

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

TSB-A-90(2)C
Corporation Tax
January 11, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C891120A

On November 20, 1989, a Petition for Advisory Opinion was received from Richard Berman, CPA, 860 Longview Avenue, Valley Stream, New York 11581.

The issue raised by Petitioner, Richard Berman, CPA, is whether a New York State corporation which is a wholly owned subsidiary of a foreign corporation qualifies as a "small business taxpayer" pursuant to Section 210.1(f) of the Tax Law.

Corporation "N" is a New York State corporation 100% owned by "F" a foreign corporation. "F" has no nexus or activity in New York State or in any of the other states of the United States. "N" has no subsidiaries in New York State or in any other state of the United States. The only subsidiary of "F" in the United States is "N".

"N" has income of less than \$290,000 for the taxable year and capital and paid in surplus of less than \$1,000,000. "F" upon translating its financial statement into U.S. dollars has income for the taxable year greater than \$290,000 and capital and paid in surplus of more than \$1,000,000.

Section 210.1(a) of the Tax Law provides:

Entire net income base. The amount prescribed by this paragraph shall be computed at the rate of nine percent of the taxpayer's entire net income base. The taxpayer's entire net income base shall mean the portion of the taxpayer's entire net income allocated within the state as hereinafter provided, subject to any modification required by paragraphs (d) and (e) of subdivision three of this section. However, in the case of a small business taxpayer, as defined in paragraph (f) of this subdivision, the amount prescribed by this paragraph shall be computed as follows:

(i) if the entire net income base is not more than two hundred thousand dollars, the amount shall be eight percent of the entire net income base; (ii) if the entire net income base is more than two hundred thousand dollars but not over two hundred ninety thousand dollars the amount shall be the sum of (a) sixteen thousand dollars, (b) nine percent of the excess of the entire net income base over two hundred thousand dollars and (c) five percent of the excess of the entire net income base over two hundred fifty thousand dollars.

Section 210.1(f) of the Tax Law provides:

For purposes of this section, the term "small business taxpayer" shall mean a taxpayer (i) which has an entire net income of not more than two hundred ninety thousand dollars for the taxable year; (ii) which constitutes a small business as defined in section 1244(c)(3) of the internal revenue code (without regard to the second sentence of subparagraph (A) thereof) as of the last day of the taxable year; and (iii) which is not part of an affiliated group, as defined in section 1504 of the internal revenue code, unless such group, if it had filed a report under this article on a combined basis, would have itself qualified as a "small business taxpayer" pursuant to this subdivision.

Section 1244(c)(3) of the Internal Revenue Code provides:

SMALL BUSINESS CORPORATION DEFINED.--

(A) IN GENERAL.--For purposes of this section, a corporation shall be treated as a small business corporation if the aggregate amount of money and other property received by the corporation for stock, as a contribution to capital, and as paid-in surplus, does not exceed \$1,000,000. The determination under the preceding sentence shall be made as of the time of the issuance of the stock in question but shall include amounts received for such stock and for all stock theretofore issued.

(B) AMOUNT TAKEN INTO ACCOUNT WITH RESPECT TO PROPERTY.--For purposes of subparagraph (A), the amount taken into account with respect to any property other than money shall be the amount equal to the adjusted basis to the corporation of such property for determining gain, reduced by any liability to which the property was subject or which was assumed by the corporation. The determination under the preceding sentence shall be made as of the time the property was received by the corporation.

Section 1504 of the Internal Revenue Code provides in part:

(a) AFFILIATED GROUP DEFINED.--For purposes of this subtitle--

(1) IN GENERAL.--The term "affiliated group" means--

(A) 1 or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation, but only if--

(B)(i) the common parent owns directly stock meeting the requirements of paragraph (2) in at least 1 of the other includible corporations, and

(ii) stock meeting the requirements of paragraph (2) in each of the includible corporations (except the common parent) is owned directly by 1 or more of the other includible corporations...

(b) DEFINITION OF "INCLUDIBLE CORPORATION".--As used in this chapter, the term "includible corporation" means any corporation except--...

(3) Foreign corporations...

In the instant case corporation "N" meets the first test of Section 210.1(f) in that its entire net income for the taxable year is not more than \$290,000.00.

Corporation "N" also meets the second test of Section 210.1(f) in that its capital and paid in surplus does not exceed \$1,000,000 which is the maximum amount allowed in order for a company to be considered a small business as defined in Section 1244(c)(3) of the Internal Revenue Code.

Finally corporation "N" meets the third test of Section 210.1(f). Its parent corporation "F" is not an includible corporation in an affiliated group since it is a foreign corporation as defined in Section 1504(b)(3) of the Internal Revenue Code. Hence corporation "N" and corporation "F" do not constitute an affiliated group in accordance with the meaning of Section 1504(a)(1) of the Internal Revenue Code.

It is therefore concluded that corporation "N" is a qualifying small business in accordance with the meaning and intent of Section 210.1(f) and thus is entitled to pay the reduced tax imposed on small business taxpayers by Section 210.1(a) of the Tax Law.

DATED: January 11, 1990

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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