

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

TSB-H-80 (21) C
Corporation Tax
September 12, 1980

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. C800620A

On June 20, 1980, a Petition for Advisory Opinion was filed by Mobil International Finance Corp., P.O. Box 900, Dallas, Texas 75221.

The issue raised is whether the interest on certain intercompany notes held by Petitioner constitutes investment income generated by investment capital or business income generated by business capital, within the meaning of the applicable provisions of Article 9-A of the Tax Law. Petitioner is presently under audit with respect to calendar years 1975 through 1977 and raises this issue with respect to both these and subsequent years.

Information contained in the petition, supplemented by a memorandum prepared by the Advisory Opinion Unit of the Audit Division and acquiesced in by Petitioner, reveals the following. Petitioner lends money to various companies in the Mobil family in order to help such companies finance their capital requirements. These loans are evidenced by the intercompany notes which constitute the subject of this discussion. The notes are issued for a period of one year or more, are unsecured, are not sold in the open market or on a recognized exchange and are not negotiable instruments.

The term "business capital" is defined, in section 208.7 of the Tax Law and section 3-4.3(a) of the Corporation Franchise Tax Regulations, as the total average fair market value of all of the taxpayer's assets exclusive of treasury stock, assets constituting subsidiary capital and investment capital, less certain liabilities. 20 NYCRR 3-4.3(a).

The term "investment capital" is defined in section 208.5 of the Tax Law to include "...investments in stocks, bonds and other securities, corporate and governmental" Section 3-4.2(c) of the Corporation Franchise Tax Regulations defines the term "other securities" to include corporate securities" . . . of a like nature as stocks and bonds, which are customarily sold in the open market or on a recognized exchange, designed as a means of investment and issued for the purpose of financing corporate enterprises and providing a distribution of rights in, or obligations of, such enterprises." 20 NYCRR 3-4.2(c). The foregoing is applicable to taxable years beginning on or after January 1, 1976 but identical language was contained in the regulations applicable to 1975.

As set forth above, one of the conditions which must be met in order for obligations to be included in the category of "other securities" is that they be customarily sold in the open market or on a recognized exchange. The notes at issue are not sold in the open market or on a recognized exchange. Indeed, the notes are not negotiable.

Accordingly, such notes are not "other securities" and do not constitute investment capital within the meaning of the provisions the Tax Law and regulations cited above. The notes constitute business capital, and the interest income derived therefrom constitutes business income with respect to all of the periods in question.

DATED: September 9, 1980

s/LOUIS ETLINGER
Deputy Director
Technical Services Bureau
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JAMES H. TULLY., COMMISSIONER

LOUIS M. JACOBSON, DEPUTY COMMISSIONER

FRANK J. PUCCIA, DIRECTOR