

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-10(7)C
Corporation Tax
June 23, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C100317A

A petition was filed by [REDACTED] (the Petitioner), a not-for-profit corporation organized as a Type A Corporation under the New York Not-for-Profit Law. The facts and analysis set forth below are based on representations in the petition and additional information provided by Petitioner's representative.

The petition presents the following four issues:

1. Whether a not-for profit corporation, duly incorporated under the New York State Not-for-Profit Corporation Law, but which has not obtained a recognition of federal tax exempt status pursuant to § 501 of the Internal Revenue Code, has an obligation to file corporate franchise tax returns and/or pay corporate franchise tax under Article 9-A of the Tax Law.
2. Whether the filing of corporate franchise tax returns under Article 9-A by a not-for-profit corporation creates a continuing obligation to file such returns.
3. Whether a lien is created pursuant to § 1092 of the Tax Law or pursuant to any other section of the Tax Law against a not-for-profit corporation for the failure to continue to file corporate franchise tax returns.
4. Whether a lien that is imposed against a not-for-profit corporation for failure to file corporate franchise tax is automatically extinguished if it is determined that the corporation does not have any obligation to file such returns and does not have any tax liability.

The analysis of the first issue will determine the conclusions to the three other issues raised. We conclude Petitioner is not subject to franchise tax under Article 9-A of the Tax Law, and that any lien imposed for failure to pay such tax should be released.

Facts

Petitioner is a not-for-profit corporation that is associated with the Knights of Columbus. The Knights of Columbus is a national religious fraternal service organization. Unlike many affiliates of the Knights of Columbus, Petitioner was established as a distinct entity in order to maintain independence from the parent organization. Petitioner states that there is no distinction between the activities of Petitioner and other affiliates of the parent organization.

Petitioner was originally organized in 1963 under the former Membership Corporation Law pursuant to a certificate of incorporation that was filed with the Secretary of Council 3424, Knights of Columbus, [REDACTED], New York, an unincorporated association not organized for pecuniary profit. The certificate provides that the purpose for which the corporation is formed is:

To promote intellectual culture, high moral standards and virtues conducive to the welfare and best interests of the community, and particularly the members of the said association, by providing a place for social intercourse and other facilities as may tend to further their physical, mental and cultural development.

After the New York Not-for-Profit Corporation Law (NPCL), was enacted, Petitioner filed a Certificate of Type with the Department of State on June 25 1973, which designated Petitioner as a Type A Corporation under the NPCL. Under § 201 of the NPCL, a Type A Corporation is a not-for-profit corporation that may be formed for any lawful non-business purpose or purposes including, but not limited to, any one or more of the following non-pecuniary purposes: civic, patriotic, political, social, fraternal, athletic, agricultural, horticultural, animal husbandry, and for a professional, commercial, industrial, trade or service association. Petitioner states that it does not have stock or shares or certificates for stock. Petitioner further states that it is operated on a not-for-profit basis and no part of its net earnings inures to the benefit of any officer, director or member of the corporation.

Petitioner contends that it does not fall under any of the Federal tax exempt provisions of § 501 of the Internal Revenue Code. Petitioner has never filed Federal Form 990 (Return of Organization Exempt From Income Tax) or other Federal tax returns because, according to Petitioner, it is not required to do so. However, the Internal Revenue Service has never notified Petitioner that it is tax exempt.

According to Petitioner's representative, Petitioner filed New York State franchise tax returns and paid taxes for the taxable years 1999 through 2003, but discontinued filing State returns after that date. As a result of the failure to file New York State returns for taxable years 2004-2008, the Department issued warrants against Petitioner for unpaid taxes for those years.

Analysis

A general principle of taxation is that tax exempt status is narrowly construed. To substantiate tax exempt status, one must typically point to a specific provision of law conferring exempt status.

New York Tax Law regulation, 20 NYCRR §1-3.4 (b)(6), provides an exemption for:

(6) corporations organized other than for profit which do not have stock or shares or certificates for stock or for shares and which are operated on a nonprofit basis no part of the net earnings of which inures to the benefit of any officer, director, or member, including Not-for-Profit Corporations and Religious Corporations.

This paragraph is further qualified by the following subparagraph:

(i) A corporation organized other than for profit, as described in this paragraph, which is exempt from Federal income taxation pursuant to subsection (a) of section 501 of the Internal Revenue Code, will be presumed to be exempt from tax under article 9-A. If a corporation organized other than for profit is denied exemption from taxation under the Internal Revenue Code, such corporation will be presumed subject to tax under article 9-A.

While it does not appear that Petitioner has been denied exemption from taxation under the Internal Revenue Code, it has not received any affirmative statement from the Internal Revenue Service confirming that it is exempt from federal income tax. Regulation 20 NYCRR §1-3.4 (b)(6), provides that failure to have a Federal exemption creates only a presumption of taxability. However, this presumption may be rebutted.

The facts supplied by Petitioner suggest that Petitioner meets the standards set forth in the exemption regulation. Therefore, Petitioner should qualify as exempt from the corporate franchise tax imposed under Article 9-A of the Tax Law. Petitioner should file a completed CT-247 form (Application for Exemption from Corporation Franchise Taxes by a Not-for-Profit Organization) with the Department certifying that it meets the exemption requirements under Regulation 20 NYCRR §1-3.4 (b)(6) as stated in the Petition.

A warrant may be issued under §1092(d) of the Tax Law for the amount of any franchise tax due but unpaid. The warrant acts as a lien on the real and personal property of the taxpayer. In addition, Tax Law § 1092(j) creates a lien for the tax imposed under Article 9-A as of the due date of the return. In the event Petitioner demonstrates that it is exempt under Article 9-A, it will be entitled to a release of any lien imposed pursuant to Tax Law §1092.

DATED: June 23, 2010

/S/
Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

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.