

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

TSB-A-96 (14) C
Corporation Tax
May 9, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C960112A

On January 12, 1996, a Petition for Advisory Opinion was received from Upper Willow Properties Corporation, One Marine Midland Center, Buffalo, New York 14203.

The issue raised by Petitioner, Upper Willow Properties Corporation, is whether a sewage-works corporation is subject to franchise tax under Article 9 of the Tax Law or under Article 9-A of the Tax Law. Further, if it is subject to Article 9, is it subject to tax under sections 183 and 184 or 186 or 186-a?

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

Petitioner is a Delaware corporation which holds title to certain real property including a sewage treatment facility in the Dickerson Pond Sewer District, Town of Cortlandt, County of Westchester, New York, as agent for Demooring, Inc., a Delaware corporation. Petitioner intends to form a wholly-owned subsidiary, to be known as Valeria Sewage-Works Corporation ("Valeria"), pursuant to section 3 of the New York Transportation Corporations Law. Pursuant to section 2 of Valeria's proposed Certificate of Incorporation, Valeria's purpose will be "to the extent and as may be permitted by law, to carry on the business of a sewage disposal corporation in all its branches and in connection therewith to provide a sewer system or sewer systems for the disposal of sewage, including all sewer pipes, easements and other appurtenances which are used or useful, in whole or in part, in connection with the collection, treatment or disposal of sewage, including sewage pumping stations, sewage treatment and disposal plants and sites, and to erect, operate and maintain the same and to perform other necessary acts incidental thereto within the Dickerson Pond Sewer District of the Town of Cortlandt, Westchester County, New York."

The Dickerson Pond Sewer District consists of two existing condominium developments: Dickerson Pond Condominium I and Dickerson Pond Condominium II and vacant undeveloped real property (owned by Petitioner, as agent for Demooring, Inc.) upon which additional units may be built (collectively, the "Dickerson Pond Projects"). Valeria will be formed solely to operate the sewer system serving the Dickerson Pond Projects.

Valeria will operate the sewer system which consists, in part, of pipe lines for the removal and transportation of sewage from the Dickerson Pond Projects to the system's pumping stations, treatment and disposal plants and sites. Although water is used in the sewer system, Valeria will not supply, and will not be in the business of supplying, water to the Dickerson Pond Projects.

Article 10 of the Transportation Corporations Law governs sewage-works corporations. Section 115.1 of the Transportation Corporations Law provides that a "sewage-works corporation" is a corporation organized "to provide a sewer system ... for the disposal of sewage, through an

established system of pipe lines, treatment plants and other means of disposal, and which erects, operates, maintains and performs other necessary acts incidental thereto, disposal systems for sewer areas formed within towns or villages and other municipal areas of the state." Section 115.2 of the Transportation Corporations Law provides that a "sewer system" means "all sewer pipes and other appurtenances which are used or useful in whole or in part in connection with the collection, treatment or disposal of sewage, and other waste, including sewage pumping stations and sewage treatment and disposal plants and sites."

Section 116 of the Transportation Corporations Law provides that the filing of a certificate of incorporation of a sewage-works corporation requires the consent of the local governing body of the city, town or village where the sewer system provided by the corporation is located. Section 118.1(a) and (b) of the Transportation Corporations Law provides that the local governing body must have a licensed professional engineer (1) examine plans and specifications for the system, and (2) perform inspections of the system at reasonable intervals during and after construction, and report to the local governing body.

Petitioner states that sewage-works corporations, such as Valeria, are not regulated by the Public Service Commission. See, Suffolk Sanitary Cord v Town Bd of Town of Brookhaven, 84 Misc 2d 373. Instead, pursuant to section 121 of the Transportation Corporations Law, the rates charged by a sewage-works corporation are agreed to between the corporation and the local governing body and are reviewable at intervals of not more than five years or at any time by petition of the corporation or motion by the local governing body.

Section 209.1 of Article 9-A of the Tax Law imposes an annual franchise tax on a domestic corporation for the privilege of exercising its corporate franchise. Section 209.4 of the Tax Law, provides that corporations liable to tax under sections 183, 184 or 186 of Article 9 of the Tax Law are not subject to tax under Article 9-A.

Sections 183 and 184 of Article 9 of the Tax Law impose annual franchise taxes on a domestic corporation formed for or principally engaged in the conduct of railroad, canal, steamboat, ferry, express, navigation, pipe line, transfer, baggage express, omnibus, trucking, taxicab, telegraph, telephone, palace car or sleeping car business, and every other domestic corporation principally engaged in the conduct of a transportation or transmission business, except the conduct of aviation and a corporation subject to tax under section 186 of Article 9 or Article 32 of the Tax Law.

Section 186 of the Tax Law imposes an annual franchise tax on every corporation formed for or principally engaged in the business of supplying water, steam or gas, when delivered through mains or pipes, or electricity, or principally engaged in two or more such businesses.

Section 186-a of the Tax Law imposes a tax on the furnishing of utility services. The tax is imposed on a utility which is not subject to the supervision of the New York State Department of Public Service, if it "sells gas, electricity, steam, water, refrigeration, telephone or telegraphy, delivered through mains, pipes or wires, or furnishes gas, electric, steam, water,

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refrigerator, telephone or telegraph service, by means of mains, pipes, or wires, regardless of whether such activities are the main business of such person or are only incidental thereto, or of whether use is made of the public streets."

To determine the classification and proper taxability of a corporation under either Article 9 or Article 9-A, an examination of the nature of the corporation's activities is necessary, regardless of the purposes for which the corporation is organized. See, McAllister Bros., Inc. v Bates, 272 App Div 511, 517.

The determination of whether Valeria is subject to tax under Article 9-A or Article 9, depends on what activity Valeria is principally engaged in. Ordinarily, a corporation is deemed to be principally engaged in the activity from which more than 50 percent of its receipts are derived. See, e.g. Re Joseph Bucciero Contracting Inc., Adv Op St Tax Comm, July 23, 1981, TSB-A-81(5)C.

Based on the facts submitted, Valeria will be organized as a sewage-works corporation pursuant to section 3 of the Transportation Corporations Law. Valeria will be solely engaged in a sewage disposal business and will operate a sewer system serving the Dickerson Pond Projects. As a sewage-works corporation, Valeria's activities in conducting the sewage disposal business will include the use of pipe lines for the removal and transportation of sewage from the Dickerson Pond Projects to the system's pumping stations, treatment and disposal plants and sites. However, it appears that Valeria's conduct of the overall sewage disposal business will not constitute being "principally engaged in the conduct of a transportation or transmission business" as contemplated under sections 183 and 184 of the Tax Law. In addition, the conduct of this business is not the business of supplying water to the Dickerson Pond Projects. Therefore, Valeria will not be subject to tax under section 186 of the Tax Law. Further, Valeria will not be selling or furnishing water to the Dickerson Pond Projects and will not be subject to tax under section 186-a of the Tax Law.

Accordingly, based on the facts submitted, Valeria will be subject to tax pursuant to Article 9-A of the Tax Law.

DATED: May 9, 1996

/s/
DORIS S. BAUMAN
Director
Technical Services Bureau

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