New York State Department of Taxation and Finance
Office of Counsel

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

The Department of Taxation and Finance ("Department") received a Petition for Advisory Opinion from [REDACTED] ([REDACTED] "Petitioner") asking the Department to conclude that: (1) Petitioner was not formed for the purpose of operating a telegraph or telephone business; and (2) to the extent more than fifty percent (50%) of Petitioner's gross receipts are derived from other than Article 9 activities, Petitioner is not principally engaged in Article 9 activities and should be classified an Article 9-A filer as of the effective date of the merger of [REDACTED] into Petitioner.

We conclude that: (1) whether Petitioner was formed for the purpose of operating a telegraph or telephone business is not dispositive of whether Petitioner is an Article 9 or Article 9-A filer as that determination is dependent on what activity Petitioner is principally engaged in; and (2) to the extent more than 50% of Petitioner's aggregate gross receipts in a taxable reporting period are derived from other than Article 9 activities, Petitioner should be classified an Article 9-A filer. Regarding this latter conclusion, whether Petitioner should be classified an Article 9-A filer as of the effective date of the merger of [REDACTED] into Petitioner is dependent on whether 50% of Petitioner's gross receipts in the taxable reporting period including that effective date are derived from other than Article 9 activities, a conclusion that cannot be reached in an advisory opinion.

Facts

According to the facts presented, Petitioner was originally formed on November 20, 1998, under the name [REDACTED] as a subsidiary of [REDACTED], for the purpose of engaging in any lawful activity for which corporations may be organized under the General Corporation Law of the State of Delaware. Approximately 11 months later, [REDACTED] re-named and re-tasked Petitioner, [REDACTED], to become the competitive local exchange ("CLEC") provider in 30 markets outside of the core wireline telephone operating states serviced by [REDACTED], with actual sales beginning no earlier than the middle of 2000. Prior to this time, Petitioner did not sell services in any state.

By 2005, Petitioner had ceased its CLEC operations and become the single member in a limited liability company providing long distance telecommunications services and a partner in [REDACTED] providing wireless telecommunications services.

Petitioner has been an Article 9 filer in New York since commencing its operations in the state in 2001.

[REDACTED], a corporation for federal income tax purposes, has been principally engaged in activities other than the telegraph or telephone business and, accordingly, has been an Article 9-A filer in New York. On December 31, 2016, [REDACTED] merged into [REDACTED] with [REDACTED] as the surviving entity. Subsequent to the merger of [REDACTED] into [REDACTED], Petitioner contends that it will derive more than 50% of its receipts from activities subject to taxation under Article 9-A.

Discussion

Sections 183 and 184 of Article 9 of the Tax Law impose franchise taxes on a domestic or foreign corporation formed for or principally engaged in the conduct of a telegraph or telephone business for the privilege of exercising its corporate franchise, doing business, employing capital, owning or leasing property in a corporate or organized capacity, or maintaining an office in New York State. However, notwithstanding the "formed for" language above, whether a given corporation is properly classified and held subject to taxation under Article 9 or under Article 9-A is to be determined from an examination of the nature of its business activities. Neither the laws under which Petitioner was incorporated nor the provisions of Petitioner's certificate of incorporation are controlling. Matter of McAllister Bros. v. Bates, 272 AD 511, 72 NYS2d 532 (3d Dept1947), lv denied 279 NY 1037; Matter of Holmes Electric Protective Services v. McGoldrick, 262 AD 514, 30 NYS2d 589, affd 288 NY 635. It is well established that classification for corporation tax purposes is to be determined by the nature of the taxpayer's business and not by the words in its certificate of incorporation, nor by focusing on one aspect of its business operations. The business must be viewed in its entirety and from the perspective of its customers—what they buy and pay for. Matter of Capitol Cablevision Sys., Inc., Tax Appeals Tribunal, June 9, 1988. Therefore, the determination of whether Petitioner is subject to tax under Article 9-A or Article 9 hinges on what activity Petitioner is principally engaged in; the purpose for which Petitioner was formed is not dispositive of whether Petitioner is an Article 9 or Article 9-A filer.

Ordinarily, a corporation is deemed to be principally engaged in the activity from which more than 50% of its gross receipts are derived. Matter of Texas Eastern Transmission Corp., Tax Appeals Tribunal, November 12, 1988. Re Joseph Bucciero Contracting Inc., Advisory Op St Comm, July 23, 1981, TSB-A-81(5)C. Advisory Opinion Petition No. C890104c, TSB-A-89(9)C, 1989 WL 137365, at 1-2 (July 18, 1989). Moreover, gross receipts from various aspects of a corporation's business may be aggregated to determine what business the corporation is principally engaged in. Advisory Opinion Petition No. C900911b, TSB-A-91(4)C, 1991 WL 64702, at 2 (Jan. 31, 1991). Therefore, to the extent that more than 50% of Petitioner's aggregate gross receipts in a taxable reporting period are derived from other than Article 9 activities, Petitioner should be classified as an Article 9-A filer.

Nonetheless, the actual determination of what activity Petitioner is principally engaged in 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, subd. twenty-fourth, 20 NYCRR 2376.4(a).

DATED: January 8, 2019

/S/
DEBORAH R. LIEBMAN
Deputy Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.