

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

TSB-A-89(10)C
Corporation Tax
August 16, 1989

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C890310A

On March 10, 1989, a Petition for Advisory opinion was received from South Shore Male Den, Inc., South Shore Mall, Bay Shore, New York 11706.

The issue raised is whether Petitioner was a corporation and subject to tax under Article 9-A of the Tax Law beginning with the fiscal year ended March 31, 1977. If yes, is the CT-6 election made for fiscal year ended 1988 valid and will Petitioner be able to keep the current fiscal year ending March 31. If no, what is the effect on all the corporate taxes paid in prior years and what is the effect on the personal returns filed by the principals of the organization for the 11 year period in question.

In the beginning of 1977, it was the intention of the individuals involved to form a corporation under the name of South Shore Male Den, Inc. They contacted their attorney and requested that he perform this service on their behalf. A short time later the principles received what they believed to be a completed corporate kit and began to conduct business as South Shore Male Den, Inc.

The organization believed it was a fully sanctioned corporation in New York State, held itself out as a corporate entity, operated as a corporate entity abiding by all the corporate rules and regulations, and filed both federal and state corporate income/franchise tax returns for a period of 11 years.

Since 1977, both the federal and state corporate income/franchise tax returns were filed for the fiscal years ending on March 31. All applicable taxes due with these returns were paid by the Petitioner.

When the Tax Reform Act of 1986 was signed into law, the management decided to file for the election to be treated as an "S" corporation. In July of 1988, the Internal Revenue Code section 444 election was made to retain the corporate fiscal year end of March 31. The shareholders filed the federal form 2553 and the state form CT-6 for the fiscal year ended 1988. Form CT-3S for the fiscal year ended March 31, 1988 was subsequently filed by the taxpayer. In November of 1988, Petitioner was contacted by the New York State Department of Taxation and Finance and told that the Department could not locate any information on South Shore Male Den, Inc. At this point Petitioner contacted the New York State Department of State, to inquire about any information they might have on South Shore Male Den, Inc. They responded shortly after and indicated that a search of their records had failed to uncover any records of such a corporate entity ever being formed. The Petitioner subsequently filed a Certification of Incorporation with the New York State Department of State.

It is the Petitioner's contention that the situation should be left in a status quo position, with the "S" election intact and the retention of the March 31 fiscal year end.

At this point, the personal income tax returns of the principals involved are being held until this matter is resolved.

Section 209.1 of Article 9-A of the Tax Law, imposes an annual franchise tax on domestic or foreign corporations for the privilege of exercising a corporate franchise, doing business, employing capital, owning or leasing property in a corporate or organized capacity, or maintaining an office, in New York State.

Section 1-2.3 of the Business Corporation Franchise Tax Regulations (hereinafter "Regulations") defines the term "corporation" as follows:

(a) The term "corporation" means an entity created as such under the laws of the United States, any state, territory or possession thereof, the District of Columbia, or any foreign country, or any political subdivision of any of the foregoing, which provides a medium for the conducting of business and the sharing of its gains.

(1) The term "domestic corporation" means a corporation incorporated by or under the laws of the State or colony of New York State.

(2) The term "foreign corporation" means a corporation which is not a domestic corporation.

(b) ... An entity conducted as a corporation is deemed to be a corporation....

Since Petitioner held itself out as a corporation and has been conducting business in New York State as a corporation since 1977, pursuant to section 1-2.3 of the Regulations, Petitioner is subject to tax under Article 9-A of the Tax Law beginning with fiscal year ended March 31, 1978.

Section 660(a) of the Tax Law provides that

(a) Election. If a corporation which is an S corporation for federal income tax purposes is subject to tax under article nine-a of this chapter, the shareholders of the corporation may elect in the manner set forth in subsection (b) of this section to take into account, to the extent provided for in this article, the S corporation items of income, loss, deduction and reductions for taxes described in paragraphs two and three of subsection (f) of section thirteen hundred sixty-six of the internal revenue code which are taken into account for federal income tax purposes for the taxable year. No election under this subsection shall be effective unless all shareholders of the corporation have so elected.

Since Petitioner is deemed to have been a corporation since 1977, Petitioner is subject to tax under Article 9-A of the Tax Law. Petitioner has properly filed franchise tax returns and paid the taxes due since the fiscal year ended March 31, 1978. As a result, Petitioner is a taxpayer under Article 9-A. Further, Petitioner has met the requirements of section 660(a) of the Tax Law

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and, therefore, may avail itself of the election contained therein to be treated as a New York State S corporation.

If Petitioner has made the section 660 election by properly filing a CT 6 for fiscal year ended March 31, 1988, Petitioner will be treated as a New York State S corporation. In addition, Petitioner may retain its March 31 fiscal year. However, to avoid the imposition of penalties for late filing, Petitioner must have filed form DTF-980 with its CT3S showing that it has retained its fiscal year for federal income tax purposes.

DATED: August 16, 1989

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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