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

TSB-A-91 (22) C
Corporation Tax
November 8, 1991

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C910822A

On August 22, 1991, a Petition for Advisory Opinion was received from Judsu Realty Corp., 317 West 88th Street, New York, New York 10013.

The issue raised by Petitioner, Judsu Realty Corp., is whether it is subject to tax under Article 9-A of the Tax Law after it was dissolved and if it is taxable, can it elect to be treated as a New York S corporation.

Petitioner was voluntarily dissolved on November 1, 1965. Since that time, Petitioner has remained in fee ownership of rental real property at 315-317-319 West 88th Street, New York, New York. Petitioner has filed and paid franchise tax for taxable years since the dissolution. Petitioner is an S corporation for federal income tax purposes beginning January 1, 1987 and has sought to elect New York S status for all years subsequent to January 1, 1987.

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

Section 2-3.1 of the Business Corporation Franchise Tax Regulations. (hereinafter "Regulations") provides that every domestic corporation is required to pay a tax measured by entire net income (or other applicable basis) up to the date on which it ceases to possess a franchise.

. Section 209.3 of the Tax Law provides that a dissolved corporation which continues to conduct business shall be subject to tax under Article 9-A. Section 1-2.2 of the Regulations provides further that where the activities of a dissolved corporation are limited to the liquidation of its business and affairs, the disposition of its assets (other than in the regular course of business) and the distribution of the proceeds, the dissolved corporation is not subject to tax under Article 9-A.

Therefore, a dissolved corporation that is merely a record title holder of real property located in New York State as nominee for the benefit of others, and is otherwise inactive, is not conducting business in New York State as contemplated by section 209.3 of the Tax Law. Eugene Strasser, Adv Op St Comm T & F, September 1, 1988, TSB-A-88(18)C and Babson Bros. Co. of New York Inc., Adv Op St Comm T & F, September 1, 1988, TSB-A-88(19)C.

Federal courts have defined a complete liquidation as the operation of winding up the corporation's affairs by settling its debts, realizing upon and distributing its assets. (Wilcox, 43 BTA 931, affd 137 F2d 136; Hellman v Helvering, 68 F2d 763.) However, if normal corporation operations are continued, not even the cancellation of the corporate charter for failure to pay the annual state franchise tax will be sufficient to provide liquidation. (Zimmerman, 31 BTA 754)

See also, Joseph Barsh and Abe Schwartz, Adv Op Comm T & F, October 12, 1990, TSB-A-90(21)C.

Herein, while Petitioner was incorporated it had fee ownership of real estate and its business was the rental of such property. Since it voluntarily dissolved in 1965, Petitioner has continued to hold fee title to the property and to continue its real property rental operation. Petitioner's activities after the dissolution are the same as before the dissolution.

Accordingly, Petitioner has continued to do business after it voluntarily dissolved. Like Joseph Barsh, supra, Petitioner's activities have exceeded the mere holding of record title to real property and the liquidating of its business affairs.

Therefore, pursuant to section 209.3 of the Tax Law, Petitioner is subject to the franchise tax imposed under Article 9-A of the Tax Law for all taxable years since it was dissolved on November 1, 1965 to the date it ceases to conduct business.

Section 660(a) of the Tax Law provides that:

> (a) Election. If a corporation which is an S corporation for federal income tax purposes is subject to tax under article nine-a of this chapter, the shareholders of the corporation may elect in the manner set forth in subsection (b) of this section to take into account, to the extent provided for in this article, the S corporation items of income, loss, deduction and reductions for taxes described in paragraphs two and three of subsection (f) of section thirteen hundred sixty-six of the internal revenue code which are taken into account for federal income tax purposes for the taxable year. No election under this subsection shall be effective unless all shareholders of the corporation have so elected.

If Petitioner has met the requirements of section 660(a) of the Tax Law, and it has made the section 660 election by properly filing Form CT6 - Election by a Small Business Corporation, Petitioner will be treated as a New York State S corporation for the taxable years for which such election is effective.

It should be noted that for taxable years beginning after 1989, a New York State S corporation must compute its franchise tax pursuant to section 210.1(g) of the Tax Law.

DATED: November 8, 1991

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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