Article 9-A after it was dissolved by proclamation.

DATED: March 3, 1995

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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