

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

TSB-A-97(2)C
Corporation Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C961001A

On October 1, 1996, a Petition for Advisory Opinion was received from 343 East 18th Street Corporation, c/o Andrew Lowry, 441 Hawthorne Place, Ridgewood, New Jersey 07450.

The issue raised by Petitioner, 343 East 18th Street Corporation, is whether it is subject to franchise tax under Article 9-A of the Tax Law after it discontinued business operations and after it was dissolved by proclamation.

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

The premises located at 343 East 18th Street, New York, New York, Section 3, Block 924 are improved by a four story brownstone dwelling. The ground floor and first floor were occupied by Alfred Lowry and his wife, Ellen N. Lowry, as their primary residence from the 1940's until the death of Mr. Lowry on March 9, 1995 and Mrs. Lowry on November 21, 1991. The second floor was and still is occupied by Edith Speziali as her primary residence since the 1940's. Ms. Speziali and the Lowrys were not related. The third floor was rented to various tenants as a residence.

The owner of the premises died in, approximately, 1956. Mr. and Mrs. Lowry acquired the premises on August 12, 1958, and a mortgage was issued on that date naming the Lowrys as the borrowers. When the premises were acquired by the Lowrys, the Lowrys and Ms. Speziali had agreed that Ms. Speziali would own her apartment on the premises although this was not reflected in the deed or any writing. In 1960, Ms. Speziali brought suit against the Lowrys in Supreme Court, New York County concerning, among other matters, ownership of the premises. On June 1, 1962, the Lowrys and Ms. Speziali entered into a settlement agreement which provided, among other things, that the premises would be conveyed to a corporation. Ms. Speziali would own 25% of the corporation and have the right to occupy her apartment; and the Lowrys would own 75% of the corporation and would occupy their apartment and have the right to rent the additional apartment.

Petitioner was incorporated in New York on June 20, 1962. The shareholders were Mr. and Mrs. Lowry as joint tenants with right of survivorship for 75 shares and Ms. Speziali for 25 shares. Petitioner was formed for the sole purpose of facilitating the settlement of litigation between the shareholders. Under the settlement agreement, Ms. Speziali would pay 25% of the operating expenses of the premises and the mortgage and the Lowrys would pay the other 75%.

On June 27, 1962, Petitioner acquired title to the premises located at 343 East 18th Street, New York from the Lowrys. The mortgage obtained by the Lowrys in 1958 was amended in 1962 to add Petitioner as mortgagor. The Lowrys remained as mortgagors and co-obligors. The mortgage was satisfied in 1976 and on January 20, 1977 a satisfaction dated September 3, 1976 was recorded.

A bank account was established at Citibank in the name of Petitioner. Periodically, Ms. Speziali would deliver to the Lowrys her check payable to Petitioner representing 25% of real estate taxes and other expenses of maintaining the premises. This check would be deposited in Petitioner's bank account. Mrs. Lowry was the sole signatory on this account. Periodically, Mrs. Lowry would draw the amount in the account to pay some of the expenses of operating the premises. The bank account was closed in 1993.

The real estate taxes, homeowners liability insurance policy and most expenses incurred in connection with the premises were usually paid by the Lowrys from their personal account and bills for such expenses were in the name of the Lowrys. Any and all leases signed with tenants showed the Lowrys as landlords. All rent was paid to the Lowrys and deposited in their personal accounts. All income and 75% of the expenses related to the premises were reported on the personal income tax returns of the Lowrys.

Petitioner was dissolved by proclamation in 1967 for failure to pay corporate franchise taxes. No corporate franchise taxes had ever been paid and no corporate franchise tax returns were ever filed. Petitioner states that it has not conducted any business operations whatsoever.

Section 209.1 of the Tax Law imposes, annually, 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.

Section 2-3.1 of the Business Corporation Franchise Tax 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 of the Tax Law. Section 1-2.4(c) of the Business Corporation Franchise Tax 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. W.R.H.R.E Corp., Adv Op Comm T & F, March 3, 1995, TSB-A-95(4)C; 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.

Liquidation is the operation of winding up the corporation's affairs by settling its debts, realizing upon and distributing its assets. (Wilcox, 43 BTA 931, affd 137 F2d 136; Hellman v Helvering, 68 F2d 763.) However, if normal corporate operations are continued, not even the cancellation of the corporate charter for failure to pay the annual state franchise tax will be sufficient to prove liquidation. (Zimmerman, 31 BTA 754)

In Joseph Barsh and Abe Schwartz, Adv Op Comm T & F, October 12, 1990, TSB-A-90(21)C, the petitioners were shareholders in a corporation that was formed in 1972 to hold title to real property. The corporation opened a bank account in 1972 and deposited rents therein. The account was maintained and rents continued to be deposited into it after the corporation was dissolved by proclamation in 1978. Also, after dissolution, leases continued to be renewed with the corporation listed on the leases as landlord. The shareholders reported the rental income and expense generated from the real property on their individual income tax returns for the years 1972 through 1987. The corporation continued to hold record title to the real property until 1988 when the property was conveyed to the shareholders individually. The opinion held that the corporation's activities after dissolution were the same as before dissolution and that the corporation continued to do business after it was dissolved by proclamation because its activities exceeded the mere holding of record title of real property and the liquidating of its business and affairs. The corporation was held subject to the franchise tax imposed under Article 9-A of the Tax Law for all taxable years from the date of incorporation to the date the corporation was liquidated and the real property was transferred to the individuals in 1988.

This case is similar to Barsh and Schwartz, supra. Petitioner was incorporated and acquired title to the premises in 1962. In 1962, the existing mortgage was amended to add Petitioner as a borrower. A bank account was opened at Citibank and Ms. Speziali's checks for her 25% of the real estate taxes and other expenses of maintaining the premises were deposited in this account. Periodically, Mrs. Lowry would draw on the account to pay some of the expenses of operating the premises. These activities continued after Petitioner was dissolved by proclamation in 1967. The mortgage was satisfied in 1976 and the bank account was closed in 1993.

Since the activities of Petitioner after dissolution were the same as before dissolution, Petitioner continued to do business after it was dissolved. Therefore, like Barsh and Schwartz, supra, Petitioner's activities exceeded the mere holding of record title to real property and the liquidating of its business and affairs. However, the mere maintenance of the bank account with the minimal activity in this case does not constitute doing business and is not sufficient activity, by itself, to subject Petitioner to tax under Article 9-A of the Tax Law. Accordingly, Petitioner is subject to the franchise tax imposed under Article 9-A of the Tax Law for all taxable years from the date it was

incorporated in 1962 to taxable year 1976 when Petitioner ceased to conduct business activities when the mortgage in Petitioner's name was satisfied.

Dated: January 21, 1997

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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