

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

TSB-A-94 (7) C
Corporation Tax
May 12, 1994

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C940224B

On February 24, 1994, a Petition for Advisory Opinion was received from RCN of New York, Inc., 46 Public Square, Wilkes-Barre, Pennsylvania 18703.

The issues raised by Petitioner, RCN of New York, Inc., are whether it is a "first" or "second" class utility for purposes of section 186-a of the Tax Law and whether it is subject to franchise tax under Article 9 or Article 9-A of the Tax Law.

Petitioner will be a provider of both local and long distance telephone services. These services will be provided in the future through the leased lines of affiliated and non-affiliated cable television companies. Petitioner was incorporated in New York as of December 29, 1993 and has not yet begun business.

Section 209.1 of Article 9-A of the Tax Law imposes the business corporation franchise tax on every corporation, unless specifically exempt, for the privilege of exercising its 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 209.4 of the Tax Law provides that corporations liable to tax under sections 183 through 186, inclusive, of Article 9 of the Tax Law are not subject to tax under Article 9-A of the Tax Law.

Section 183 of the Tax Law imposes a franchise tax on corporations formed for or principally engaged in the conduct of a telephone or telegraph business, or formed for or principally engaged in the conduct of two or more of such businesses or principally engaged in the conduct of a transmission business. The tax is imposed on domestic corporations and corporations organized, incorporated or formed under the laws of any other state 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. The tax is computed on the basis of the amount of the corporation's capital stock within New York State during the preceding year, and upon each dollar of such amount.

Section 184 of the Tax Law imposes an additional franchise tax on corporations formed for or principally engaged in the conduct of a telephone or telegraph business, or formed for or principally engaged in the conduct of two or more of such businesses or principally engaged in the conduct of a transmission business. The tax is imposed on domestic corporations and corporations organized, incorporated or formed under the laws of any other state 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. The tax is equal to three-quarters of one per centum on the corporation's gross earnings from all sources within New York State.

The determination of whether a corporation is subject to tax under Article 9-A or Article 9 of the Tax Law, depends 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., Adv Op St Tax Comm, July 23, 1981, TSB-A-81(5)C.

Section 186-a of the Tax Law imposes a tax equal to three and one-half percent of gross income of utilities doing business in New York State which are subject to the supervision of the New York State Department of Public Service which has gross income in excess of \$500, and three and one-half percent of the gross operating income of utilities, not subject to the supervision of the New York State Department of Public Service, that is doing business in New York State which has gross operating income in excess of \$500. The word "utility" includes "every person ... who sells ... telephony or telegraphy ... or furnishes ... telephone or telegraph service ... regardless of whether such activities are the main business of such person or are only incidental thereto " The word "person" means "persons, corporations, companies, associations " The imposition of this tax is in addition to any tax that may be imposed under Article 9-A or sections 183 and 184 of Article 9 of the Tax Law.

Pursuant to section 209.1 of the Tax Law, Petitioner is subject to franchise tax under Article 9-A of the Tax Law from the date of incorporation in New York State, December 29, 1993. Petitioner will continue to be subject to tax under Article 9-A unless Petitioner becomes principally engaged in the conduct of a telephone or transmission business. At such time, Petitioner would become subject to tax under sections 183 and 184 of Article 9 of the Tax Law and cease to be subject to tax under Article 9-A pursuant to section 209.4 of the Tax Law.

Petitioner will also be subject to tax under section 186-a of the Tax Law whenever Petitioner sells telephony or telegraphy or furnishes telephone or telegraph service and is a utility of the first class and has gross income in excess of \$500, or is a utility of the second class and has gross operating income in excess of \$500, regardless of whether such activities are the main business of Petitioner or are only incidental thereto. The tax imposed under section 186-a of the Tax Law is imposed in addition to any tax imposed under Article 9-A or sections 183 and 184 of the Tax Law. The determination of whether Petitioner would be a utility of the first class or a utility of the second class will depend on whether Petitioner is subject to the supervision of the New York State Public Service Commission.

DATED: May 12, 1994

s/PAUL B. COBURN
Deputy Director
Taxpayer-Services Division

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