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

TSB-A-99(11)C
Corporation Tax
January 27, 1999

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C981103D

On November 3, 1998, a Petition for Advisory Opinion was received from Sutdex Real Estate Corp, Corporate Tax Dept., 250 West Street, 9th Floor, New York, New York 10013.

The issue raised by Petitioner, Sutdex Real Estate Corp, is whether it is subject to franchise tax under Article 9-A of the Tax Law due to its having made the grandfather election, pursuant to section 1452(d) of the Tax Law, to continue to be subject to Article 9-A.

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

On August 25, 1998, Citicorp, a bank holding company, subject to Article 32 of the Tax Law, purchased all of the stock of Petitioner, a New York corporation, from a corporation subject to Article 32 of the Tax Law. Petitioner, which was engaged in little or no business prior to its acquisition by Citicorp, was subject to tax under Article 9-A of the Tax Law due to its having made the grandfather election, pursuant to section 1452(d) of the Tax Law, to continue to be subject to Article 9-A.

On October 8, 1998, Citicorp merged into Citi Merger Sub Inc. ("Merger Sub"), a wholly owned subsidiary of Travelers Group Inc. ("Travelers"), as part of the plan of reorganization between Citicorp and Travelers. Pursuant to that plan of reorganization, when Citicorp merged into Merger Sub, in exchange for their Citicorp shares, Citicorp shareholders received shares of Travelers, Merger Sub changed its name to Citicorp, Travelers changed its name to Citigroup Inc. ("Citigroup") and Citigroup became a bank holding company.

Assuming that the election pursuant to section 1452(d) of the Tax Law was properly made by Petitioner, does Petitioner remain taxable under Article 9-A of the Tax Law under the following three scenarios:

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

Scenario 2. Subsequent to Citicorp's acquisition of Petitioner, Petitioner will be transferred to Citigroup, or a subsidiary of Citigroup with which Citigroup files a federal consolidated return. Citigroup is a bank holding company with which Citicorp files a federal consolidated return. Subsequent to the transfer, one or more corporations with which Citicorp and Citigroup file a federal consolidated return will merge into Petitioner. The activities of the corporation(s) to be merged into Petitioner 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 Petitioner may not be the same as the activities conducted by Petitioner at the time of the section 1452(d) of the Tax Law election or thereafter.

Scenario 3. Assuming the same facts as in Scenarios 1 and 2 above, in addition to the merger of the corporations into Petitioner, certain businesses currently conducted by subsidiaries of Citicorp or Citigroup will be transferred into Petitioner. The businesses transferred into Petitioner 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 Petitioner may not be the same as the businesses conducted by petitioner at the time of the section 1452(d) of the Tax Law 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. To qualify as a banking corporation under section 1452(a)(9) of the Tax Law, a corporation, in addition to meeting certain ownership requirements, must 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 was made by a 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 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, it is assumed that Petitioner properly made the election under section 1452(d) of Article 32 of the Tax Law, to continue to be subject to tax under Article 9-A of the Tax Law. In all three Scenarios, one or more corporations will merge with Petitioner. Since these are hypothetical scenarios that have not taken place, Petitioner cannot describe the merger transactions or state which entity will be the survivor. Therefore, it is not possible in this advisory opinion to determine whether Petitioner's election to continue to be taxable under Article 9-A made pursuant to section 1452(d) of the Tax Law, would be revoked as a result of the transactions described in Scenarios 1, 2 and 3. Such determination is a question of fact 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.Twenty-fourth; 20 NYCRR 2376.1(a).

However, the following will provide guidance in determining whether Petitioner's election, pursuant to section 1452(d) of the Tax Law would be revoked. As in Buckley, supra, and Apple Bank, supra, Citicorp's acquisition of Petitioner will not revoke Petitioner's election, pursuant to section 1452(d) of the Tax Law, to be taxed under Article 9-A of the Tax Law. Likewise, with respect to Scenario 2, the subsequent transfer of Petitioner to Citigroup, or a subsidiary of Citigroup would not revoke Petitioner's election.

With respect to Scenarios 1 and 2, if Petitioner is the surviving entity when one or more corporations are merged with Petitioner, following Apple Bank, supra, and Barclays, supra, such transaction or transactions would not revoke Petitioner's election, pursuant to section 1452(d) of the Tax Law, to be taxed under Article 9-A of the Tax Law. However, if Petitioner is not the surviving entity after the merger transaction or transactions, Petitioner would cease to exist, and Petitioner's election, pursuant to section 1452(d) of the Tax Law would also cease. Petitioner's election made pursuant to section 1452(d) of the Tax Law would not carry over to the surviving entity.

With respect to Scenario 3, it is assumed that the transfer to Petitioner of certain businesses conducted by subsidiaries of Citicorp or Citigroup does not constitute a merger of the entities. Following Apple Bank, supra, the transfer of such business activities to Petitioner would not revoke Petitioner's election, pursuant to section 1452(d) of the Tax Law, to be taxed under Article 9-A of the Tax Law.

If the transactions described in Scenarios 1, 2 and 3 do not revoke Petitioner's election, Petitioner, pursuant to section 1452(d) of the Tax Law, will continue to elect to be taxed under Article 9-A as long as Petitioner continues to file its tax returns under Article 9-A of the Tax Law.

DATED: January 27, 1999

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

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