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

TSB-A-98(10)C
Corporation Tax
July 27, 1998

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C980623B

On June 23, 1998, a Petition for Advisory Opinion was received from Roberts & Holland LLP, Worldwide Plaza, 825 Eighth Avenue, 37th Floor, New York, New York 10019.

The issue raised by Petitioner, Roberts & Holland LLP, is whether a corporation's election to be taxed under Article 9-A of the Tax Law pursuant to the grandfather provision set forth in section 1452(d) of Article 32 of the Tax Law is revoked upon the purchase of all of the stock of the corporation by a bank holding company or one of its subsidiaries subject to Article 32 of the Tax Law and a change in the corporation's activities.

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

Corporation A, a bank holding company, or one of its subsidiaries, subject to Article 32 of the Tax Law, will purchase all of the stock of corporation B from a corporation subject to Article 32 of the Tax Law. B is currently engaged in little or no business activity, and is subject to tax under Article 9-A of the Tax Law due to B's having made the grandfather election pursuant to section 1452(d) of the Tax Law to continue to be subject to Article 9-A. It is assumed that B properly made the election pursuant to section 1452(d) of the Tax Law to remain taxable under Article 9-A.

After A's acquisition of B, the activities of B will vary with the three following scenarios:

Scenario 1. Subsequent to A's acquisition of B, one or more corporations with which A files a federal consolidated return will merge into B. The activities of the corporation(s) to be merged into B are such that, had the corporation(s) not been owned by a bank holding company, the corporation(s) would be subject to tax under Article 9-A of the Tax Law. The activities of the corporation(s) to be merged into B may not be the same as the activities conducted by B at the time of the section 1452(d) election or thereafter.

Scenario 2. Subsequent to A's acquisition of B, B will be transferred to corporation C. C is a bank holding company with which A files a federal consolidated return. Subsequent to the transfer to C, one or more corporations with which A and C file a federal consolidated return will merge into B. The activities of the corporation(s) to be merged into B are such that, had the corporation(s) not been owned by a bank holding company, the corporation(s) would be subject to tax under Article 9-A of the Tax Law. The activities of the corporation(s) to be merged into B may not be the same as the activities conducted by B at the time of the section 1452(d) election or thereafter.

Scenario 3. Assuming the same facts as in 1 and 2 above, in addition to the merger of corporation(s) into B, certain businesses currently conducted by subsidiaries of A or C will be transferred to B. The businesses transferred into B are such that, had the businesses been conducted in a corporation not owned by a bank holding company, such corporation would have been subject to tax under Article 9-A of the Tax Law. The businesses to be transferred into B may not be the same as the businesses conducted by B at the time of the section 1452(d) election or thereafter.

Discussion

Section 1452(a) of Article 32 of the Tax Law defines a "banking corporation". Chapter 298 of the Laws of 1985 amended section 1452(a)(9) of the Tax Law by expanding the definition of a banking corporation to include additional entities. However, to be a banking corporation, a corporation must still be principally engaged in a business which might be lawfully conducted by a corporation subject to Article 3 of the Banking Law or by a national banking association or which is so closely related to banking or managing or controlling banks as to be a proper incident thereto, as set forth in section 4(c)(8) of the Federal Bank Holding Company Act of 1956, as amended.

Section 1452(d) of the Tax Law was added by Chapter 298 of the Laws of 1985, and provides that, notwithstanding the provisions of Article 32, all corporations of classes now or heretofore taxable under Article 9-A shall continue to be taxable under Article 9-A except, among other entities, banking corporations described in section 1452(a)(9) of the Tax Law. However, section 1452(d) provides further that a corporation described in section 1452(a)(9) of the Tax Law which was subject to the tax imposed by Article 9-A for its taxable year ending during 1984 may make a one-time election to continue to be taxable under Article 9-A. The election is made by the corporation on or before the due date for filing its return (determined with regard to extensions) for its taxable year ending during 1985. The election shall continue to be in effect until revoked by the taxpayer. In no event shall the election or revocation be for a part of a taxable year.

Section 16-2.5(j)(3) of the Franchise Tax on Banking Corporations Regulations provides that the election is made by the filing of a tax return pursuant to Article 9-A of the Tax Law and the revocation is made by the filing of a tax return pursuant to Article 32 of the Tax Law.

In Robert J. Buckley, Adv Op Comm T & F, May 26, 1994, TSB-A-94(8)C, it was held that where a corporation made the election pursuant to section 1452(d) of the Tax Law, the subsequent takeover of the electing corporation's parent bank by the FDIC and the subsequent sale of the parent bank's stock did not affect the corporation's election.

In Apple Bank for Savings, Adv Op Comm T & F, March 25, 1996, TSB-A-96(7)C, it was held that where a corporation made the election pursuant to section 1452(d) of the Tax Law, the acquisition of a subsidiary's parent bank by another bank and the expansion of the subsidiary's line of business did not affect the subsidiary's election to be taxable under Article 9-A of the Tax Law. Further,

for purposes of determining whether the election made under section 1452(d) of the Tax Law is revoked, the activities of the corporation making the election are not considered, except that, if the corporation changes its activities to the extent that it can not be properly classified as a corporation taxable under Article 9-A of the Tax Law, the election made under section 1452(d) of the Tax Law would be revoked. In Apple Bank, the subsidiary had been solely involved in an insurance agency business. As a condition of its parent's reorganization, the Federal Reserve Bank of New York required that the subsidiary cease all new insurance business by a certain date. The subsidiary did cease all insurance operations and it planned to expand its line of business to include investments in securities after its New York charter was amended.

In Barclays Business Credit Inc., Adv Op Comm T & F, November 15, 1996, TSB-A-96(26)C, it was held that where a corporation made the election pursuant to section 1452(d) of the Tax Law, the merger of another corporation into it with the electing corporation as the surviving entity and the change in the electing corporation's activities to be a registered broker/dealer and a primary dealer in U.S. government securities did not require a change in the classification of the corporation as an Article 9-A taxpayer and did not affect the corporation's election to be taxable under Article 9-A.

In this case, following Buckley, supra, Apple Bank, supra, and Barclays, supra, as long as B continues to file its tax returns under Article 9-A of the Tax Law, under the three scenarios presented, B will continue to elect, pursuant to section 1452(d) of the Tax Law, to be taxed under Article 9-A.

/s/
DATED: July 27, 1998 John W. Bartlett
Deputy Director
Technical Services Bureau

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