New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-A-08(5)C
Corporation Tax
October 16, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C080129A

On January 29, 2008, a Petition for Advisory Opinion was received from CaComm, Inc., P.O. Box 73, Spring Lake, New Jersey, 07762.

The issues raised by Petitioner, CaComm, Inc., are whether:

1. Petitioner is subject to tax in New York under Article 9-A of the Tax Law.

2. Petitioner's receipts from its portion of the gain on the sale of a Federal Communications Commission (FCC) broadcast license are business receipts within the meaning of the Tax Law.

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

Petitioner is a C Corporation that was formed in New Jersey in 1981. Petitioner's corporate offices are located in New Jersey and Petitioner's principal shareholders are New Jersey residents. Petitioner is a fiscal tax year filer with its tax year ending July 31 of each year. For at least the last 10 years, Petitioner's sole activity has consisted of holding a general partnership interest in a partnership formed pursuant to the laws of the District of Columbia (the "Partnership"). For its fiscal year ending July 31, 2007, Petitioner realized interest and dividend income but generated no business or operating income. Petitioner does not expect to have income for its fiscal year ending July 31, 2008, other than interest, dividends, and a capital gain from the sale of a license, described below.

In 1985, Petitioner and three other corporations formed the Partnership. The four original partners were all interested in obtaining a Multichannel Multipoint Distribution Service ("MMDS") license to be offered by the Federal Communications Commission ("FCC") pursuant to a lottery for multichannel distribution service ("MDS") broadcast rights in the New Jersey-New York metropolitan area. Since the FCC permitted potential license applicants to aggregate their interest in a partnership, the partners enhanced their chances of obtaining the license by forming the partnership. The Partnership eventually obtained an FCC license (the "License") as described below. In July of 1999, one of the original partners, a California corporation, was bought out by the other partners. Since that time, the Partnership has consisted of three general partners, Petitioner, Partner 1 and Partner 2 ("Partners"). The Partners were equal one-third owners with each Partner having a one-third interest in profits and losses, an obligation to make one-third of the Partnership's required capital contributions, and a one-third voice in partnership management. Petitioner's partnership management activities were conducted from its New Jersey headquarters, Partner 1's partnership management activities were conducted from its

Connecticut headquarters, and Partner 2's partnership management activities were conducted from its Rhode Island and Florida offices.

The Partnership has never recognized any operating income, subscription income, or otherwise generated any revenue from the License. For its final tax year beginning January 1, 2007, the Partnership had no income, since the individual partners were transferors of their one-third undivided interests in the License, as described below.

In 1985, the Partnership won the lottery conducted by the FCC and was selected as a "Designated Selectee" which entitled the Partnership to seek a broadcast license (the "Broadcast Rights") to a certain geographic area (the "Broadcast Area"). Due to a number of factors, however, including the overlap between commercial and educational users of spectrum channels, the resulting signal interference, and ambiguous government rules and regulations regarding the manner in which these issues were to be resolved, the Partnership never realized its intended use of the License prior to the Partnership's sale of the License.

At the time the Partnership was awarded its Designated Selectee status by the FCC, MDS licenses for commercial purposes operated at frequencies in the 2596-2690 MHz range. It was not uncommon for there to be overlapping use of common channels among commercial and educational users in the MDS spectrum. As a Designated Selectee, the Partnership had the right to ultimately obtain an FCC broadcast license if it could demonstrate to the FCC that its signal transmission would not interfere with the use of broadcast spectrum by any grandfathered co-channel educational licensee. When the Partnership received Designated Selectee status, there was a grandfathered non-profit co-channel educational licensee (the "Educational Licensee") transmitting signals through the Broadcast Area. Therefore, the Partners were aware that any launch of service in the Broadcast Area would need to avoid interference with the Educational Licensee's signal transmission. As a result, the Partnership began the process of seeking to rectify the anticipated interference with the Educational Licensee's signal broadcast. The Partnership's attempts in this regard continued for a number of years without success.

Eventually, the Partnership postponed its attempts to utilize the Broadcast Rights throughout the entire Broadcast Area. Instead, the Partnership adopted a new strategy to minimize signal interference by requesting an FCC license that would only involve the use of a west-facing antenna. This strategy was developed in response to the fact that the Educational Licensee's signal transmitted to the eastern portion of the Broadcast Area. The Partners believed that they might salvage the ability to receive a license to launch a broadcast system if signals broadcast toward New Jersey had the effect of reducing or eliminating interference. The modification of the Partnership's business plan to include a west-facing antenna was sufficient for the FCC to issue the License to the Partnership on May 6, 1997. The Partnership continued its efforts to resolve the ongoing impediments to full utilization of the License throughout the Broadcast Area. These efforts ultimately proved futile. A collection of FCC rules and regulations and the condensed geographic market created by utilizing only the west-facing

antenna made the costs of system launch prohibitive and economically unsound. As a consequence, the Partnership was unable to launch its broadcast service.

As a result of having been granted the License, however, the Partnership was obligated to begin transmitting signals. These signals were transmitted from the Empire State Building (ESB) in Manhattan. At that time, ESB management was aware that the Partnership had no subscribers and no income, and thus permitted transmission to take place from a window high on the ESB without requiring the Partnership to enter into a lease agreement or pay rent, in part because ESB management believed that the Partnership would eventually have customers and would later enter into a formal lease agreement for ESB space. Accordingly, the Partnership began to transmit a selective signal from the ESB to satisfy the FCC's requirement to maintain the License. The signals emitted by the Partnership only included the Partnership name, address, and telephone number. The general public could not receive the signals, however, since such receipt would have required special equipment. Although the Partnership's initial licensed transmission location was the ESB, the Partnership could have transmitted signals from anywhere within its licensed service area, including New Jersey, as long as such transmission did not interfere with the transmission of other licensees and was approved by the FCC.

In 2001, the FCC renewed the partnership's License for an additional period of ten years. In 2003, the ESB retained new management which requested the Partnership to enter into a formal lease for ESB space. The lease agreement was executed in November 2003. In 2004, the FCC issued an order designed to remove regulatory hurdles impeding the public's ability to fully exploit the potential of the 2500-2690 MHz spectrum. The Partnership interpreted provisions of the 2004 Order as eliminating the requirement of signal transmission in order to retain License rights. Because the 2004 Order was ambiguous on this point, however, the Partnership's legal counsel submitted an opinion request to the FCC. The FCC issued its opinion in February 2005 and concluded that the Partnership would no longer be required to transmit signals in order to retain the License.

Based on these cumulative events and no longer being under a requirement to continue transmitting signals, Partnership ceased all transmission and turned off electricity for its transmitting equipment in May 2006. The transmission equipment was later removed from the ESB and delivered to a Connecticut warehouse in July 2006 for storage. The Partnership immediately began negotiations with ESB management to terminate its ESB lease, and, after removal of the equipment from ESB in July 2006, the Partnership conducted no further activities in New York and began to consider a disposition of the License.

In the spring of 2007, Petitioner retained an investment banking firm specializing in the communications industry to seek a buyer for the License. The investment banker was successful in locating a buyer and in June 2007 the buyer and the Partnership entered into an agreement for the purchase of the License. The purchase transaction resulted in the Partnership assigning its rights in the License to the Partners with each Partner receiving a one-third undivided interest in the License. The Partnership elected a principal of Partner 1 (the "Seller's Representative") to

conclude negotiations with the buyer on behalf of all Partners. Subsequent to his appointment, the Seller's Representative continued to negotiate final details of the transfer of the License with the buyer, including keeping the buyer informed of the progress of the FCC's consideration and approval of the sales. All such negotiations were conducted by the Seller's Representative at Partner 1's office in Connecticut. In August 2007, the FCC approved the transfer of the License from the three Partners to the buyer. In September 2007, the Partners as successors to the Partnership concluded negotiations with the landlord on the termination of the ESB lease. After previously removing the transmission equipment from the leased premises in July 2006, the Partnership did not utilize the leased space nor did it sublease this space. In October 2007, Petitioner's sale of its undivided one-third interest in the License to the buyer closed and Petitioner received its sale proceeds.

Applicable law and regulations

Section 208 of the Tax Law provides, in part:

> 5. The term "investment capital" means investments in stocks, bonds and other securities, corporate and governmental, not held for sale to customers in the regular course of business, exclusive of subsidiary capital and stock issued by the taxpayer, provided, however, that, in the discretion of the commissioner, there shall be deducted from investment capital any liabilities which are directly or indirectly attributable to investment capital; …
>
> 6. The term "investment income" means income, including capital gains in excess of capital losses, from investment capital, to the extent included in computing entire net income,…
>
> * * *
>
> 8. The term "business income" means entire net income minus investment income;

Section 209.1 of the Tax Law imposes a tax on every domestic or foreign corporation "For 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, or of maintaining an office in this state, for all or any part of each of its fiscal or calendar years,…"

Section 209.2 of the Tax Law provides, in part:

> A foreign corporation shall not be deemed to be doing business, employing capital, owning or leasing property, or maintaining an office in this state, for the purposes of this article, by reason of … (d) the maintenance of an office in this state by one or

more officers or directors of the corporation who are not employees of the corporation if the corporation otherwise is not doing business in this state,…

Section 1-3.2 of the Business Corporation Franchise Tax Regulations (Article 9-A Regulations) provides, in part:

Foreign corporations subject to tax. (a) *General.* (1) The tax is imposed on every foreign corporation, not specifically exempt as provided in section 1-3.4 of this Subpart, whose activities include one or more of the following:

(i) doing business in New York State in a corporate or organized capacity or in a corporate form; or
(ii) employing capital in New York State in a corporate or organized capacity or in a corporate form; or

(iii) owning or leasing property in New York State in a corporate or organized capacity or in a corporate form; or
(iv) maintaining an office in New York State.

* * *

(5) If a partnership is doing business, employing capital, owning or leasing property or maintaining an office in New York State, then all of its corporate general partners are subject to the tax imposed by article 9-A of the Tax Law.

* * *

(b)(1) *Foreign corporation--doing business.* (1) The term doing business is used in a comprehensive sense and includes all activities which occupy the time or labor of people for profit. Regardless of the nature of its activities, every corporation organized for profit and carrying out any of the purposes of its organization is deemed to be doing business for the purposes of the tax. In determining whether a corporation is doing business, it is immaterial whether its activities actually result in a profit or loss.

(2) Whether a corporation is doing business in New York State is determined by the facts in each case. Consideration is given to such factors as:

(i) the nature, continuity, frequency, and regularity of the activities of the corporation in New York State;

(ii) the purposes for which the corporation was organized;

(iii) the location of its offices and other places of business;

(iv) the employment in New York State of agents, officers and employees; and

(v) the location of the actual seat of management or control of the corporation.

* * *

(d) *Foreign corporation—owning or leasing property.* The owning or leasing of real or personal property within New York State constitutes an activity which subjects a foreign corporation to tax. Property owned by or held for the taxpayer in New York State, whether or not used in the taxpayer's business, is sufficient to make the corporation subject to tax. Property held, stored or warehoused in New York State creates taxable status. Property held as a nominee for the benefit of others creates taxable status. Also, consigning property to New York State may create taxable status if the consignor retains title to the consigned property.

Section 4-4.1(a) of the Regulations provides:

The percentage of the taxpayer's business receipts allocable to New York State is determined by:

(1) ascertaining the taxpayer's business receipts within New York State during the period covered by the report; and

(2) dividing the sum of the New York State business receipts by the taxpayer's total business receipts within and without New York State during such period.

For purposes of this section, the term *business receipts* means gross income received in the regular course of the taxpayer's business, provided such receipts are includible in the computation of the taxpayer's entire net income for the taxable year.

Section 4-4.6(e) of the Article 9-A Regulations (Regulations) provides:

Receipts from sales of capital assets are not business receipts and are not included in the receipts factor of the business allocation percentage. For example, the receipts from the sale of a capital asset as scrap or at a gain is not included in the receipts factor of the business allocation percentage. The term *capital assets* means property that is not held by the taxpayer for sale to customers in the regular course of its business.

Opinion

A foreign corporation is subject to tax in New York under Article 9-A of the Tax Law if it is a corporate general partner of a partnership that is doing business, employing capital, owning or leasing property, or maintaining an office in New York State. (Section 1-3.2(a)(5) of

the Regulations). Petitioner is a general partner of the Partnership, a partnership that leased space in the Empire State Building for the purpose of transmitting its broadcast signal to maintain the right to hold an FCC broadcast license. These leasing activities conducted by the partnership took place from November 2003 until the termination of the lease in September 2007.

If a partnership is doing business, employing capital, owning or leasing property, or maintaining an office in New York State, then all of its corporate general partners are subject to the tax imposed by Article 9-A of the Tax Law. Therefore, Petitioner, as a corporate general partner of a partnership that was leasing property in New York, is subject to tax under Article 9-A of the Tax Law. Petitioner is required to file New York State tax returns for the period that the Partnership leased the property located in New York.

Corporations taxable under Article 9-A of the Tax Law must compute their tax on four alternative tax bases, and pay the highest amount computed on the four bases, plus a tax on subsidiary capital. (See section 210.1 of the Tax Law.) One of these four bases is the entire net income base. The starting point for the determination of entire net income is the corporation's federal taxable income, and amounts are then added and subtracted as required by statute. (See section 208.9 of the Tax Law.) The capital gain from the sale of the FCC license is includible in Petitioner's federal taxable income and Petitioner's entire net income.

Entire net income is divided into business income and investment income. *Business income* is defined as entire net income minus investment income. *Investment income* is defined as income from investment capital. (See sections 208.6 and 208.8 of the Tax Law). The term *investment capital* means investments in stocks, bonds, and other securities, corporate and governmental, not held for sale to customers in the regular course of business, exclusive of subsidiary capital and stock issued by the taxpayer. (See section 208.5 of the Tax Law). The FCC broadcast license is not investment capital within the meaning of section 208.5 of the Tax Law. Since business income is comprised of entire net income less investment income, and the capital gain income is not investment income, the capital gain income received by the Petitioner is classified as business income.

Business income is allocated to New York State using the business allocation percentage. For taxable years beginning on and after January 1, 2007, the business allocation percentage is determined by dividing the taxpayer's New York State business receipts by its total business receipts within and without New York State.

Petitioner earned receipts from the sale of its license granted by the FCC for the right to broadcast in New York and New Jersey. All business receipts earned by a taxpayer in the regular course of the taxpayer's business are includible in the calculation of the business allocation percentage. (See section 4-4.1 of the Regulations.) However, receipts from sales of capital assets are not business receipts and are not included in the receipts factor of the business allocation percentage. The term *capital assets* is defined in the Regulations as "property that is

not held by the taxpayer for sale to customers in the regular course of its business." (See section 4-4.6(e) of the Regulations.)

Petitioner acquired the license for the purpose of broadcasting in the New York-New Jersey metropolitan area. Petitioner held the Broadcast Rights and subsequently the License, for over 20 years. During that 20-plus year period, no revenue was produced through business exploitation of the License. The transaction that generated the capital gain income, the sale of the License, occurred only one time. There is no indication that an active trade or business was conducted, only activities to maintain the possession and ownership of the License. Therefore, the License is property that was not held by Petitioner for sale to customers in the regular course of its business. Accordingly, the License is a capital asset within the meaning of section 4-4.6(e) of the Regulations and the receipts from the sale of the License are not includible in the receipts factor of the business allocation percentage pursuant to that section.

DATED: October 16, 2008

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Taxpayer Guidance Division

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.