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

TSB-A-03(12)C
Corporation Tax
November 6, 2003

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C030529A

On May 29, 2003, a Petition for Advisory Opinion was received from McDermott, Will & Emery, 50 Rockefeller Plaza, New York, New York 10020.

The issue raised by Petitioner, McDermott, Will & Emery, is whether a bank subsidiary's election to be taxed under Article 9-A of the Tax Law pursuant to the grandfather provision in section 1452(d) of the Tax Law remains valid after the reincorporation of the subsidiary from State A to State B, which reincorporation qualifies as a reorganization under Internal Revenue Code (IRC) section 368(a)(1)(F).

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

Corporation X was incorporated in State A in 1980. It has been qualified to do business in New York State since 1981 and, since that time, has reported and paid corporation franchise tax under Article 9-A of the Tax Law. Corporation X made the one-time election under section 1452(d) of the Tax Law, on or before the due date for the filing of its return for its 1985 taxable year, to continue being subject to taxation pursuant to Article 9-A of the Tax Law instead of Article 32 of the Tax Law. Corporation X has not revoked that election and it has not engaged in any transactions or activities that would cause the revocation of that election. Since it first made that election, it has always been principally engaged in activities that may be properly conducted by a corporation taxable under Article 9-A of the Tax Law.

For administrative efficiency reasons, Corporation X is contemplating reincorporating from State A to State B. Such reincorporation would qualify as a tax-free reorganization under IRC section 368(a)(1)(F). Mechanically, the reorganization would be effected by creating a new corporation in State B and then merging Corporation X into the new corporation ("State B Corporation X").

For all practical and most significant legal purposes, Corporation X will be the same corporation after the reincorporation. The content of the Charter and Bylaws of State B Corporation X will be identical to the Charter and Bylaws of Corporation X, except to the extent required to be changed due to differences in the corporate law of State A and State B. State B Corporation X will assume and be liable for all liabilities and obligations of Corporation X. Any pending actions or judicial proceedings, whether civil or criminal, to which Corporation X is a party will not abate or be discontinued by reason of the reorganization but will continue in the same manner as if the reincorporation had not taken place. After the reincorporation, the name, ownership and assets of State B Corporation X will be the same as that of Corporation X. All of Corporation X's operations at each of its current business locations will continue uninterrupted and will remain the same after the reincorporation. Accordingly, State B Corporation X will continue to be principally engaged

in activities that may be properly conducted by a corporation taxable under Article 9-A of the Tax Law. Finally, for federal income tax purposes, State B Corporation X will file all tax returns under Corporation X's federal employer identification number and upon the same reporting dates or reporting periods as are required of Corporation X prior to the reincorporation.

**Applicable law and regulations**

Section 1450(a) of the Tax Law provides that "[t]he word 'taxpayer' means a corporation or association subject to a tax imposed by this article."

Section 1452(d) of the Tax Law provides, in part:

> Corporations taxable under article nine-a. Notwithstanding the provisions of this article, all corporations of classes now or heretofore taxable under article nine-a of this chapter shall continue to be taxable under article nine-a, except: ... (3) banking corporations described in paragraph nine of subsection (a) of section fourteen hundred fifty-two. Provided, however, that a corporation described in paragraph three of this subsection which was subject to the tax imposed by article nine-A of this chapter for its taxable year ending during nineteen hundred eighty-four may, on or before the due date for filing its return (determined with regard to extensions) for its taxable year ending during nineteen hundred eighty-five, make a one time election to continue to be taxable under such article nine-A. Such election shall continue to be in effect until revoked by the taxpayer. In no event shall such election or revocation be for a part of a taxable year.

Section 16-2.5(j)(3) of the Banking Corporation Franchise Tax Regulations provides:

> Any corporation described in paragraph (1) of this subdivision which was subject to the tax imposed by article 9-A of the Tax Law for its taxable year ending during 1984 may, on or before the due date for filing its return (determined with regard to extensions of time for filing) for its taxable year ending during 1985, make a one-time election to continue to be taxable under article 9-A. Such election shall continue to be in effect until revoked by the taxpayer. In no event shall such election or revocation be for a part of a taxable year. 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.

IRC section 361(a) provides that:

> General rule. – No gain or loss shall be recognized to a corporation if such corporation is a party to a reorganization and exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

IRC section 368(a)(1) defines "reorganization", in pertinent part, as follows:

In general. – For purposes of parts I and II and this part, the term "reorganization" means –

* * *

(F) a mere change in identity, form or place of organization of one corporation, however effected; ...

Treasury Regulation section 1.368-1 contains the purpose and scope of exception of reorganization exchanges, and provides, in pertinent part:

(b) Purpose. Under the general rule, upon the exchange of property, gain or loss must be accounted for if the new property differs in a material particular, either in kind or in extent, from the old property. The purpose of the reorganization provisions of the Code is to except from the general rule certain specifically described exchanges incident to such readjustments of corporate structures made in one of the particular ways specified in the Code, as are required by business exigencies and which effect only a readjustment of continuing interest in property under modified corporate forms....

(c) Scope. The nonrecognition of gain or loss is prescribed for two specifically described types of exchanges, viz.: The exchange that is provided for in section 354(a)(1) ... and the exchange that is provided for in section 361(a) in which a corporation, a party to a reorganization, exchanges property, in pursuance of a plan of reorganization, for stock or securities in another corporation, a party to the same reorganization. Section 368(a)(1) limits the definition of the term "reorganization" to six kinds of transactions and excludes all others. . . .

IRC section 381(a) provides in pertinent part:

General Rule.– In the case of the acquisition of assets of a corporation by another corporation –

* * *

(2) in a transfer to which section 361 (relating to nonrecognition of gain or loss to corporations) applies, but only if the transfer is in connection with a reorganization described in subparagraph ... (F) ... of section 368(a)(1),

the acquiring corporation shall succeed to and take into account, as of the close of the day of distribution or transfer, the items described in subsection (c) of the distributor or transferor corporation, subject to the conditions and limitations specified in subsections (b) and (c)....

Treasury Regulation section 1.381(b)-1(a)(2) provides:

> Reorganizations under section 368(a)(1)(F). In the case of a reorganization qualifying under section 368(a)(1)(F) (whether or not such reorganization also qualifies under any other provision of section 368(a)(1)), the acquiring corporation shall be treated (for purposes of section 381) just as the transferor corporation would have been treated if there had been no reorganization. Thus, the taxable year of the transferor corporation shall not end on the date of transfer merely because of the transfer; a net operating loss of the acquiring corporation for any taxable year ending after the date of transfer shall be carried back in accordance with section 172(b) in computing the taxable income of the transferor corporation for a taxable year ending before the date of transfer; and the tax attributes of the transferor corporation enumerated in section 381(c) shall be taken into account by the acquiring corporation as if there had been no reorganization.

**Opinion**

In *Pendex Real Estate Corp*, Adv Op Comm T&F, January 27, 1999, TSB-A-99(10)C, the issue was whether the petitioner's election pursuant to section 1452(d) of the Tax Law continued under three scenarios. Since the scenarios were hypothetical and the petitioner could not describe the merger transactions or state which entity was the survivor, it was not possible to determine whether the election would continue. However, the opinion did provide guidance in making such determination, and held that when one or more corporations merged with the petitioner, where the petitioner was the surviving entity, such transaction would not revoke the petitioner's election pursuant to section 1452(d). The opinion also held that if the petitioner was not the surviving entity after the merger transaction, the petitioner would cease to exist, and the petitioner's election pursuant to section 1452(d) would also cease, and would not carry over to the surviving entity. (See also *Sutdex Real Estate Corp*, Adv Op Comm T&F, January 27, 1999, TSB-A-99(11)C.)

Under IRC sections 361(a), 368(a)(1)(F) and 381, and Treasury Regulation sections 1.368-1(b) and (c) and 1.381(b)-1(a)(2), it is recognized that two distinct corporations are parties to a reorganization. However, with respect to a reorganization under IRC section 368(a)(1)(F), there is no gain or loss recognized by the transferor corporation as a result of the transaction, the taxable year of the transferor corporation does not end on the date of transfer merely because of the transfer, net operating losses of the acquiring corporation for taxable years ending after the transfer are carried back in accordance with IRC section 172(b) in computing the taxable income of the transferor corporation, and the tax attributes of the transferor corporation are taken into account by the acquiring corporation as if there had been no reorganization.

In this case, it is assumed that Corporation X properly made the election, pursuant to section 1452(d) of Article 32 of the Tax Law, to continue to be subject to tax under Article 9-A of the Tax Law. Petitioner states that Corporation X organized in State A is contemplating merging into

a new corporation organized in State B. Under this scenario, Corporation X organized in State A would be dissolved in State A, and the new corporation organized in State B would become State B Corporation X. This transaction would meet the definition of a reorganization for federal income tax purposes under IRC section 368(a)(1)(F) as a change in state of incorporation. As such, it is recognized under the applicable provisions of the IRC that Corporation X and State B Corporation X are two distinct corporations, but that there is no federal income tax effect resulting from the transaction.

For purposes of Article 32 of the Tax Law, Corporation X organized in State A was the corporation that was the taxpayer under section 1450(a) of the Tax Law that made the election pursuant to section 1452(d) of the Tax Law by filing its 1985 tax return under Article 9-A of the Tax Law. Since Corporation X organized in State A would not be the surviving entity after the merger transaction contemplated in this case, Corporation X organized in State A would cease to exist, and following *Pendex*, *supra*, the election made by Corporation X would also cease. Accordingly, the election made by Corporation X pursuant to section 1452(d) of the Tax Law would not carry over to State B Corporation X, the new taxpayer under section 1450(a) of the Tax Law.

DATED: November 6, 2003

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

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