



FINANCE
NEW YORK
MARTHA E. STARK
COMMISSIONER

November 3, 2004

Re: Letter Ruling Request
New York City Banking Corporation Tax
FLR -044827-006

Dear _____ :

This is in response to your request for a ruling dated July 29, 2004 on behalf of an anonymous taxpayer regarding the filing requirements of its wholly owned subsidiary under the New York City Banking Corporation Tax (the "Bank Tax").

FACTS

The facts as presented are as follow:

The taxpayer is a New York bank holding company ("Holding") that owns 100 percent of the stock of a national chartered bank (the "Bank"). The Bank has three wholly owned subsidiaries. One of the subsidiaries holds and manages investments (the "Company"). The Bank purchased the Company in 1999. In 1984, under its former owner, the Company elected to continue to be taxed as an Article 9-A (New York State Corporate Franchise Tax) corporation under New York State Tax Law (the "Tax Law") section 1452(d). The Department assumes that the Company was eligible to make the election because it qualified as a banking corporation under Tax Law section 1452(a)(9).

The Bank has three branches located in New York City and has been filing a combined Bank Tax return with Holding since 2000. The Company was not included in the combined Bank Tax return of Holding and the Bank for these years, nor did it file a separate Tax or New York City General Corporation Tax ("GCT") return.

The Bank made an initial contribution of capital to the Company in 1999 and an additional capital contribution in 2000. The Bank has not made any additional capital contributions to the Company and the Company has not loaned any funds or paid any dividends to the Bank. All the investment functions of the Company are performed on its behalf by Bank personnel. All payroll and related expenses incurred by the Bank on behalf of the Company are allocated to the Company at cost. While the Bank has three branches in New York City, neither the Company nor the Bank employees performing services on its behalf have any physical presence in the City. No other intercompany transactions between the Bank and the Company have occurred.

ISSUES

You have requested rulings on the following issues:

1. Whether the City follows the New York State grandfather treatment of Article 9A companies that elected to continue Article 9A treatment under Tax Law section 1452(d).
2. Given the facts presented, whether the Company would have to file a GCT return or be included in a combined Bank Tax return with the Bank and Holding.
3. Whether, to preserve the grandfathered status of the Company as a GCT corporation, a City level election is necessary in the first year that the Company is subject to tax.
4. Whether a City election to be treated as a GCT taxpayer is necessary if the Company is not required to file a separate GCT or combined Bank Tax return.
5. Whether an effective City election to treat the Company as a GCT taxpayer could be made by the Bank on its next return even if the Company is not required to file a return.

CONCLUSIONS

1. While the City has a comparable provision to Tax Law section 1452(d), the Company cannot rely on the election made for State purposes in 1984 to be grandfathered under section 11-640(d) of the Administrative Code of the City of New York (the "Code").
2. The question of whether the Company has sufficient nexus to be required to file a return on a separate basis or is required to file on a combined basis with the Bank are factual questions not suitable to a determination in a letter ruling. *See* Title 19 of the Rules of the City of New York ("RCNY") §16-01(c)(5).
3. While a separate City election had to be made under Code section 11-640(d), the Company is not now eligible to make an election under Code section 11-640(d) because that election had to be made on a timely filed New York City return for its taxable year ending in 1985.
- 4 & 5. Based on our conclusions above, your remaining inquiries are moot.

DISCUSSION

The Bank Tax is imposed on banking corporations doing business in New York City. Code §11-639(a). For this purpose, Code Section 11-640(a)(9) defines a banking corporation as including a corporation 65 percent or more of whose voting stock is owned or controlled directly or indirectly by another corporation that is engaged in activities connected with or related to banking provided that the corporation whose stock is so owned is principally engaged in a business, regardless of where conducted, that:

might be lawfully conducted by a corporation subject to article three of the banking law or a national banking association, or,

is so closely related to banking or managing or controlling banks as to be a proper incident thereto, as set forth in paragraph (8) of subsection (c) of section four of the Federal Bank Holding Company Act of 1956.

Code section 11-640(d) provides that certain corporations, including corporations described in Code section 11-640(a)(9), previously subject to the GCT became subject to the Bank Tax beginning in 1985. However, banking corporations described in Section 11-640(a)(9) were permitted to make a one-time election to remain taxable under the GCT. Code Section 11-640(d). Code section 11-640(a)(9) and (d) are substantively identical to Tax Law section 1452(a)(9) and (d).

Title 19 RCNY section 3-01(b)(5) definition of “Banking Corporation” (x)(B), requires that the above election had to be made by filing a GCT tax return for the year ending in 1985 on or before the due date for that return. The Company did not make the election on a GCT return for 1985 because it was not a taxpayer in that year. The election cannot be made in a subsequent year when the Company becomes subject to New York City tax. Therefore, assuming that the Company's activities are those described in Code section 11-640(a)(9), it is not eligible to file a return under the GCT. The election under Tax Law section 1452(d) to file its returns under Article 9-A has no effect on its filing status for GCT purposes.

The manner of making the election under Code section 11-640(d) is specified by Title 19 RCNY section 3-01(b)(5). That section does not permit the election to be made by filing a statement with the Bank's next Bank Tax return.

Transitional provisions relating to the enactment and implementation of the Federal Gramm-Leach-Bliley Act are codified in Code section 11-640(g) through (j). For taxable years beginning after 1999 and before 2001, a corporation, other than a banking corporation described in paragraphs (1) through (8) of Code section 11-640(a), that was in existence before January 1, 2000, was taxable under the same tax (either the GCT or the Bank Tax) as applied to its last taxable year beginning before January 1, 2000. A corporation that was in existence prior to 2000 but first became subject to tax after 2000 is considered to have been subject to whichever tax, GCT or Bank Tax, would have applied based on its activities had it been a taxpayer prior to 2000. Subdivisions (h) through (j) of Code section 11-640 provide that once a taxpayer is classified under these rules as either subject to the GCT or Bank Tax for its first taxable year

beginning after 1999, that classification continues for filing purposes through taxable years beginning before 2006.

The Company made an election in 1984 under Tax Law §1452(d) to be taxed under Article 9A and was acquired by the Bank in 1999. Consequently, under the transitional rules relating to the Gramm-Leach-Bliley Act, the Company is classified as a banking corporation, assuming its activities in 1999 continued to be activities described in Code section 11-640(a)(9)(i) and (ii). That classification continues for purposes of the transitional rules, which apply to years beginning before 2006. Therefore, if the Company's activities in the City are sufficient to subject it to tax, or if the Company is required to file on a combined basis with the Bank and Holding, it will be taxable under the Bank Tax and not the GCT.

Sincerely,

Ellen E. Hoffman
Assistant Commissioner for Tax Law and Conciliations

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