

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-04(1)C
Corporation Tax
February 26, 2004

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C031028A

On October 28, 2003, a Petition for Advisory Opinion was received from RBC Holdings (USA), Inc., 1 Liberty Plaza, New York, New York 10006.

The issues raised by Petitioner, RBC Holdings (USA), Inc., are:

1. Whether, pursuant to section 1452(j)(2) of the Tax Law, a newly formed wholly owned domestic subsidiary corporation of Petitioner has the right to elect to be subject to tax under Article 9-A of the Tax Law for its first short taxable year beginning in 2003 and ending on October 31, 2004.
2. Whether, pursuant to section 1462(f)(2)(iv)(B) of the Tax Law, the subsidiary described in Issue 1, which will also register for the first time as a bank holding company and elect financial holding company status upon its formation, is required to file a combined Article 32 return with any Article 32 affiliates (e.g., operating subsidiaries) for its short taxable year beginning in 2003 and ending on October 31, 2004.

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

Petitioner is an indirect wholly owned domestic subsidiary of Royal Bank of Canada, an alien bank, and a fiscal year taxpayer doing business in New York. Petitioner's fiscal year, and the fiscal year of its subsidiaries, begins on November 1 and ends on October 31 of each year.

Petitioner indirectly acquired a greater than 5% but less than 65% interest in the domestic banking subsidiaries of Royal Bank of Canada in 2003, during its taxable year ending October 31, 2003. As a result, Petitioner both (i) registered as a bank holding company (BHC) under the Federal Bank Holding Company Act of 1956, as amended, (the Act) and (ii) elected financial holding company (FHC) status during its taxable year ending October 31, 2003.

In addition to its current status as a BHC and FHC, Petitioner is a *banking corporation* as such term is defined in section 1452(a)(9) of the Tax Law. Petitioner is not a corporation described in paragraphs (1) through (8) of section 1452(a) of the Tax Law.

For its taxable year ended October 31, 2002, Petitioner filed a combined franchise tax return under Article 32 of the Tax Law with Bull & Bear Securities, Inc., its Article 32 subsidiary. Bull & Bear Securities, Inc., was dissolved during the taxable year ending October 31, 2003, and as a result, Petitioner no longer has any 65% or more owned operating subsidiaries that are both doing business in New York and subject to Article 32 of the Tax Law.

Currently, Petitioner's 65% or more owned operating subsidiaries consist primarily of broker/dealer and insurance related entities. To the extent these other entities are doing business in New York, they are properly subject to taxation under either Article 9-A or Article 33 of the Tax Law.

For its taxable year ended October 31, 2003, Petitioner remained an Article 32 taxpayer.

Petitioner formed Newco on December 8, 2003, by contributing all of the assets and liabilities currently owned by Petitioner to Newco in exchange for 100% of the stock of Newco in a transaction that qualifies under Internal Revenue Code (IRC) section 351 for federal income tax purposes.

Newco registered for the first time as a BHC on December 22, 2003, and elected FHC status on December 29, 2003. From a bank regulatory perspective, Newco will be principally engaged in activities that are described in section 4(k)(4) or 4(k)(5) of the Act. In addition to being a BHC and FHC, Newco will be a *banking corporation* as defined in section 1452(a)(9) of the Tax Law, and will not be described in paragraphs (1) through (8) of section 1452(a) of the Tax Law.

Through various restructurings or changes in business operations that may occur in its taxable year beginning in December 2003 and ending October 31, 2004, Newco may have, in addition to broker/dealer and insurance related entities as operating subsidiaries, 65% or more owned operating subsidiaries that are *banking corporations* doing business in New York that are subject to Article 32 of the Tax Law.

Applicable law

Section 1452(j)(2) of the Tax Law, as amended by Chapter 62 of the Laws of 2003, provides:

Notwithstanding anything to the contrary contained in this section, a corporation formed on or after January first, two thousand three and before January first, two thousand four may elect to be subject to tax under this article or under article nine-A of this chapter for its first taxable year beginning on or after January first, two thousand three and before January first, two thousand four in which either (i) sixty-five percent or more of its voting stock is owned or controlled, directly or indirectly by a financial holding company, provided the corporation whose voting stock is so owned or controlled is principally engaged in activities that are described in section 4(k)(4) or 4(k)(5) of the federal bank holding company act of nineteen hundred fifty-six, as amended and the regulations promulgated pursuant to the authority of such section, or (ii) it is a financial subsidiary.

An election under this paragraph may not be made by a corporation described in paragraphs one through eight of subsection (a) of this section or in subsection (e) of this section. In addition, an election under this paragraph may not be made by a corporation that is a party to a reorganization, as defined in subsection (a) of section 368 of the internal

revenue code of 1986, as amended, of a corporation described in paragraph one of this subsection if both corporations were sixty-five percent or more owned or controlled, directly or indirectly, by the same interests at the time of the reorganization. An election under this paragraph must be made by the taxpayer on or before the due date for filing its return (determined with regard to extensions of time for filing) for the applicable taxable year. The election to be taxed under article nine-A of this chapter shall be made by the taxpayer by filing the report required pursuant to section two hundred eleven of this chapter and the election to be taxed under this article shall be made by the taxpayer by filing the return required pursuant to section fourteen hundred sixty-two of this article. Any election made pursuant to this paragraph shall be irrevocable and shall apply to each subsequent taxable year beginning on or after January first, two thousand three and before January first, two thousand four, provided that the stock ownership requirements described in subparagraph (i) of this paragraph are met or such corporation described in subparagraph (ii) of this paragraph continues as a financial subsidiary.

Section 1462(f)(2)(iv)(B) of the Tax Law, as amended by Chapter 62 of the Laws of 2003, provides:

Notwithstanding any provision of this paragraph other than clause (A) of this subparagraph, the commissioner may not require a bank holding company which, during a taxable year beginning on or after January first, two thousand and before January first, two thousand four, registers for the first time during such taxable year under the federal bank holding company act, as amended, and also elects to be a financial holding company, to make a return on a combined basis for any taxable year beginning on or after January first, two thousand and before January first, two thousand four with a banking corporation sixty-five percent or more of whose voting stock is owned or controlled, directly or indirectly, by such bank holding company.

Section 351(a) of the IRC provides, in part:

General Rule. – No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock in such corporation and immediately after the exchange such person or persons are in control ... of the corporation.

Section 368(a) of the IRC provides, in part:

Reorganization. –

(1) In general. – For purposes of parts I and II and this part, the term “reorganization” means –

* * *

(C) the acquisition by one corporation, in exchange solely for all or a part of its voting stock (or in exchange solely for all or a part of the voting stock of a corporation which is in control of the acquiring corporation), of substantially all of the properties of another corporation, but in determining whether the exchange is solely for stock the assumption by the acquiring corporation of a liability of the other shall be disregarded;

* * *

(2) Special rules relating to paragraph (1). –

* * *

(G) Distribution requirement for paragraph (1)(C). –

(i) In general. – A transaction shall fail to meet the requirements of paragraph (1)(C) unless the acquired corporation distributes the stock, securities, and other properties it receives, as well as its other properties, in pursuance of the plan of reorganization. For purposes of the preceding sentence, if the acquired corporation is liquidated pursuant to the plan of reorganization, any distribution to its creditors in connection with such liquidation shall be treated as pursuant to the plan of reorganization.

(ii) Exception. – The Secretary may waive the application of clause (i) to any transaction subject to any conditions the Secretary may prescribe.

Opinion

Petitioner is a banking corporation under section 1452(a)(9) of the Tax Law and is a BHC and a FHC. On December 8, 2003, Petitioner formed Newco by contributing all of the assets and liabilities currently owned by Petitioner in exchange for 100% of Newco's stock. This transaction will qualify under IRC section 351, and does not appear to be a reorganization under IRC section 368(a).

Newco registered, for the first time, as a BHC on December 22, 2003, and elected FHC status on December 29, 2003. Newco will be principally engaged in activities that are described in section 4(k)(4) or 4(k)(5) of the Act, and will be a banking corporation under section 1452(a)(9) of the Tax Law. For its first taxable year beginning in December 2003 and ending October 31, 2004, Newco

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may have, in addition to broker/dealer and insurance related entities as operating subsidiaries, 65% or more owned operating subsidiaries that are *banking corporations* doing business in New York that are subject to Article 32 of the Tax Law.

Accordingly, with respect to Issue 1, Newco has the right, pursuant to section 1452(j)(2) of the Tax Law, as added by Chapter 62 of the Laws of 2003, to elect to be subject to tax under Article 9-A of the Tax Law for its first short taxable year beginning in December 2003 and ending on October 31, 2004.

With respect to Issue 2, pursuant to section 1462(f)(2)(iv)(B) of the Tax Law, as amended by Chapter 62 of the Laws of 2003, Newco may not be required to file a combined Article 32 return with any Article 32 affiliates (e.g., operating subsidiaries that are banking corporations subject to tax under Article 32) for its short taxable year beginning in December 2003 and ending on October 31, 2004.

DATED: February 26, 2004

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