

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

TSB-A-97(18)C
Corporation Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C970513E

On May 13, 1997, a Petition for Advisory Opinion was received from Fred Drasner, 450 West 33rd Street, New York, New York 10001.

The issue raised by Petitioner, Fred Drasner, is whether New Elmira Company L.L.C. will be a "new business" within the meaning of section 210.12 of Article 9-A of the Tax Law.

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

New Elmira Company L.L.C. will be a newly formed Delaware limited liability company ("LLC"). The members of the company and their membership interests are: Mortimer B. Zuckerman, 99 percent interest and Fred Drasner, one percent interest. New Elmira Company L.L.C. has been formed for the purpose of purchasing the assets of Elmira Litho, Inc., a New York corporation ("Elmira Litho"), a subsidiary of Meehan-Tooker, Inc., a New Jersey corporation which is presently in Chapter 11. Mortimer B. Zuckerman and Fred Drasner have no ownership interest in Meehan-Tooker, Inc. It is assumed for purposes of this advisory opinion that Mortimer B. Zuckerman and Fred Drasner have no ownership interest in Elmira Litho. Elmira Litho presently conducts a printing business employing approximately 180 people at the Horseheads Industrial Center in the Village of Horseheads, Chemung County, New York. The Elmira Litho business is located in the Elmira Economic Development Zone. Elmira Litho produces 100 percent full-web long run printing using 2 M-1000 full-web long run presses. It produces approximately 20 jobs per month with an average per job of 5,000,000 impressions and sales of \$104,000. It has equipment capable of in-line finishing and extensive off-line finishing. Elmira Litho has contracts with many of its customers for special minimum impression requirements. New Elmira Company L.L.C. will conduct a printing business at the Horseheads location similar to that conducted by Elmira Litho using the equipment and customer list it will purchase from Elmira Litho.

Applied Printing Technologies ("APT") is a limited partnership which is owned 92.5 percent by Mortimer B. Zuckerman or entities he controls and 7.5 percent by Fred Drasner. Applied Printing Technologies is engaged in the printing business at 77 Moonachie Avenue, Moonachie, New Jersey. APT is primarily a sheetfed printer with half-web and some full-web short run capability with equipment consisting of eight sheetfed presses, 2 M-100 half-webs and one short-run full-web. APT produces approximately 500 jobs per month with an average per job of 500,000 impressions and sales of \$10,000. APT has only limited, primarily off line, finishing capabilities. APT completes its jobs on a job by job basis. From 1988 through April 1996, APT conducted an additional printing operation in New York City and as a result during that period, was a New York State taxpayer. APT no longer has any operations in New York State.

Petitioner states that Elmira Litho and APT are distinct and dissimilar types of printing operations located in different states. Also, they have a completely different customer base; there is no overlap between material sales by APT to APT customers and material sales by Elmira Litho to Elmira Litho customers.

Petitioner also states that New Elmira Company L.L.C. is not a corporation in which over 50 percent of the shares of stock entitling its holders to vote for the election of directors or trustees is owned or controlled directly or indirectly by taxpayers subject to the provisions of Articles 9, 9-A, 32 or 33 of the Tax Law. It is not a corporation that is substantially similar in operation and ownership to a business entity taxable or previously taxable under Articles 9, 9-A, 23, 32, or 33 of the Tax Law.

Section 2 of the Tax Law provides the definition of certain terms used in the Tax Law, and was amended by Chapter 576 of the Laws of 1994 which added the following:

5. The term "limited liability company" means a domestic limited liability company or a foreign limited liability company, as defined in section one hundred two of the limited liability company law.

6. "Partnership and partner," unless the context requires otherwise, shall include, but shall not be limited to, a limited liability company and a member thereof, respectively.

Section 208.1 of the Tax Law provides that the term "corporation" includes an association within the meaning of section 7701(a)(3) of the Internal Revenue Code, including an LLC.

Section 209.1 of Article 9-A of the Tax Law imposes the business corporation franchise tax on every corporation, unless specifically exempt, for the privilege of exercising its franchise, or of doing business, or of employing capital, or of owning or leasing property in New York State in a corporate or organized capacity, or of maintaining an office in New York State.

An LLC that is treated as a corporation for federal income tax purposes is treated as a corporation for New York State tax purposes. An LLC that is treated as a partnership for federal income tax purposes, is treated as a partnership for New York State tax purposes. (See, FGIC CMRC Corp, Adv Op Comm T & F, April 1, 1996, TSB-A-96(11)C; and Department of Taxation and Finance Memorandum, TSB-M-94(6)I and (8)C, October 25, 1994.)

Assuming that New Elmira Company L.L.C. is treated as a corporation for federal income tax purposes, it will be treated as a corporation for New York State tax purposes and will be subject to tax under Article 9-A of the Tax Law.

Section 210.12-B of the Tax Law provides for an economic development zone investment tax credit ("EDZ-ITC"). Section 210.12-B(d) of the Tax Law provides that the amount of the EDZ-ITC allowed for any taxable year shall not reduce the tax due for the year to less than the higher of the amounts prescribed in section 210.1(c) and (d) of the Tax Law. Provided, however, that if the amount of EDZ-

ITC allowed reduces the tax to such amount, any amount of credit not deductible in the taxable year may be carried over to the following year or years. In lieu of the carryover, a taxpayer which qualifies as a new business under section 210.12(j) of the Tax Law may elect, on its report for its taxable year with respect to which the credit is allowed, to treat 50 percent of the amount of carryover as an overpayment of tax to be credited or refunded in accordance with the provisions of section 1086 of the Tax Law.

Section 210.12(j) of the Tax Law defines a "new business" as any corporation except:

1. a corporation in which over 50% of the number of shares of stock entitling their holders to vote for the election of directors or trustees is owned or controlled, either directly or indirectly, by a taxpayer subject to tax under Article 9-A; section 183, 184, 185, 186 of Article 9; Article 32 or 33 of the Tax Law; or
2. a corporation that is substantially similar in operation and in ownership to a business entity or entities taxable, or previously taxable under Article 9-A; section 183, 184, 185, or 186 of Article 9; Article 32 or 33; or Article 23 or that would have been subject to tax under Article 23, as such article was in effect on January 1, 1980, or the income (or losses) of which is (or was) includable under Article 22 of the Tax Law whereby the intent and purpose of section 210.19(e) of the Tax Law with respect to refunding of credit to new business would be evaded; or
3. a corporation that has been subject to tax under Article 9-A for more than four years (excluding short periods) before each tax year during which the taxpayer becomes eligible for the EDZ investment tax credit or EDZ wage tax credit (that is, the year for which the credit is allowed).

Based on the facts presented, it appears that:

1. New Elmira Company L.L.C. will not be a corporation owned or controlled, either directly or indirectly by a taxpayer subject to tax under Article 9, 9-A, 32 or 33 of the Tax Law.

2. New Elmira Company L.L.C. will be similar in operation to an entity previously taxable under Article 9-A, because it will acquire Elmira Litho which was an Article 9-A taxpayer that will be continuing its operations in New York under the new ownership. However, New Elmira Company L.L.C. will not be similar in ownership to Elmira Litho, a business entity previously taxable under Article 9-A, because even though Elmira Litho was an Article 9-A taxpayer, Elmira Litho and New Elmira Company L.L.C. will not be affiliated prior to the acquisition, and the ownership of New Elmira Company L.L.C. after the acquisition is not substantially similar to the ownership of Elmira Litho prior to the acquisition. New Elmira company L.L.C. will be similar in ownership to APT. However, Petitioner states that Elmira Litho and, subsequently, New Elmira Company L.L.C. will not be similar in operation to APT. The determination of whether these entities are similar in operation is a factual question that is not susceptible

of determination in an Advisory Opinion. An Advisory Opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to "a specified set of facts." Tax Law, §171.20; 20 NYCRR 2376.1(a). For purposes of this Advisory Opinion, it is assumed that New Elmira Company L.L.C. and APT will not be similar in operation.

3. New Elmira Company L.L.C. is a new LLC that was not previously subject to tax under Article 9-A of the Tax Law.

Accordingly, assuming that New Elmira Company L.L.C. will be treated as a corporation for federal income tax purposes, it will be treated as a corporation for New York franchise tax purposes and a taxpayer under Article 9-A of the Tax Law. Assuming, further, that New Elmira Company L.L.C. is not similar in operation to APT's operations, New Elmira Company L.L.C. will be a "new business" pursuant to section 210.12(j) of the Tax Law and will also be considered a "new business" pursuant to section 210.12(e) of the Tax Law for purposes of the EDZ credits and refunds for those taxable years that it meets the requirements of section 210.12(j)(3) of the Tax Law.

DATED: July 16, 1997

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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