

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

TSB-A-90(17)C
Corporation Tax
August 29, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C900724A

On July 24, 1990 a Petition for Advisory Opinion was received from Ludwig Institute for Cancer Research, c/o Universe Tankships, Inc., 1345 Avenue of the Americas, New York, New York 10105.

The issue raised by Petitioner, Ludwig Institute for Cancer Research, is whether it is exempt from the franchise tax imposed under Article 9-A of the Tax Law by reason of Section 1-3.4(b)(6) of the Business Corporation Franchise Tax Regulations (hereinafter "Regulations").

Petitioner is a nonprofit joint-stock company organized under the laws of Switzerland for the purpose of engaging in medical research, primarily in the field of cancer, for the benefit of the public. The Petitioner has issued fifty shares. Under the Petitioner's basic articles and Swiss law the shares entitle the shareholders simply to vote on the election and removal of the board of directors of the Petitioner and on limited corporate matters, such as the appointment of auditors, approval of annual reports and changes in the Petitioner's registered "seat". The shares provide no rights to dividends, liquidation distributions or other payments. The Petitioner's basic articles cannot be amended to change its basic nonprofit charitable and scientific purposes.

The bulk of the shares are held by an irrevocable charitable trust which selects and elects the Petitioner's directors and maintains oversight and control over the directors in the same way that the members of a nonprofit membership corporation supervise their directors. The charitable trust has been determined by the Internal Revenue Service to be an organization described in Internal Revenue Code Section 501(c)(3). One share is held by the Swiss Confederation subject to its undertaking to hold and vote such shares to assure that the Petitioner is operated for nonprofit charitable and scientific purposes.

Petitioner's research is funded by an endowment. Its primary source of income is dividends and interest and other income such as royalties. All income received or earned by Petitioner must be used for research. In the event that Petitioner liquidates, the entire surplus and capital of the Petitioner must be distributed to hospitals described in Section 501(c)(3) of the Internal Revenue Code, and not to the shareholders.

Petitioner qualifies as an exempt organization for Federal tax purposes under Section 501(c)(3). In addition, Petitioner applied for and received authority from the Secretary of State of New York to conduct activities in New York as a not-for-profit organization. Petitioner desires to establish a cancer research laboratory in association with a hospital in New York City.

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Section 209.1 of Article 9-A of the Tax Law imposes a franchise tax on every domestic or foreign corporation "[f]or the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this State " Section 1-3.4(b)(6) of the Regulations exempts from the franchise tax "...corporations organized other than for profit which do not have stock or shares or certificates for stock or for shares and which are operated on a nonprofit basis no part of the net earnings of which inures to the benefit of any officer, director, or member, including Not-For-Profit Corporations and Religious Corporations. Such section 1-3.4(b)(6) provides further that "[a] corporation organized other than for profit, as described in this paragraph, which is exempt from Federal income taxation pursuant to subsection (a) of section 501 of the Internal Revenue Code, will be presumed to be exempt from tax under article 9-A."

It was not intended that such exemption be applied to not-for-profit stock corporations. Senate Bill Introductory No. 2503 of 1966 would have explicitly exempted stock corporations operated on a nonprofit basis. That bill was vetoed by the Governor on May 16, 1966 specifically to avoid creating doubt about the exemption of nonstock corporations which is acknowledged as valid but which is not explicit in the statute. Opinion of Counsel, November 28, 1967, NYTB 1967-4, p. 47.

In Cornell Research Foundation, Inc., Adv Op St Tax Comm, July 20, 1987, TSB-A-87(18)C, and in University Medical Practice Services, P.C., Adv Op, Comm T & F, January 26, 1990, TSB-A-90(3)C, it was determined that a stock corporation, even if it is organized and operated exclusively for nonprofit purposes, is not exempt from the franchise tax pursuant to section 1-3.4(b)(6) of the Regulations. Also, see 1049 Management Corporation, Adv Op St Tax Comm, December 23, 1985, TSB-A-86(1)C and Matter of Cape Pond, Inc., Dec St Tax Comm, July 18, 1980, TSB-H-80(20)C.

Based on the legislative history of this issue, State Tax Commission and Commissioner of Taxation and Finance advisory opinions issued, and State Tax Commission decisions rendered, it is clear that a stock corporation, regardless of whether it is organized and operated exclusively for nonprofit purposes, is not exempt from tax pursuant to section 1-3.4(b)(6) of the Regulations.

Herein, Petitioner is a stock corporation. Therefore, Petitioner does not fall within the scope of the exemption contained in section 1-3.4(b)(6) of the Regulations. It is of no consequence that Petitioner is exempt for federal income tax purposes or that the holders of its stock have no right of ownership in its assets. Accordingly, Petitioner is subject to the franchise tax imposed by Article 9-A of the Tax Law.

DATED: August 29, 1990

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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