

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

TSB-A-99(23)C
Corporation Tax
September 17, 1999

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C990729A

On July 29, 1999, a Petition for Advisory Opinion was received from NAMCO Asset Management Inc., c/o Roberts & Holland LLP, 825 Eighth Avenue, 37th Floor, New York, New York 10019.

The issue raised by Petitioner, NAMCO Asset Management Inc., is whether, based on the facts presented, it remains taxable under Article 9-A of the Tax Law pursuant to the election made under section 1452(d) of the Tax Law.

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

On April 30, 1997, Bankers Federal Savings FSB ("Bankers Federal") was acquired by and merged into The Dime Savings Bank of New York, FSB, ("Dime"). Both companies were subject to Article 32 of the Tax Law, and Dime, the surviving corporation, remains subject to Article 32.

John Street Service Corp. ("John Street"), a New York corporation, was formed in 1972. From its inception and continuing to the date of the merger with Dime, Bankers Federal owned all of the outstanding shares of John Street. After the merger, Dime owned all of the shares of John Street.

For all years since its formation in 1972, John Street has been subject to tax and filing returns under Article 9-A of the Tax Law. Pursuant to section 1452(d) of the Tax Law, John Street made the grandfather election to continue to be subject to Article 9-A of the Tax Law. That election was made by John Street by filing its tax return under Article 9-A for its taxable year ending in 1985.

On December 8, 1998, John Street, which was engaged in little or no activity, changed its corporate name to NAMCO Asset Management Inc., ("NAM"). The federal employer identification number that had been John Street's continued to be used by NAM. Subsequent to December 8, 1998, specific business activities were contributed to NAM. The activities are such that the corporation would properly be classified as subject to Article 9-A of the Tax Law if it were not owned by Dime.

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,

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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

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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, the merger of Bankers Federal into Dime, and the name change of John Street to NAM would not revoke John Street's election, pursuant to section 1452(d) of the Tax Law, to be taxed under Article 9-A of the Tax Law. Further, since the businesses transferred into NAM are such that NAM would be subject to tax under Article 9-A of the Tax Law if it were not owned by Dime, the change in NAM's business activities would not revoke John Street's election, pursuant to section 1452(d) of the Tax Law to be taxed under Article 9-A of the Tax Law. As long as NAM continues to file its tax returns under Article 9-A of the Tax law, NAM will continue to elect, pursuant to section 1452(d) of the Tax Law, to be taxed under Article 9-A of the Tax Law.

DATED: September 17, 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.