

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

TSB-A-84 (1) C
Corporation Tax
May 10, 1984

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. C820324A

On March 24, 1982 a Petition for Advisory Opinion was filed by Marine Midland Banks, Inc., One Marine Midland Center, Buffalo, New York 14203.

The issue raised herein is whether a certain subsidiary of Petitioner, a bank holding company, would qualify to be included by Petitioner on a consolidated return filed under Article 32 of the Tax Law.

Petitioner is a bank holding company registered under the Federal Bank Holding Company Act of 1956, as amended, and is the parent of a group of corporations of which Marine Midland Bank, N.A. (hereinafter "MMB") is the principal subsidiary. MMB is the only bank located in New York which Petitioner owns. Petitioner files a consolidated return under Article 32 of the Tax Law, which imposes the Franchise Tax on Banking Corporations, including MMB thereon.

Petitioner has formed a new wholly-owned subsidiary called Marine Midland National Corporation ("National"), which was incorporated under the laws of Delaware. National was formed to hold the stock of certain banks not conducting business in New York. In addition, National proposes to form subsidiaries to engage in financial service businesses in states other than New York. These businesses may include a finance company, a leasing company and a real estate credit corporation.

The proposed financial service subsidiaries will make and acquire, for their own account or for the account of others, secured and unsecured loans and other extensions of credit. Such subsidiaries will also provide other financially-related services to their customers. All of the proposed subsidiaries will borrow or otherwise obtain funds for their lending activities. National will have its principal offices in New York and will have staff in New York which will manage, oversee and provide administrative services to the proposed subsidiaries.

Section 1462(f) of the Tax Law provides for the filing of consolidated returns by a bank holding company and an affiliated corporation taxable under Article 32 of the Tax Law. Section 1451 of the Tax Law, contained in Article 32 thereof, imposes a franchise tax on banking corporations. The term banking corporation is defined, in relevant part, as including "any corporation eighty per cent or more of whose voting stock is beneficially owned by a corporation...registered under the federal bank holding company act of nineteen hundred fifty-six, as amended, and which makes a consolidated return under the provisions of [Tax Law, §1462(f)] provided the corporation whose voting stock is so owned is principally engaged in business which might be lawfully conducted by a corporation subject to article three of the banking law or a national banking association." Tax Law, § 1452(a)(9). In the case of a subsidiary of a bank holding company, the dispositive question under section 1452(a)(9) is whether such subsidiary is doing business which

might be lawfully conducted, with regard both to its nature and location, by any bank owned by the bank holding company, which bank (1) is either a corporation subject to Article 3 of the Banking Law or a national bank whose principal place of business is in New York, and (2) which bank makes a consolidated return with the bank holding company. The phrase "business which might be lawfully conducted" means business which may be conducted absent any specific grant of authorization by the appropriate regulatory authorities, or business which may be conducted with such authorization where such bank has in fact received such authorization. Thus, if such a bank has in fact received permission to perform certain activities requiring such permission, but such business activities are instead performed by its subsidiary or a subsidiary of a bank holding company owning such bank, such subsidiary would be doing business "which might be lawfully conducted" by the bank. In the present instance, then, the critical issue to be determined is whether National is or will be doing business which might be lawfully conducted by MMB.

One portion of the business of National will be the holding of the stock of banks located outside New York. The type of stock which a national bank may purchase for its own account is limited by Federal statute. 12 U.S.C. § 24, ¶7. As to the stock of banks, thus, a national bank may own stock in certain banks owned exclusively by depository institutions and engaged exclusively in the provision of services to other depository institutions and their officers, directors and employees. Ibid. In addition, national banks may own the stock of certain banks principally engaged in a foreign banking business. Federal Reserve Act, §25 (12 U.S.C. 601). However, there is no such statutory authorization for bank stock ownership of the type described herein, which falls within neither of the categories just described.

In addition to the stock of banks, National will also own the stock of subsidiary financial service corporations. National banks are permitted to own operations subsidiaries only upon the receipt of authorization therefor. 12 CFR § 7.7376. MMB has in fact not received authorization to own the subsidiaries in question.

Accordingly, inasmuch as National is and will be wholly engaged in activities which may not be engaged in by a national bank without authorization of the appropriate regulatory authorities, and as MMB has in fact not received such authorization, National is and will not be "principally engaged in business which might be lawfully conducted" by MMB, within the meaning and intent of section 1452(a)(9) of the Tax Law. It follows that National is not and will not be permitted or required to be included in a consolidated return with Petitioner.

DATED: February 6, 1984

s/FRANK J. PUCCIA
Director
Technical Services Bureau