

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

TSB-A-89(9)C
Corporation Tax
July 18, 1989

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C890104C

On January 4, 1989, a Petition for Advisory Opinion was received from CCC Telex Service, Inc., 1009 Glen Cove Avenue, Glen Head, New York 11545.

The issue raised is whether Petitioner is subject to tax under sections 183 and 184 of Article 9 of the Tax Law as a transportation and transmission corporation or subject to tax under Article 9-A of the Tax Law as a general business corporation.

Petitioner states that it is engaged in a service business, wherein it maintains a small office staffed by three employees. Petitioner is not organized under the Transportation Corporation Law.

The primary function of Petitioner is to provide telephone answering services and telex/fax services for small business clients. Petitioner states that it receives telephone calls and telex messages for clients and forwards same to them either by telephone or mail or both. Petitioner stresses that it does not have any telephone or telex equipment, lines, etc., except for the normal telephone or telex equipment found in any office. Further, Petitioner does not furnish or have any telephone transmission equipment or lines and all messages received or sent are transmitted through outside transmission companies such as N.Y. Telephone, A.T.T., R.C.A., Swift Global and others.

In a letter from Jay Garfinkel, Garfinkel & Company (Petitioner's representative), to Mr. John J. Ferris of the New York State Department of Taxation and Finance, Audit Division, dated November 13, 1987, Mr. Garfinkel stated that with regard to the operations of Petitioner:

Gross sales from business activities were as follows:

| YEAR ENDING | TELEX/FAX | ANSWERING SERV. |
|-------------|-----------|-----------------|
| 06/30/85 | \$173,133 | \$ 0 |
| 06/30/86 | 185,320 | 0 |
| 06/30/87 | 186,616 | 26,000 |

Petitioner contends that it is furnishing only a clerical service and that it should not be taxed under sections 183 and 184 of Article 9 as a transportation and transmission corporation.

Section 209.1 of Article 9-A of the Tax Law imposes an annual franchise tax on domestic or foreign corporations for the privilege of exercising a corporate franchise, doing business, employing capital, owning or leasing property in a corporate or organized capacity, or maintaining an office, in New York State.

Section 209.4 of the Tax Law, provides that corporations liable to tax under sections 183 and 184 of Article 9 of the Tax Law are not subject to tax under Article 9-A.

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.

To determine the classification and proper taxability of a corporation under either Article 9 or Article 9-A, an examination of the nature of the corporation's activities is necessary, regardless of the purposes for which the corporation was organized. See Matter of McAllister Bros., Inc. v. Bates, 272 AD 511, 517 (3d Dept. 1947). While a telephone answering service may be construed to be an activity taxable under Article 9-A, a telex/fax service, regardless of whether the corporation owns the telephone transmission equipment or lines, is an activity taxable under Article 9.

The determination of whether Petitioner is subject to tax under Article 9-A or Article 9, hinges on what activity the taxpayer is principally engaged in. Ordinarily, a corporation is deemed to be principally engaged in the activity from which more than 50% of its receipts are derived. See, e.g. Re Joseph Bucciero Contracting Inc., Advisory Op St Comm, July 23, 1981, TSB-A-81(5)C.

Herein, Petitioner provides both a telephone answering service as well as a telex/fax service. Based on the amounts presented as Petitioner's gross sales from business activities, it appears that, for years ended June 30, 1985, June 30, 1986 and June 30, 1987, Petitioner was principally engaged in a telex/fax service business and thereby taxable under Article 9.

However, the actual determination of whether Petitioner is principally engaged in a telex/fax service business 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 NYGRR 901.1(a).

Accordingly, if it determined that Petitioner is principally engaged in the telex/fax service, Petitioner will be classified as a transportation and transmission corporation subject to tax under

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Article 9. If it is determined that Petitioner is principally engaged in a telephone answering service, Petitioner may be classified as a general business corporation subject to tax under Article 9-A.

DATED: July 18, 1989

s/FRANK J. PUCCIA
Director
Technical Services

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