New York State Department of Taxation and Finance

Taxpayer Services Division
Technical Services Bureau

TSB-A-91 (14) C
Corporation Tax
TSB-A-91 (5) I
Income Tax
May 28, 1991

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. Z910315B

On March 15, 1991, a Petition for Advisory Opinion was received from Martin Galuskin, c/o Milgrom, Galuskin, Rosner & Company, 2025 Lincoln Hwy., Edison, New Jersey 08817.

The issue raised by Petitioner, Martin Galuskin, is whether a corporation's New York S status is terminated by a tax-free merger under section 368(a)(1)(F) of the Internal Revenue Code (hereinafter "IRC") thereby requiring the shareholders to make a new election and requiring two short period returns to be filed for the federal taxable year during which the merger occurs.

At the close of business on June 30, 1991, X Corp, a New York corporation, will be merged into Y Corp, a Delaware corporation. The merger will be tax-free pursuant to section 368(a)(1)(F) of the IRC.

X Corp had previously adopted S status for both federal and New York State tax purposes and has adopted a 52-53 week reporting period for the filing of its tax returns. Y Corp will qualify to do business in New York State and will operate the business formerly carried on by X Corp. Y Corp will continue to use the federal employer identification number assigned to X Corp.

Under section 660(a) of the Tax Law, shareholders of a federal S corporation are permitted to make an election to treat the corporation as a New York S corporation whereby the shareholders take into account, to the extent provided for under Article 22 of the Tax Law, their pro rata share of the S corporation's items of income, loss, deduction and reduction for taxes described in section 1366(f)(2) and (3) of the IRC which are taken into account for federal income tax purposes.

Section 660(b)(4) of the Tax Law provides that the election made under section 660(a) is effective for the taxable year of the corporation for which it is made and for all succeeding taxable years of the corporation until such election is terminated.

Pursuant to section 660(c) of the Tax Law, termination occurs when the election made under section 660(a) ceases to be effective. The election will cease to be effective:

1. on the day the election to be treated as an S corporation for federal income tax purposes ceases;

2. if shareholders owning a majority of the shares revoke the election; or

3. on the day a person becomes a new shareholder if he affirmatively refuses to consent to the S corporation treatment.

For federal income tax purposes, Revenue Ruling 64-250 (1964-2 CB 333) holds that based on the facts presented, a reorganization under section 368(a)(1)(F) of the IRC did not cause a termination of the election to be treated as an S corporation under section 1372 of the IRC. The facts in the revenue ruling provided that the shareholders of M (an electing S corporation) reincorporated in a state other than that of original incorporation by organizing, a new corporation, N, in the other state and merged M into N. The surviving corporation, N, also met the requirements for qualifying as an S corporation under section 1371(a) of the IRC.

Based on federal Revenue Ruling 64-250, it appears that when X Corp files for a section 368(a)(1)(F) reorganization for federal income tax purposes, X Corp's merger into Y Corp will not change its federal status and the transaction will not terminate the S corporation election for federal income tax purposes.

Section 607(a) of the Tax Law provides that "[a]ny term used in this article shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required." When an interpretation of a law of the United States relating to federal income taxes is established by the Internal Revenue Service through a Revenue Ruling or a Revenue Procedure, such federal interpretation will be followed for New York State personal income tax purposes, as well.

Therefore, for New York personal income tax purposes, Revenue Ruling 64-250 would be followed and since the section 368(a)(1)(F) reorganization would not terminate the federal S corporation election, such reorganization would not cause a termination of the New York S corporation election. See Spectrum Energy, Inc., Adv Op St Tax Comm, May 29, 1987, TSB-A-87(11)C.

Herein, X Corp will file for a section 368(a)(1)(F) reorganization for federal income tax purposes. Therefore, if X Corp's election to be treated as a S corporation for federal income tax purposes is not terminated because of its merger into Y Corp in 1991, X Corp's New York S corporation status will not terminate pursuant to section 660(c) of the Tax Law. Since none of the causes for termination of the New York S corporation election exist, Y Corp will continue to be a New York S corporation for taxable year 1991.

However, when X Corp merges into Y Corp, X Corp will cease to exercise its New York State franchise. Y Corp will be a foreign corporation that has authority to do business in New York State.

Therefore, assuming X Corp's S corporation election is not terminated, for taxable year 1991, two short period CT-3S returns will be required for New York State franchise tax purposes, even though only one return is required for federal income tax purposes. A short period return will be required for the period from the beginning of its federal taxable year up to and including the day X Corp ceases to exercise its franchise. Also, a short period return will be required for the period from the day Y Corp merges X Corp to the end of its federal taxable year.

If X Corp's election to be treated as an S corporation for federal income tax purposes is terminated when X Corp merges into Y Corp in 1991, X Corp's

election to be a New York S corporation is also terminated. In such instance, for taxable year 1991, two short period returns will be required for New York State franchise tax purposes. A CT-3S short period return will be required for the period X Corp's election is in effect and a CT-3 short period report will be required to be filed by Y Corp for the period the election ceases to be in effect.

It should be noted, that section 181.2 of the Tax Law provides that every foreign corporation that is authorized to do business in New York State pursuant to Article 13 or Article 15-a of the Business Corporation Law shall pay an annual maintenance fee of $300 for each year or portion thereof for which it is so authorized, provided however such fee is reduced by 50 percent if the period for which the fee is imposed consists of no more than six months. Such fee is to be paid annually until the corporation surrenders its authority to do business in New York State.

Additionally, section 181.1 of the Tax Law provides that a foreign corporation, including a New York S corporation, must pay a license fee for the privilege of carrying on its business in New York State. This fee is payable only once unless the capital share structure changes or the amount of capital stock employed in New York State has increased since the last license fee report, form CT-240, was filed.

DATED: May 28, 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.