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

TSB-A-90(22)C
Corporation Tax
October 12, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C900419C

On April 19, 1990, a Petition for Advisory Opinion was received from Interactive Media Services, Inc., 560 Broad Hollow Road, Suite 203, Melville, New York 11747.

The issue raised by Petitioner, Interactive Media Services, Inc., is whether it is a transmission corporation under sections 183 and 184 of the Tax Law.

Petitioner was incorporated in New York State on June 7, 1988 under section 402 of the Business Corporation Law. Petitioner operates a digital microwave network. The Petitioner's primary service is to lease dedicated circuits to businesses to connect the customer's equipment between multiple facilities and, in some instances, to connect their customers' equipment to the public switched telephone network. Petitioner is not allowed to resell telephone company services and only operates its dedicated circuits between the public switched telephone network and the customer's equipment when the customer provides access to the public switched telephone network via a circuit that the customer contracts with the telephone company to provide.

Petitioner holds Federal Communications Commission (hereinafter "FCC") licenses to operate its service under Part 94 of the Code of Federal Regulations of the FCC (hereinafter "FCC regulations" (47 CFR 94).

Pursuant to such Part 94, Petitioner provides dedicated circuits for voice and data telecommunications to business customers. However, its services can only be sold to specific businesses as allowed under such Part 94 and not to the general public. In addition, Petitioner is not allowed to provide services to common carrier service providers who are able to resell services to the general public.

Petitioner is unable due to lack of FCC authorization to connect directly to the public switched telephone network. The FCC authorization for telephone companies to provide service facilities through the use of microwave communications is under Part 21 of the FCC regulations, and the Petitioner holds no licenses to provide this type of service.

Petitioner elected S corporation status for both Federal and New York State tax purposes effective for the tax year beginning June 7, 1988 and ending December 31, 1988. Petitioner had no gross receipts from leasing dedicated circuits in 1988. An S corporation return (Form CT-3S) was filed for that year. Petitioner expects its gross receipts from the leasing of dedicated circuits to exceed 50 percent of total receipts in 1989.

Section 209.1 of Article 9-A of the Tax Law imposes an annual franchise tax on domestic or foreign corporations for the privilege of exercising a corporate franchise, doing business,

employing capital, owning or leasing property in a corporate or organized capacity, or maintaining an office, in New York State. Section 209.4 of the Tax Law, provides that corporations liable to tax under sections 183 and 184 of Article 9 of the Tax Law are not subject to tax under Article 9-A.

Sections 183 and 184 of Article 9 of the Tax Law impose franchise taxes, on a domestic or foreign corporation formed for or principally engaged in the conduct of a telephone business, for the privilege of exercising its corporate franchise, doing business, employing capital, owning or leasing property in a corporate or organized capacity or maintaining an office, in New York State.

To determine the classification and proper taxability of a corporation under either Article 9 or Article 9-A, an examination of the nature of the corporation's activities is necessary, regardless of the purposes for which the corporation was organized. See Matter of McAllister Bros., Inc. v Bates, 272 App Div 511, 517 (3d Dept. 1947). Ordinarily, a corporation is deemed to be principally engaged in the activity from which more than 50 percent of its receipts are derived. See, e.g. Joseph Bucciero Contracting Inc., Adv Op St Tax Comm, July 23, 1981, TSB-A-81(5)C.

Herein, Petitioner operates a digital microwave network. It holds FCC licenses to operate its services under Part 94 of the FCC regulations, which prescribes the manner in which operational fixed radio facilities may be licensed and operated. Petitioner provides dedicated circuits for voice and data telecommunications to business customers, and operates its dedicated circuits between a public switched telephone network and the customer's equipment.

Through these activities, Petitioner is providing a telephone service and is in competition with a telephone company even though Petitioner, itself, is not a common carrier of telephone service. It is immaterial that Petitioner is not regulated by the New York State Public Service Commission as a telephone company or that it is unable to connect directly to the public switched telephone network. Petitioner's telephone service constitutes a telephone business and Petitioner is subject to the franchise taxes imposed under section 183 and 184 of the Tax Law if Petitioner is principally engaged in such telephone business, that is, if more than 50 percent of Petitioner's receipts are derived from providing such telephone service.

The determination of whether Petitioner is principally engaged in a telephone business is a question of fact not susceptible of determination in an Advisory Opinion. An Advisory Opinion sets for the applicability of pertinent statutory and regulatory provisions to "a specified set of facts" Tax Law, §171, subd twenty-fourth; 20 NYCRR 901.1(a).

Since Petitioner did not have any gross receipts from the leasing of dedicated circuits in 1988, Petitioner's shareholders were eligible to make the election, pursuant to section 660 of the Tax Law, to be treated as a New York S corporation for taxable year ended December 31, 1988. If in a subsequent taxable year it is determined that Petitioner is principally engaged in a telephone business that is properly taxable under section 183 and 184 of Article 9 of the Tax Law, Petitioner

will cease to meet the requirements to be eligible to make such election pursuant to section 660 of the Tax Law. In such event, the election is terminated for such taxable year. If Petitioner's shareholders election is terminated, and in the future Petitioner's activities change so that Petitioner is, again, properly classified as an Article 9-A taxpayer, Petitioner's shareholders must make another election pursuant to such section 660 of the Tax Law in order to be treated as a New York S corporation, if all of the other requirements of section 660 are met.

It should be noted, that since it is determined that Petitioner is providing a telephone service, Petitioner may also be subject to the tax on the furnishing of utility services under section 186-a of the Tax Law. Section 186-a of the Tax Law imposes a tax equal to three percent of a corporation's gross operating income from the furnishing of telephone service for the year ending December thirty-first if such gross operating income is in excess of five hundred dollars. This tax is imposed regardless of whether a corporation is properly classified as a transmission corporation subject to tax under sections 183 and 184 of the Tax Law or a general business corporation subject to tax under Article 9-A of the Tax Law and regardless of whether Petitioner has made the election under section 660 of the Tax Law to be treated as a New York S corporation.

DATED: October 12, 1990

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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