

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-00(2)R
Real Estate Transfer Tax
TSB-A-00(4)C
Corporation Tax
February 29, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z991215A

On December 15, 1999, a Petition for Advisory Opinion was received from Central Hudson Gas & Electric Corporation, 284 South Avenue, Poughkeepsie, New York 12601-4879.

The issues raised by Petitioner, Central Hudson Gas & Electric Corporation, are a follow-up to an advisory opinion issued to Petitioner on July 29, 1998, TSB-A-98(2)R, (12)C and (2)M, with respect to Petitioner's proposed restructuring as required under the New York State Public Service Commission's ("PSC") Competitive Opportunities Proceeding and the PSC's policy objectives set forth in the Opinion No. 96-12 ("Issued Advisory Opinion"):

1. Is the spin-off by Petitioner of its ownership of three wholly-owned subsidiaries to CH Energy Group, Inc., the parent ("Holdco") of Petitioner, by a distribution of stock ("Existing Subsidiaries Spin-Off"), a mere change of form of ownership or organization where there is no change in beneficial ownership ("Mere Change") and, therefore, exempt, pursuant to section 1405(b)(6) of the Tax Law, from tax, to the extent applicable, under section 1402(a) of the Tax Law?
2. Since tax exempt treatment under section 355 of the Internal Revenue Code ("IRC") is not recognized for purposes of sections 186 and 186-a of the Tax Law with respect to the Existing Subsidiaries Spin-Off (*i.e.*, for purposes of taxation under the IRC, the Spin-Off would be considered to be a taxable distribution by Petitioner of appreciated property under section 311(b) of the IRC), would any amount be recognized by Petitioner as "gross earnings" under section 186 of the Tax Law or as "gross income" under section 186-a of the Tax Law?
3. Since tax exempt treatment under section 355 of the IRC is not recognized for purposes of section 186 of the Tax Law, and assuming Petitioner were subject to the 4.5% excess dividends tax under section 186 ("Excess Dividends Tax"), would any portion of the value of the stock in the Existing Subsidiaries Spin-Off be subject to the Excess Dividends Tax?

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

Issues 1, 2 and 3 of this Advisory Opinion relate to Questions 2, 9 and 10, respectively, of the Issued Advisory Opinion. The Issued Advisory Opinion sets forth a proposed restructuring of

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Petitioner's organization and operations pursuant to the PSC's Competitive Opportunities Proceeding and the PSC's policy objectives set forth in the Opinion No. 96-12 and implemented under the restructuring plan described in the Restated Settlement Agreement dated January 2, 1998, as modified February 26, 1998, which includes a proposed structure for its subsidiaries spin-off. Subsequent to the issuance of the Issued Advisory Opinion, Petitioner revised its proposed structure of its subsidiaries spin-off. All other facts presented in the Issued Advisory Opinion remain the same. Petitioner states that although the form of the restructuring is different than originally envisioned, the substance is the same and continues to be a Mere Change with no change in beneficial ownership. The revised facts are as follows:

Petitioner states that on or about December 15, 1999, Petitioner restructured as follows:

1. Central Hudson Services, Inc. was established as a new subsidiary ("Newco") of CH Energy Group, Inc. (CH Energy Group, Inc. was a subsidiary of Petitioner).
2. The shareholders of Petitioner exchanged their shares of stock for shares of CH Energy Group, Inc. ("Share Exchange"), making CH Energy Group, Inc. the parent (Holdco) of Petitioner as well as Newco.
3. The original shares of stock issued by Holdco to Petitioner were cancelled (100 shares @ \$.10 / share) such that 100 percent of the Holdco stock is now owned by outside shareholders.
4. Petitioner spun up three of its subsidiaries (Central Hudson Enterprises Corp. ("CHEC"), CH Resources, Inc., and Greene Point Development Corp.) to Holdco (the Existing Subsidiaries Spin-Off).
5. Holdco dropped down the three subsidiaries to Newco.

Discussion

Issue 1: Refer to Issue A: New York State Real Estate Transfer Tax of the Issued Advisory Opinion for the applicable law.

In the Existing Subsidiaries Spin-Off, Petitioner would distribute to Holdco 100% of the common stock of Central Hudson Enterprises Corp. ("CHEC"), CH Resources, Inc., and Greene Point Development Corp. As CHEC is an entity with an interest in real property, the Existing Subsidiaries Spin-Off will result in Holdco acquiring a controlling interest in an entity with an

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interest in real property. Therefore, the Spin-Off of CHEC results in a taxable conveyance of real property in accordance with sections 1402, 1401(b) and 1401(e) of the Tax Law.

However, as determined in the Answer to Question 2 of the Issued Advisory Opinion, as a result of the Share Exchange, Holdco became the sole owner of Petitioner and, thus, the indirect owner of CHEC. Therefore, the Spin-Off of CHEC represents a mere change of identity with no change in beneficial ownership and would be exempt from the real estate transfer tax as provided in section 1405(b)(6) of the Tax Law.

Similarly, when the stock of Existing Subsidiaries is distributed down from Holdco to Newco, Newco will acquire a controlling interest in an entity (CHEC) with an interest in real property. Therefore, the transaction will result in a taxable conveyance of real property in accordance with sections 1402, 1401(b) and 1401(e) of the Tax Law.

However, because Holdco is the parent company of Newco, the distribution down to Newco of the stock of the Existing Subsidiaries represents a mere change of identity with no change in beneficial ownership and would be exempt from the real estate transfer tax as provided in section 1405(b)(6) of the Tax Law.

Issue 2: Refer to Issue B: Sections 186 and 186-a – Spin-Offs and Generation Assets of the Issued Advisory Opinion for the applicable law.

As stated in the Answer to Question 9 of the Issued Advisory Opinion, the Existing Subsidiaries Spin-Off is part of a series of transactions being entered into by Petitioner as mandated by the PSC pursuant to the Competitive Opportunities Proceeding and the PSC's policy objectives set forth in the Order (Opinion No. 96-12), and implemented under the restructuring plan described in the Restated Settlement Agreement dated January 2, 1998, and modified February 26, 1998. The facts, as presented in this Advisory Opinion, provide that after the Share Exchange with CH Energy Group, Inc. (Holdco), Petitioner will distribute to Holdco all of the common stock of its wholly owned subsidiaries, CHEC, CH Resources, Inc. and Greene Point Development Corp. The fact that subsequent to the Spin-Off of the stock of the subsidiaries from Petitioner to Holdco, Holdco will drop down those subsidiaries to Newco will not affect the tax ramifications of the transactions for Petitioner.

As determined in the Answer to Question 9 of the Issued Advisory Opinion, like Matter of Consolidated Edison Co. of NY v State Tax Commission, 24 NY2d 114, 119, and Long Island Lighting company, Adv Op Comm T&F, February 27, 1998, TSB-A-98(3)C, Petitioner does not employ its capital within the meaning of section 186 of the Tax Law for the purpose of restructuring its organization. Therefore, these transactions will not generate any "gross earnings" for Petitioner.

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With respect to the excise tax imposed under section 186-a of the Tax Law, Petitioner will realize “gross income” to the extent that a profit is generated. The profit, if any, would equal the amount that the fair market value of the common stock of each of the subsidiaries exceeds Petitioner’s book value of the common stock.

Issue 3: Refer to Issue B: Sections 186 and 186-a – Spin-Offs and Generation Assets of the Issued Advisory Opinion for the applicable law.

As stated in the Answer to Question 10, of the Issued Advisory Opinion, in People ex rel Adams Electric Light Co v Graves, 272 NY 77,79, the Court of Appeals stated that under the franchise tax imposed by section 186, “[a] dividend implies a division or distribution of corporate profits.” In this case, Petitioner’s distribution to Holdco, after the Share Exchange, of all of the common stock of Petitioner’s subsidiaries, CHEC, CH Resources, Inc. and Greene Point Development Corp., (the Existing Subsidiaries Spin-Off), is part of the series of transactions being entered into by Petitioner as mandated by the PSC pursuant to the Competitive Opportunities Proceeding and the PSC’s policy objectives set forth in the Order (Opinion No. 96-12), and implemented under the restructuring plan described in the Restated settlement Agreement dated January 2, 1998 and modified February 26, 1998, whereby Petitioner is reorganized into the holding company structure. It does not represent a distribution of the profits of Petitioner. Accordingly, these restructuring distributions are not treated as dividends subject to the Excess Dividends Tax under section 186 of the Tax Law.

DATED: February 29, 2000

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

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