

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

TSB-A-87 (31) C
Corporation Tax
TSB-A-87 (8) I
Income Tax
December 8, 1987

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z870603A

On June 3, 1987, a Petition for Advisory Opinion was received from Kansas Gas and Electric Company, Wolf Creek Generating Station Decommissioning Trust, 21 West Street, New York, New York 10015.

The issues raised are whether Petitioner is subject to tax under (I) the franchise tax on business corporations imposed under Article 9-A of the Tax Law; (II) the New York State personal income tax imposed under Article 22 of the Tax Law and the New York City Personal Income Tax authorized under Article 30 of the Tax Law and (III) the New York City General Corporation Tax and Unincorporated Business Income Tax imposed under Title II of the Administrative Code of the City of New York.

Petitioner is a nuclear decommissioning reserve fund for federal income tax purposes under section 468A of the Internal Revenue Code of 1986. Petitioner was established as a trust solely for purposes of paying the future cost of decommissioning a nuclear power plant. Petitioner does not issue stock or other certificates or written instruments evidencing ownership interests. Petitioner's sole activity is investing for its own account.

Temporary regulation section 1.468A-5T(a) (3) (i) provides as follows:

(3) Limitation on use of fund - (i) In general. The assets of a nuclear decommissioning fund are to be used exclusively-

(A) To satisfy in whole or in part, the liability of the electing taxpayer for decommissioning costs of the nuclear power plant to which the nuclear decommissioning fund relates;

(B) To pay administrative costs and other incidental expenses of the nuclear decommissioning fund; and

(C) To the extent that the assets of the nuclear decommissioning fund are not currently required for the purposes described in paragraph (a) (3) (i) (A) or (B) of this section to invest in-

(1) Public debt securities of the United States;

(2) Obligations of a State or local government that are not in default as to principal or interest; or

(3) Time or demand deposits in a bank ... or a credit union ... located in the United States.

Issue (I)

Section 209(1) of Article 9-A of the Tax Law imposes a corporate franchise tax on a corporation "[f]or the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity "

Section 208(1) of the Tax Law provides that "[It]he term "corporation" includes a joint-stock company or association and any business conducted by a trustee or trustees wherein interest or ownership is evidenced by certificate or other written instrument "

Regulation section 1-2.3 (b) provides:

(b) The term corporation includes a joint stock company or association and any business conducted by a trustee or trustees wherein interest or ownership is evidenced by certificate or other written instrument. An entity conducted as a corporation is deemed to be a corporation.

(1) The terms joint stock company and association include every unincorporated Joint stock association, joint stock company or enterprise having written articles of association and capital stock divided into shares. The term association includes a joint stock association.

(2) The term trust includes any business conducted by a trustee or trustees in which interest or ownership is evidenced by certificate or others written instrument. Such a trust includes, but is not limited to, an association commonly referred to as a business trust or Massachusetts trust. In determining whether a trustee or trustees are conducting a business, the form of the agreement is of significance but is not controlling. The actual activities of the trustee or trustees, not their purposes and powers, will be regarded as decisive factors in determining whether a trust is subject to tax under Article 9-A. The mere investment of funds and the collection of income therefrom, with incidental replacement of securities and reinvestment of funds, does not constitute the conduct of a business in the case of a trust. (20 NYCRR 1-2.3).

Inasmuch as Petitioner was created as a trust, does not issue stock or other certificates or written instruments evidencing ownership interests and is limited to investing in government debt securities and bank time or demand deposits, it is concluded that Petitioner is not a "corporation" for purposes of regulation section 1-2.3(b) and is not subject to the tax imposed by Article 9-A of the Tax Law.

TSB-A-87 (31) C
Corporation Tax
TSB-A-87 (8) I
Income Tax
December 8 , 1987

Issue II

Section 468A(e) (2) (A) of the Internal Revenue Code provides that "[t]here is hereby imposed on the gross income of the fund for any taxable year a tax at the rate equal to the highest rate of tax specified in section 11(b) [the tax imposed upon the taxable income of every corporation]..." Section 468A(e) (2) (C) provides "[f]or purposes of subtitle F (i) the fund shall be treated as if it were a corporation, and (ii) any tax imposed by this paragraph shall be treated as a tax imposed by section 11."

Section 601(c) of Article 22 of the Tax Law provides that "[a]n association, trust or other unincorporated organization which is taxable as a corporation for federal income tax purposes shall not be subject to tax under this article."

However, Petitioner argues that it should not be considered an unincorporated entity taxable as a corporation for federal income tax purposes because "[a]lthough the rate imposed on the Trust's income is a corporate rate, the Trust is generally set up as a trust and it is treated as a corporation only for very specific enumerated purposes."

Additionally, Petitioner argues that before the enactment of Code section 468A, Petitioner would qualify as a grantor trust under Code section 671 through 679. Under such circumstances, the income of the trust would be treated as income of the grantor and the trust itself would not be subject to tax for either federal or state purposes.

Thus, Petitioner argues the Kansas Gas & Electric Company (the Grantor) should include in its taxable income the income, deductions and credits which are attributable to the trust and the trust itself should be exempt from tax.

The New York personal income tax includes no provision analogous to Code section 468A. Section 618 of the Tax Law provides that taxable income of a resident trust means its federal taxable income with certain modifications. Clearly, if Petitioner is a nuclear decommissioning reserve fund under Code section 468A, it does not have federal taxable income. Moreover, if Petitioner's federal taxable income could be computed as if Code section 468A did not apply, Petitioner would still not have federal taxable income if it qualifies as a federal grantor trust.

Prior to the enactment of Code section 468A, Petitioner would have qualified as a grantor trust under Code section 677. Pursuant to that section, the grantor of a trust is treated as the owner of any portion of a trust whose income is or may be distributed to the grantor or held or accumulated for future distribution to the grantor without the approval or consent of any adverse party. Since the income of the fund will be distributed to Kansas Gas and Electric Company when it is needed to decommission the nuclear powerplant or will be held or accumulated for future distribution to the grantor in order for the grantor to pay for its liabilities in the decommissioning of its nuclear power plant, the Petitioner would have clearly qualified as a grantor trust.

TSB-A-87 (31) C
Corporation Tax
TSB-A-87 (8) I
Income Tax
December 8 , 1987

Inasmuch as Petitioner has no federal taxable income in any event, it is concluded that Petitioner is exempt from personal income tax under Article 22 of the Tax Law. In light of this answer, Petitioner's question regarding whether it would be deemed to be taxed as a corporation for federal income tax purposes is rendered moot.

Issue (III)

Petitioner makes reference in its petition to the New York City General Corporation Tax (Title II, Chapter 6, Subchapter 2 of the Administrative Code of the City of New York) and the New York City Unincorporated Business Income Tax (Title II, Chapter 5 of the Administrative Code of the City of New York).

Section 171, paragraph twenty-fourth of the Tax Law provides that the Commissioner of Taxation and Finance shall "render advisory opinions with respect to taxes administered by such commissioner " The New York City General Corporation Tax and Unincorporated Business Income Tax are not among the taxes administered by the Commissioner of Taxation and Finance. Accordingly, the Commissioner is not authorized to issue an advisory opinion with respect to either such tax and no opinion is rendered herein with respect to either such tax.

DATED: December 8, 1987

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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