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

TSB-A-87 (11) C
Corporation Tax
May 29, 1987

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION PETITION NO. C870218A

On February 18, 1987, a Petition for Advisory Opinion was received from Spectrum Energy, Inc., 208 Huston Street, Scotia, New York 12302.

The issue raised is whether Petitioner is a New York S corporation for taxable years 1984, 1985 and 1986.

Prior to 1984, Petitioner has incorporated in Delaware. Petitioner elected New York S corporation status for the taxable year ended December 31, 1982.

On January 13, 1984, Petitioner changed its state of incorporation to New York State. For federal income tax purposes, Petitioner's federal identification number remained the same. Also, Petitioner's business activities and place of business did not change. The new corporation is the same as the old corporation. The only change is the state of incorporation. Petitioner states that this transaction would qualify as an "F" reorganization pursuant to section 368(a)(1)(F) of the Internal Revenue Code. However, for federal income tax purposes, Petitioner did not file for the "F" reorganization.

Petitioner states that it did not request approval of an election to be treated as a New York S corporation for taxable year 1984 because it believed it retained its New York S corporation status elected for taxable year 1982.

Under section 660(a) of the Tax Law, shareholders of a federal S corporation are permitted to make an election to treat the corporation as a New York S corporation whereby the corporation would be exempt from the corporation franchise tax and the shareholders would be taxed under the personal income tax law on their pro rata share of the S corporation's items of income, loss, deduction and reduction for taxes described in section 1366(f)(2) and (3) of the Internal Revenue Code which are taken into account for federal income tax purposes.

Section 660(b)(4) of the Tax Law provides that the election made under section 660(a) is effective for the taxable year of the corporation for which it is made and for all succeeding taxable years of the corporation until such election is terminated.

Pursuant to section 660(c) of the Tax Law, termination occurs when the election made under section 660(a) ceases to be effective. The election will cease to be effective:

1. on the day the election to be treated as an S corporation for federal income tax purposes ceases;
2. if shareholders owning a majority of the shares revoke the election; or
3. on the day a person becomes a new shareholder if he affirmatively refuses to consent to the S corporation treatment.

For federal income tax purposes, Revenue Ruling 64-250 holds that based on the facts presented, a reorganization under section 368(a)(1)(F) of the Internal Revenue Code did not cause a termination of the election to be treated as an S corporation under section 1372 of the Internal Revenue Code. The shareholders of M (an electing S corporation) reincorporated in a state other than that of original incorporation by organizing, a new corporation, N, in the other state and merged M into N. The surviving corporation, N, also met the requirements for qualifying as an S corporation under section 1371(a) of the Internal Revenue Code.

Based on federal Revenue Ruling 64-250, it is clear that if Petitioner filed for a section 368(a)(1)(F) reorganization for federal income tax purposes the Petitioner's reincorporation in New York State from Delaware would not have changed its federal status and the transaction would not have terminated the S corporation election for federal income tax purposes.

Section 607(a) of the Tax Law provides that "[a]ny term used in this article shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required." It is now beyond question that when an interpretation of a law of the United States relating to federal income taxes is established by the Internal Revenue Service through a Revenue Ruling or a Revenue Procedure, such federal interpretation will be followed for New York State personal income tax purposes, as well.

Therefore, for New York personal income tax purposes, Revenue Ruling 64-250 would be followed and since the section 368(a)(1)(F) reorganization would not terminate the federal S corporation election, such reorganization would not cause a termination of the New York S corporation election.

In the instant case, Petitioner did not file for a section 368(a)(1)(F) reorganization for federal income tax purposes. Therefore, if Petitioner's election to be treated as a S corporation for federal income tax purposes has not been terminated because of the reincorporation in 1984, Petitioner's New York S corporation status was not terminated pursuant to section 660(c) of the Tax Law. Since none of the causes for termination of the New York S corporation election exist, Petitioner would be a New York S corporation for taxable years 1984, 1985 and 1986.

However, when Petitioner changed the state of incorporation from Delaware to New York, Petitioner surrendered its authority to do business in New York State as a foreign corporation and began to exercise its New York State franchise. Therefore, assuming Petitioner's S corporation election has not been terminated, for taxable year 1984, two short period CT-3S returns are required for New York State franchise tax purposes, even though only one return is required for federal income tax purposes. A short period return is required for the period from the beginning of its federal taxable year up to and including the day Petitioner surrendered its authority to do business in New York State. A maintenance fee is required to be paid for this period. Also, a short period return is required for the period from the day Petitioner incorporated in New York State to the end of its federal taxable year.

If Petitioner's election to be treated as an S corporation for federal income tax purposes was terminated when Petitioner reincorporated in New York State in 1984, Petitioner's election to be a New York S corporation was also terminated. In such instance, for taxable year 1984, two short period returns would be required for New York State franchise tax purposes. A CT-3S short period return is required for the period Petitioner's election was in effect and a CT-3 short period return is required for the period the election ceased to be in effect.

It should be noted, that section 181.2 of the Tax Law provides that every foreign corporation that is authorized to do business in New York State pursuant to Article 13 or Article 15-a of the Business Corporation Law shall pay an annual maintenance fee of $200 for each year or portion thereof for which it is so authorized, provided however such fee is reduced by 50 percent if the period for which the fee is imposed consists of no more than six months. Such fee is to be paid annually until the corporation surrenders its authority to do business in New York State.

Additionally, section 181.1 of the Tax Law provides that a foreign corporation, including a New York S corporation, must pay a license fee for the privilege of exercising its corporate franchise or carrying on its business in New York State. This fee is payable only once unless the capital share structure changes or the amount of capital stock employed in New York State has increased since the last license fee report, form CT-240, was filed.

DATED: May 29, 1987

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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