

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

TSB-A-89 (5)C
Corporation Tax
May 9, 1989

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C890505A

On May 5, 1989, a Petition for Advisory Opinion was received from RJR Nabisco, Inc., 300 Galleria Parkway, Atlanta, Georgia 30339, RJR Holdings Corp., RJR Holdings Group, Inc. and RJR Holdings Capital Corp.

The issue raised is whether sections 342 to 363 of Chapter 61, Laws of 1989, are applicable to Petitioners as a result of the fact pattern set forth in a letter from Mr. J. Thomas Pearson, Senior Vice President, RJR Nabisco, Inc., dated April 27, 1989, addressed to Mr. William F. Collins, Deputy Commissioner and Counsel, Department of Taxation and Finance.

Facts

Mr. Pearson's letter states:

On February 9, 1989, RJR Acquisition Corporation ("Acquisition") acquired 74.3Z of the common (voting) stock of RJR Nabisco, Inc. ("RJRN"). Acquisition is a wholly-owned subsidiary of RJR Holdings Capital Corp. ("Capital"), which is a wholly-owned subsidiary of RJR Holdings Group, Inc. ("Group"), which is a wholly-owned subsidiary of RJR Holdings Corp. ("Holdings"), a corporation controlled by partnerships managed by Kohlberg Kravis Roberts & Co. Under an Agreement and Plan of Merger, dated as of November 30, 1988 and amended as of April 3, 1989, Acquisition is scheduled to merge with and into RJRN on April 28, 1989, as a result of which Holdings, Group and Capital will own 100% of RJRN's common stock. Subsequent to the merger, there may be restructurings of business units, including the sale or disposition of certain RJRN assets.

Management desires to locate the headquarters of RJRN and certain of its affiliates in New York State. Before doing so, however, management requests assurance that Holdings, Group, Capital, RJRN and its subsidiaries (collectively referred to as the "RJRN Group") are not subject to Sections 342 to 363 of Chapter 61, the Laws of 1989 (the "M&A Act").

Section 342 of the M&A Act (which adds subdivision 15 to Section 208 of the Tax Law) defines a "corporate acquisition" subject to the provisions of the M&A Act as excluding an acquisition that occurred prior to the effective date of subdivision 15. Section 365 provides that the M&A Act shall take effect immediately (upon enactment -- April 19, 1989). However, Section 365(m) states that

Section 342 to 363 of the M&A Act "shall apply to taxable years beginning on and after January 1, 1989."

. . . .

Because of the importance of this issue to the RJP. N Group in its decision as to the location of its corporate headquarters, we respectfully request your written opinion that Sections 342 to 363 of the M&A Act do not apply:

- 1) to the acquisition of 74.3% of RJRN's common stock by Acquisition on February 9, 1989;
- 2) to the contemplated merger on April 28, 1989 of Acquisition with and into RJRN; and
- 3) to any corporate restructuring within, or subsidiary or asset disposition by, the RJRN Group subsequent to the merger.

. . . .

Discussion

In accordance with section 365(m) of Chapter 61, which was enacted on April 19, 1989, the M&A Act takes effect on that date and applies to taxable years beginning on or after January 1, 1989.

By its terms, the M&A Act does not apply to corporate acquisitions, as defined in subdivision 15 of section 208 of the Tax Law (Act section 342), occurring "prior to the effective date of this subdivision". In this context, there is understandable confusion as to whether "the effective date of this subdivision" is (i) April 19, 1989 or (ii) taxable years beginning on or after January 1, 1989. Based upon our significant involvement in the drafting process, we are convinced that the legislative intent of the effective date reference in subdivision 15 is April 19, 1989, and the Department will administer the M&A Act accordingly. We also will urge a technical correction of the M&A Act for the sole purpose of clarifying this provision, i.e., we do not consider such an amendment a condition precedent to the interpretation proffered in this opinion. In light of our interpretation, the acquisition of 74.3% of RJRN common stock on February 9, 1989 was not a "corporate acquisition" within the meaning of subdivision 15 of section 208 of the Tax Law regardless of the taxable year in which it occurred, and the acquisition therefore is not within the purview of the M&A Act.

The M&A Act also does not apply to corporate mergers defined in subdivision 13 of section 208 of the Tax Law if the merger is excluded under subdivision 16 thereof (Act section 342). As applied to Petitioners, we would construe the affiliated group under paragraph (b) of such subdivision to consist of the chain of corporations having Holdings as the common parent and

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May 9, 1989

including Group, Capital, Acquisition and RJRN. Since the corporations in the chain meet the prescribed 50% ownership tests under such paragraph (b), the April 28, 1989 merger of Acquisition and RJRN would be an excluded merger and therefore not a "corporate merger" within the purview of the M&A Act.

Conclusion

Under the above analysis, the M&A Act does not apply to Petitioners as a result of the February 9, 1989 acquisition or the April 28, 1989 merger. Any subsequent disposition of the stock of a subsidiary acquired as a result of such acquisition, and any subsequent disposition of the assets of such a subsidiary, would not bring Petitioners within the purview of the M&A Act. Any subsequent restructuring among Petitioners involving a corporate acquisition, a corporate merger or a corporate consolidation, where such transaction is an excluded transaction within the meaning of subdivision 16 of section 208 of the Tax Law, would also not bring Petitioners within the purview of the M&A Act. However, corporate mergers, corporate consolidations or corporate acquisitions (as defined in subdivisions 13, 14 and 15 of section 208 of the Tax Law, respectively), occurring on or after April 19, 1989, unless excluded under subdivision 16 of section 208 of the Tax Law, may engender tax consequences under the M&A Act with respect to taxable years beginning on or after January 1, 1989.

DATED: May 9, 1989

s/FRANK J. PUCCIA
Director
Technical Services

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