

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

TSB-A-96 (26) C
Corporation Tax
November 15, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C960718B

On July 18, 1996, a Petition for Advisory Opinion was received from Barclays Business Credit, Inc., c/o McDermott, Will & Emery, 1211 Avenue of the Americas, New York, New York 10036.

The issue raised by Petitioner, Barclays Business Credit, Inc., is whether a bank subsidiary's election to be taxed under Article 9-A of the Tax Law pursuant to the grandfather provision set forth in section 1452(d) of Article 32 of the Tax Law is revoked upon the merger of another bank subsidiary into it with the electing subsidiary as the survivor of the merger.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner was incorporated in Connecticut on November 28, 1980. It has been qualified to do business in New York since January, 1981 and since that time it has reported and paid tax under Article 9-A of the Tax Law. Petitioner made the one-time election under section 1452(d) of the Tax Law, on or before the due date for the filing of its return for its 1985 taxable year, to continue being taxable pursuant to Article 9-A of the Tax Law.

During the early 1980's, Petitioner operated three divisions: the Business Finance division, the Leasing division, and the Special Assets division. The Business Finance division provided asset-based lending to the corporate middle market, with loans typically ranging from amounts of \$1 million to \$10 million. The assets of the Business Finance division had a value in excess of \$1 billion at the beginning of 1995. The Leasing division engaged in the business of leasing equipment and vehicles, which leases ranged from periods of approximately three years to five years. It also provided leveraged leases, which could last for periods of up to 25 years. At the beginning of 1995, the Leasing division's assets had a value of several million dollars. The Special Assets division managed the nonaccrual portfolio and workout subsidiaries. It had gross assets of several million dollars, and bad debt provisions that were almost as large, at the beginning of 1995. All of the activities that were carried on by Petitioner's three divisions were activities which could lawfully be conducted by a bank under Article 3 of the New York State Banking Law.

On January 31, 1995, Petitioner sold its Business Finance division and the equipment and vehicle lease portfolio of its Leasing division to Shawmut Capital Corporation, an independent third party. Petitioner still owns and runs the leveraged lease portfolio of its Leasing division and its Special Asset division. Several million dollars of capital remain in Petitioner.

Barclays de Zoete Wedd Securities Inc. ("BZWSI") was incorporated in New York on February 20, 1990, and since then, it has been subject to tax under Article 32 of the Tax Law. BZWSI is a registered securities broker/dealer and a futures commission merchant; additionally, it

has been granted primary dealer status by the Federal Reserve Board. Since inception, it has been principally engaged as a registered broker/dealer and as a primary dealer in U.S. government securities, activities which may lawfully be conducted by a bank under section 4(c)(8) of the Federal Bank Holding Company Act of 1956, as amended. BZWSI is the "section 20" subsidiary for the group of corporations of which both Petitioner and BZWSI are a part (the "Barclays Group"). A section 20 subsidiary is a corporation through which affiliates are permitted to engage in expanded securities-related activities on a limited basis. The permitted activities include transactions in mortgage-backed securities, asset-backed securities, international debt securities, commercial paper and other corporate-related securities. BZWSI has engaged in all of these types of activities at one time or another. As of December 31, 1995, BZWSI had several billion dollars in assets, nearly all of which were in securities.

Both Petitioner and BZWSI are owned or controlled, indirectly, by Barclays Bank PLC, an alien corporation which is conducting a banking business. A merger of BZWSI into Petitioner is being planned to simplify the structure of the Barclays Group. Petitioner states that the Barclays Group currently has too many special-purpose subsidiaries to permit efficient management. The structure of the Barclays Group has become too confusing and there are many administrative costs as a result of the numerous subsidiaries.

After the merger, Petitioner will be principally engaged as a registered broker/dealer and as a primary dealer in U.S. government securities, which are activities that may be properly conducted by a corporation taxable under Article 9-A of the Tax Law.

Section 1452(a) of Article 32 of the Tax Law defines a "banking corporation". Chapter 298 of the Laws of 1985 amended section 1452(a)(9) of the Tax Law by expanding the definition of a banking corporation to include, among other entities, a corporation 65 percent or more of whose voting stock is owned or controlled, directly or indirectly, by a foreign bank. In order to be a banking corporation, the corporation must be principally engaged in a business which might be lawfully conducted by a corporation subject to Article 3 of the Banking Law or by a national banking association or which is so closely related to banking or managing or controlling banks as to be a proper incident thereto, as set forth in section 4(c)(8) of the Federal Bank Holding Company Act of 1956, as amended. Chapter 298 of the Laws of 1985 also added a grandfather clause, set forth in section 1452(d) of the Tax Law, that permitted certain corporations to make a one-time election to continue to be taxed under Article 9-A of the Tax Law.

Section 1452(d) of the Tax Law provides that, notwithstanding the provisions of Article 32, all corporations of classes now or heretofore taxable under Article 9-A shall continue to be taxable under Article 9-A except, among other entities, banking corporations described in section 1452(a)(9) of the Tax Law. However, section 1452(d) provides further that a corporation described in section 1452(a)(9) of the Tax Law which was subject to the tax imposed by Article 9-A for its taxable year ending during 1984 may make a one-time election to continue to be taxable under Article 9-A. The election is made by the corporation on or before the due date for filing its return (determined with regard to extensions) for its taxable year ending during 1985. The election

shall continue to be in effect until revoked by the taxpayer. In no event shall the election or revocation be for a part of a taxable year.

Section 16-2.5(j)(3) of the Franchise Tax on Banking Corporations Regulations provides that the election is made by the filing of a tax return pursuant to Article 9-A of the Tax Law and the revocation is made by the filing of a tax return pursuant to Article 32 of the Tax Law.

In Robert J. Buckley, Adv Op Comm T & F, May 26, 1994, TSB-A-94(8)C, it was held that where a corporation made the election, pursuant to section 1452(d) of the Tax Law, to be taxed under Article 9-A of the Tax Law, the subsequent takeover of the bank parent by the FDIC and the subsequent sale of the bank parent's stock did not affect the corporation's election.

In Apple Bank for Savings, Adv Op Comm T & F, March 25, 1996, TSB-A-96(7)C, it was held that where a corporation made the election pursuant to section 1452(d) of the Tax Law, the acquisition of a subsidiary's parent bank by another bank and the expansion of the subsidiary's line of business did not affect the subsidiary's election to be taxable under Article 9-A of the Tax Law. Further, for purposes of determining whether the election made under section 1452(d) of the Tax Law is revoked, the activities of the corporation making the election are not considered, except that, if the corporation changes its activities to the extent that it can not be properly classified as a corporation taxable under Article 9-A of the Tax Law, the election made under section 1452(d) of the Tax Law would be revoked. In Apple Bank, the subsidiary had been solely involved in an insurance agency business. As a condition of its parent's reorganization, the Federal Reserve Bank of New York required that the subsidiary cease all new insurance business by a certain date. The subsidiary did cease all insurance operations and it planned to expand its line of business to include investments in securities after its New York charter was amended.

In this case, pursuant to section 1452(d) of the Tax Law, Petitioner made the election to be taxed under Article 9-A of the Tax Law. Petitioner has continued to file reports under Article 9-A. The change in Petitioner's activities to become a registered broker/dealer and a primary dealer in government securities will not require a change in the classification of Petitioner as an Article 9-A taxpayer. Therefore, pursuant to section 1452(d) of the Tax Law, section 16-2.5(j)(3) of the Franchise Tax on Banking Corporations Regulations, Buckley, supra, and Apple Bank, supra, the merger of BZWSI into Petitioner with Petitioner as the surviving entity and the subsequent change in Petitioner's activities to be principally engaged as a registered broker/dealer and as a primary dealer in U.S. government securities, will not affect Petitioner's election to be taxable under Article 9-A of the Tax Law.

DATED: November 15, 1996

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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