

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

TSB-A-87 (18) C
Corporation Tax
July 20, 1987

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. C870218B

On February 18, 1987, a Petition for Advisory Opinion was received from Cornell Research Foundation, Inc., East Hill Plaza, Ithaca, New York 14850.

The issue raised is whether, pursuant to section 1-3.4 of the Business Corporation Franchise Tax regulations, Petitioner is exempt from the franchise tax imposed on business corporations under Article 9-A of the Tax Law.

Petitioner is a New York State corporation, organized in 1932 by officers of Cornell University for the purpose of holding for the exclusive benefit of the University certain patents, patent rights, trademarks or trademark rights, obtained by members of the faculty of the University as a result of research and discoveries. Petitioner is a stock corporation whose stock is owned solely by Cornell University, which is an exempt organization for Federal income tax purposes and New York State franchise tax purposes.

On August 1, 1940, Petitioner was granted a federal tax exemption under section 101(14) of the Internal Revenue Code of 1939. This exemption corresponds to section 501(c)(2) of the Internal Revenue Code of 1954. Petitioner was advised by the Treasury Department on August 25, 1943 that its plans to share royalty income with vendors would not alter its tax exempt status, but each such original inventor agreement should be obtained by Petitioner as evidence by its property right. On July 11, 1944, Petitioner was advised by the Treasury Department that it would be required to file Form 990 based on the provisions in section 101(14) of the Internal Revenue Code.

Petitioner is, generally, an information source for Cornell University faculty and staff on questions of patenting and patent ability. Typically, as the result of a general publicity campaign, an inventor approaches Petitioner for assistance. Sometimes, through a publication or by word of mouth, Petitioner is referred to the inventor. After receiving a formal invention disclosure, and when necessary, reporting it to the appropriate government agency, Petitioner evaluates the invention on two basis. First, is it patentable? Second, assuming it is patentable, is there sufficient likelihood a commercial product will arise out of the invention to make the patenting process economically relevant? The patent ability decision is usually made after a search of the relevant prior art, and input from knowledgeable experts if they can be uncovered and are willing to assist. Next, the commercial feasibility is explored by talking with the inventors, other faculty, alumni who may have skills in the area and corporations who are potential licensees. Once a decision is made to proceed, a patent application is filed, usually with the assistance of outside counsel. At that point, serious licensing efforts begin by attempting to find either an existing corporation or a venture capitalist who will license the patent and develop a commercial product.

The purpose of Petitioner's existence is first to bring Cornell University research to practical benefit for the public and, secondarily, to economically benefit the inventors and the University. The income generated by Petitioner is shared with the faculty and the University in accordance with the University Patent Policy.

Section 209.1 of Article 9-A of the Tax Law imposes a franchise tax on every domestic or foreign corporation "[f]or the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this State. . . ." Section 1-3.4(b)(6) of the Business Corporation Franchise Tax regulations exempts from the franchise tax "...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 nonprofit 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.

It was not intended that such exemption be applied to not-for-profit stock corporations. Senate Bill Introductory No. 2503 of 1966 would have explicitly exempted stock corporations operated on a nonprofit basis. That bill was vetoed by the Governor on May 16, 1966 specifically to avoid creating doubt about the exemption of nonstock corporations which is acknowledged as valid but which is not explicit in the statute. Opinion of Counsel, November 28, 1967, NYTB 1967-4, p. 47.

In Matter of Cape Pond, Inc., Decision of the State Tax Commission, July 18, 1980, TSB-H-80(20)C, it was determined that a stock corporation, even if it is organized and operated exclusively for nonprofit purposes, is not exempt from the franchise tax pursuant to section 1-3.4(b)(6) of the Business Corporation Franchise Tax regulations. Also, see 1049 Management Corporation, State Tax Commission Advisory Opinion, December 23, 1985, TSB-A-86(1)C.

Based on the legislative history of this issue, State Tax Commission Decisions rendered and State Tax Commission Advisory Opinions issued, it is clear that a stock corporation, regardless of whether it is organized and operated exclusively for nonprofit purposes, is not exempt from tax pursuant to section 1-3.4(b)(6) of the Business Corporation Franchise Tax regulations.

Herein, Petitioner is a stock corporation. It is of no consequence that Petitioner's stock is owned solely by a tax exempt entity. Therefore, Petitioner does not fall within the scope of the exemption contained in section 1-3.4(b)(6) of the Business Corporation Franchise Tax regulations. Accordingly, Petitioner is subject to the franchise tax imposed by Article 9-A of the Tax Law.

It should be noted, that Section 209.1 of Article 9-A of the Tax Law provides "...every domestic or foreign corporation... shall annually pay a franchise tax, upon the basis of its entire net income, or upon such other basis as may be applicable as hereinafter provided...." Section 210.1(a) of Article 9-A sets forth four methods of computing such tax and provides that the method which produces the largest tax shall be applicable. Section 3-1.2(a) of the Business Corporation Franchise Tax regulations describes the four methods as follows:

- (1) 10 percent of its entire net income, or the portion thereof allocated to New York State;
- (2) 10 percent of an amount equal to 30 percent of the balance remaining after adding to entire net income compensation paid to officers and to stockholders owning in excess of five percent of its issued capital stock and deducting therefrom \$30,000... and any net loss for the reported year, or the portion of such amount allocated to New York State;
- (3) 1.78 mills... of the total of its business capital and investment capital, or the portion thereof allocated to New York State; or
- (4) \$250.

DATED: July 20, 1987

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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