

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

TSB-A-85 (2) C
Corporation Tax
April 29, 1985

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. C830623B

On June 23, 1983 a Petition for Advisory Opinion was received from 1274 Fifth Avenue Housing Development Fund Corporation, Inc., c/o Settlement Housing Fund, Inc., 1780 Broadway, New York, New York 10016.

At issue is whether exemption from the Franchise Tax provided in 209(4) of the Tax Law for housing companies organized pursuant to Article 2 of the Private Housing Finance Law also applies to housing companies organized pursuant to Article 11 of that Law, and if not, whether Petitioner is in any case exempt from such tax by virtue of its not-for-profit status.

1274 Fifth Avenue Housing Development Fund Corporation, Inc. is incorporated pursuant to Article 11 of the Private Housing Finance Law and the Not-for-Profit Corporation Law. The corporation is, in fact, operated on a non-profit basis; net earnings are not distributed to, or set aside for, the benefit of any officer, director, or member.

Section 209(4) of the Tax Law provides in pertinent part that "housing companies organized and operating pursuant to the provisions of article two of the private housing finance law shall not be subject to tax under [Article 9-A]." Neither Article 9-A of the Tax Law, nor any article of the Private Housing Finance Law, contain provisions which would exempt a company formed under Article 11 of the latter Law from any franchise tax imposed by the State.

The purpose of the Private Housing Finance Law as set forth in both Article 2 (Limited-Profit Housing Companies) and Article 11 (Housing Development Fund Companies) is substantially the same -- that is, to assist the construction of housing for low-income individuals. However, an examination of applicable legislative history does not show any intent on the part of the Legislature to extend the exemption granted by 209(4) of the Tax Law beyond limited-profit housing companies. Further, where exemptions from tax are at issue they are to "be construed against a taxpayer unless it would defeat the settled purpose of the statute." Grace v. State Tax Commission, 37 N.Y.2d 193, 197 (1976). Accordingly, the exemption provided in 209(4) of the Tax Law is to be narrowly construed, and as so construed reaches only to limited profit housing companies organized pursuant to Article 2 of the Public Housing Finance Law. Thus, Petitioner does not fall within the ambit of this exemption.

However, the regulations applicable to 208 of the Tax Law provided that the following corporations, among others, are exempt from the New York State Franchise Tax:

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(6) corporations organized other than for profit which do not have stock or shares or certificates for stock or for shares and which are operated on a non-profit basis no part of the net earnings of which inures to the benefit of any officer, director, or member, including Not-For-Profit Corporations and Religious Corporations.

(i) A corporation organized other than for profit, as described in this paragraph, which is exempt from Federal income taxation pursuant to subsection (a) of section 501 of the Internal Revenue Code, will be presumed to be exempt from tax under article 9-A. If a corporation organized other than for profit is denied exemption from taxation under the Internal Revenue Code, such corporation will be presumed subject to tax under article 9-A.

(ii) The determination of the Internal Revenue Service, denying or revoking exemption from Federal taxation under the Internal Revenue Code, will ordinarily be followed.

20 NYCRR 1-3.4(b)(6).

In the present case, Petitioner fits within the above exemption. Although the corporation has neither requested, nor received, an IRS ruling or determination letter indicating exemption under section 501(a) of the Internal Revenue Code, it is 'operated on a non-profit basis no part of the net earnings of which inures to the benefit of any officer, director, or member, including Not-For-Profit Corporations and Religious Corporations'. Accordingly, it is exempt from the State Franchise Tax imposed under Article 9-A. 20 NYCRR 1-3.4(b)(6).

DATED: April 25, 1985

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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