

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

TSB-A-82(3)C  
Corporation Tax  
March 22, 1982

STATE OF NEW YORK  
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. C810603A

On June 3, 1981, a Petition for Advisory Opinion was received from Bankers Trust New York Corporation, P.O. Box 1703 - Wall Street Station, New York, New York 10268.

The issue presented is whether one of Petitioner's subsidiaries (B.T. Capital Corporation) is required to be included in a consolidated return filed by Petitioner, with other of its subsidiaries, under Article 32 of the Tax Law (Franchise Tax on Banking Corporations).

Petitioner is a bank holding company, organized under Article 3-A of the Banking Law, and is the parent of a group of banking corporations. Petitioner files a consolidated return, under Article 32 of the Tax Law, with its affiliated group, pursuant to the provision of section 1462(f) of the Tax Law.

B.T. Capital Corporation (hereinafter BTCC), incorporated in Delaware, is licensed to do business under the Small Business Investment Company Act of 1958, as amended. Prior to 1981 Petitioner owned a 45% interest in BTCC. On February 24, 1981 such ownership was increased to a 94.5% interest. The sole office of BTCC has been in New York since it began its operations in 1972. BTCC provides small business companies with financial assistance by granting loans and purchasing corporate bonds and capital stock. BTCC also provides its customers with management services.

Article 32 of the Tax Law imposes a tax on every "banking corporation" which exercises its corporate franchise or does business in New York in a corporate or organized capacity. Tax Law, §1451(a).

Section 1452(a)(8) of the Tax Law defines the term "banking corporation" to include:

"(8) any corporation eighty percent or more of whose voting stock is beneficially owned by a corporation or corporations subject to article three-a of the banking law or registered under the federal bank holding company act of nineteen hundred fifty-six, as amended, and which makes a consolidated return under the provisions of subdivision (f) of section fourteen hundred sixty-two, or by a corporation or corporations subject to article three of the banking law or by a national banking association or associations, provided the corporation whose voting stock is so owned is principally engaged in business which might be lawfully conducted by corporation subject to article three of the banking law or a national banking association."  
(emphasis added)

Section 1462(f) of the Tax Law provides, in pertinent part, as follows:

"Corporations which are affiliated may, if authorized, and shall, if required, by the commission, under regulations prescribed by the commission, make a consolidated return for the purpose of this article. The commission may, in its discretion, authorize bank holding companies as defined in article three-a of the banking law or the federal bank holding company act of nineteen hundred fifty-six, as amended, to make a consolidated return with affiliated corporations taxable under this article . . . . "

The dispositive question herein is thus whether BTCC is "principally engaged in business which might be lawfully conducted by a corporation subject to article three of the banking law . . . . "

Article 3 of the Banking Law is applicable to banks and trust companies (hereinafter referred to as "Article 3 banks"). Section 96 of the Banking Law, contained in such article, sets forth the general powers of banks and trust companies, while sections 96-a, 97, 98 and 100 describe their powers with respect to specified areas of activity.

BTCC's business is described as consisting of a number of components. First, investments are made in small businesses by means of the purchase of original issue capital stock. The stocks purchased are not of a type which Article three banks are permitted to purchase pursuant to the Banking Law. Second, BTCC makes loans which fall into two categories, those of a type permitted to Article three banks and those prohibited to such banks by virtue of section 103(1) of the Banking Law. That provision prohibits loans in excess of specified amounts to individual borrowers. Finally, BTCC derives income from the provision of management services, some of which are provided to the recipients of loans from BTCC of a type prohibited by section 103(1) of the Banking Law.

Petitioner has supplied the following analysis of the operations of BTCC for the taxable year ending December 31, 1980:

	<u>Investment</u>	<u>Income</u>
Loans of a type permissible to Article 3 banks	\$492,585	\$75,057
Loans of a type prohibited to Article 3 banks pursuant to Banking Law, §103(1)	864,593	84,768
Investments in capital stock prohibited as an investment by Article 3 banks	44,810	
Management services (including services provided to issuers of debt prohibited to Article 3 banks under Banking Law, §103(1)		36,210
Interest on idle funds	-----	32,403
Miscellaneous	-----	10,870

In addition, BTCC held cash, idle funds and other assets not invested in business activities. Such assets amounted to \$309,317.

Based on all of the facts here presented, and principally the fact that less than one third of BTCC's invested capital is devoted to business of a type permitted to banks organized under Article 3 of the Banking Law, it is concluded that BTCC, during the taxable year ending December 31, 1980, was not "principally engaged in business which might be lawfully conducted by a corporation subject to article three of the banking law "Tax Law, §1452(a)(8). Accordingly, even had it been "affiliated" with Petitioner, it would not have been a corporation taxable under Article 32 of the Tax Law, and thus could not have been permitted or required to file a consolidated return, under such Article, with Petitioner. The same conclusion is applicable to subsequent years during which BTCC is affiliated with Petitioner, where its business activities are substantially similar to those described herein.

DATED: March 17, 1982

s/LOUIS ETLINGER  
Deputy Director  
Technical Services Bureau