

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

TSB-A-96 (7) C
Corporation Tax
March 25, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C951201B

On December 1, 1995, a Petition for Advisory Opinion was received from Apple Bank for Savings, 277 Park Avenue, 40th Floor, New York, New York 10172.

The issues raised by Petitioner, Apple Bank for Savings, are whether the Article 9-A status of a bank subsidiary, taxed under Article 9-A of the Tax Law pursuant to the grandfather provision set forth in section 1452(d) of Article 32 of the Tax Law and clarified in section 16-2.5(j)(3) of the Franchise Tax on Banking Corporations Regulations, is revoked (1) upon the acquisition of its parent bank by another bank, or (2) by an expansion of the line of business of such subsidiary.

Petitioner presents the following facts. On December 31, 1986, Petitioner, a New York State chartered savings bank, acquired Eastern Savings Bank ("Eastern") through a tax-free merger. At the time of the merger, both Petitioner and Eastern were subject to tax under Article 32 of the Tax Law. Petitioner continues to be taxable under Article 32.

Prior to the acquisition, Eastern had a wholly owned subsidiary corporation, ESB Associates, Inc. ("ESB"). After the acquisition of Eastern by Petitioner, ESB was renamed "Apple Associates of New York Inc." ("Associates"). Associates retained the same employer identification number that ESB had and no material changes were made to Associates.

Since its inception, ESB had been solely involved in an insurance agency business. After the acquisition of Eastern by Petitioner, Associates continued to operate the insurance agency business. However, on September 29, 1989, Petitioner reorganized into a bank holding company structure. (It has since reorganized into its current savings bank form.) As a condition of the reorganization, the Federal Reserve Bank of New York required that Associates cease all new insurance business as of September 29, 1989. For two years, Associates was only permitted to renew existing insurance policies. After the expiration of the two-year period, Associates had to cease all renewals. Since then, Associates has ceased all insurance operations, and its only income is commissions in the form of overrides from pre-existing insurance policies and interest from a bank account.

Currently, Petitioner is planning to have Associates expand its line of business to include investments in securities. To that end, Petitioner has requested an amendment to Associates' New York charter, and is awaiting a response from New York State. Petitioner intends to fund Associates to enable Associates to begin its investment activities.

Petitioner states that ESB was subject to tax under Article 9-A of the Tax Law for its taxable year ending during 1984. Petitioner also states that ESB timely made the election, pursuant to section 1452(d) of the Tax Law, to continue to be taxable

under Article 9-A of the Tax Law, and that ESB and, subsequently, Associates have continued to file their tax returns under Article 9-A for all taxable years.

Section 1452(a) of Article 32 of the Tax Law defines a "banking corporation". Chapter 298 of the Laws of 1985 amended section 1452(a)(9) of the Tax Law by expanding the definition of a banking corporation to include, among other entities, a corporation 65 percent or more of whose voting stock is owned or controlled, directly or indirectly, by a savings bank or a savings bank holding company. In order to be a banking corporation, the corporation must be principally engaged in a business which might be lawfully conducted by a corporation subject to Article 3 of the Banking Law or by a national banking association or which is so closely related to banking or managing or controlling banks as to be a proper incident thereto, as set forth in section 4(c)(8) of the Federal Bank Holding Company Act of 1956, as amended. Chapter 298 of the Laws of 1985 also added a grandfather clause, set forth in section 1452(d) of the Tax Law, that permitted certain corporations to make a one-time election to continue to be taxed under Article 9-A of the Tax Law.

Section 1452(d) of the Tax Law provides that, notwithstanding the provisions of Article 32, all corporations of classes now or heretofore taxable under Article 9-A shall continue to be taxable under Article 9-A except, among other entities, banking corporations described in section 1452(a)(9) of the Tax Law. However, section 1452(d) provides further that a corporation described in section 1452(a)(9) of the Tax Law which was subject to the tax imposed by Article 9-A for its taxable year ending during 1984 may make a one-time election to continue to be taxable under Article 9-A. The election is made by the corporation on or before the due date for filing its return (determined with regard to extensions) for its taxable year ending during 1985. The election shall continue to be in effect until revoked by the taxpayer. In no event shall the election or revocation be for a part of a taxable year.

Section 16-2.5(j) (3) of the Franchise Tax on Banking Corporations Regulations provides that 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.

In Robert J. Buckley, Adv Op Comm T & F, May 26, 1994, TSB-A-94(8)C, it was held that where a corporation made the election, pursuant to section 1452(d) of the Tax Law, to be taxed under Article 9-A of the Tax Law, the subsequent takeover of the bank parent by the FDIC and the subsequent sale of the bank parent's stock did not affect the corporation's election.

In this case, pursuant to section 1452(d) of the Tax Law, ESB timely made the election to be taxed under Article 9-A of the Tax Law. ESB and, subsequently, Associates have continued to file tax returns under Article 9-A of the Tax Law. Pursuant to section 1452(d) of the Tax Law, section 16-2.5(j) (3) of the Franchise Tax on Banking Corporations Regulations and Buckley, supra, the subsequent takeover of Eastern by Petitioner in 1986 did not affect ESB's election to be taxable under Article 9-A of the Tax Law.

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Further, for purposes of determining whether the election made under section 1452(d) of the Tax Law is revoked, the activities of the corporation making the election are not considered, except that, if the corporation changes its activities to the extent that it can not be properly classified as a corporation taxable under Article 9-A of the Tax Law, the election made under section 1452(d) of the Tax Law would be revoked.

DATED: March 25, 1996

/s/
DORIS S. BAUMAN
Director
Technical Services Bureau

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