

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

TSB-A-98(14)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S971231H

On December 31, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from Brookhaven Science Associates, LLC, Office of Research Services, S-5422 Melville Library, State University of New York-Stony Brook, Stony Brook, New York 11794-3365.

The issue raised by Petitioner, Brookhaven Science Associates, LLC, is whether Petitioner is organized exclusively for the purposes specified in Section 1116(a)(4) of the Tax Law.

Petitioner submits the following facts as a basis for this advisory opinion. Petitioner is a not-for-profit limited liability company formed under Chapter 18, Title 6 of the Delaware Code on October 28, 1997. A certified copy of its Certificate of Formation and a proposed draft of the Limited Liability Company Operating Agreement (the "Agreement") was submitted with the Petition. The Certificate of Formation and the Agreement together constitute Petitioner's governing instruments. Petitioner will be entitled to elect, and intends to elect, to be treated as a partnership for federal and New York State corporate income tax purposes.

Petitioner is owned by its two members, The Research Foundation of State University of New York (the "Foundation") and Battelle Memorial Institute ("Battelle"), each of which has a 50 percent interest in Petitioner. The Foundation and Battelle will each appoint five of the directors to Petitioner's Board of Directors. The remaining six directors are the presidents (or their designees) of Columbia University, Cornell University, Harvard University, the Massachusetts Institute of Technology, Princeton University and Yale University. The approval of four of the Foundation's and four of Battelle's directors is required for any matter which materially affects the finances, liabilities or business of Petitioner. Neither the Foundation nor Battelle may assign their membership in Petitioner except to one another or with the consent of the other, and neither has any plans or intentions for making, or seeking permission to make, any such transfers.

The Foundation is a private New York not-for-profit educational corporation. The Foundation administers externally funded contracts and grants for and on behalf of the State University of New York ("SUNY"). It is governed by a Board of Directors composed of researchers, campus and SUNY administrators, SUNY Trustees, and representatives of business and industry. The chancellor of SUNY serves as chair of the Foundation's Board, *ex officio*. A Sponsored Programs Advisory Council, composed of faculty researchers and campus administrators, provides operating advice to Foundation management. Since its establishment in 1951, the Foundation has facilitated research, education, and public service at SUNY. The Foundation supports, through quality management services, more than 4,800 sponsored programs being conducted at 30 State-operated SUNY locations. The Foundation is exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code.

Battelle is a nonprofit Ohio corporation formed in 1925 pursuant to the Will of Gordon Battelle (the "Will") to utilize science for the benefit of mankind through technological innovation. Battelle serves industry and government in the generation, application and commercialization of technology and scientific knowledge. Battelle's principal services include research (conceptual problem-solving and product and process development), on-site technical assistance, and management of large complex technology programs. Battelle is known for utilizing multi-disciplinary approaches to provide practical, imaginative, and scientifically sound answers to its project sponsors' problems and needs.

The Will and its interpretation by the courts provide for the distribution by Battelle of its earnings at specified levels to such charitable institutions, needy enterprises, or persons as in the judgement of Battelle's Trustees will do the greatest good for humanity. An Ohio nonprofit corporation is, by law, a corporation not formed for the pecuniary gain or profit of, and no part of any net earnings of which is distributable to, its members, trustees, officers or other private persons. In 1974, Battelle voluntarily relinquished its tax exempt status under Section 501(c)(3) of the Internal Revenue Code because of uncertainty as to whether the development aspects of the scientific research which it was conducting pursuant to the Will and Ohio Law were consistent with Treasury Regulations interpreting Section 501(c)(3) of the Internal Revenue Code.

Petitioner has been organized for the purpose of submitting a proposal to the United States Department of Energy ("DOE") in response to a DOE request for proposals for the management and operation of Brookhaven National Laboratory ("BNL") in Suffolk County on Long Island, and undertaking the management and operation of BNL pursuant to a management agreement (the "Management Agreement") with DOE. DOE requires that the manager of BNL be a non-profit entity. BNL is dedicated to basic and applied investigation in a multitude of scientific disciplines, including experimental and theoretical physics, medicine, chemistry, biology, environmental research and engineering. Major BNL facilities include the High Flux Beam Reactor, the Brookhaven Medical Research Reactor, the Alternating Gradient Synchrotron complex, and the National Synchrotron Light Source, and in the future will include a relativistic heavy ion collider. The two reactors and the two synchrotrons (also referred to as accelerators) are used for a variety of research, most notably in high and medium energy physics, isotope production, material science, solid state physics, chemistry, biology, environmental science, and geo-science. Experiments are conducted in a wide range of areas, such as high energy collisions, radiobiology, photochemistry, and trace chemical composition. Certain of the research activities at BNL are designed and conducted by university and industry users.

DOE announced in May of 1997 that a new contractor would be retained to manage BNL effective January 1998. On November 25, 1997, DOE announced that Petitioner had been selected. BNL was previously managed by Associated Universities, Inc. ("AUI"). AUI has been performing essentially the same activities at BNL as will be performed by Petitioner. AUI has been issued an Exempt Organization Certificate by the Department of Taxation and Finance.

Section 2.4 of the Agreement provides:

Purposes. The purposes of the Company [Petitioner] are to engage in scientific research and educational activities and any other related activities for which not-for-profit limited liability companies may be organized under the Act [Delaware Limited Liability Company Act, Title 6, §§ 18-101] and which are in furtherance of scientific research and educational activities. The primary purpose of the Company is to enter into and perform the BNL Management Agreement. The Company shall possess and may exercise all the powers and privileges granted by the Act or by any other law, together with any powers incidental thereto, so far as such powers and privileges are necessary or convenient to the conduct, promotion or attainment of the purposes of the Company. Notwithstanding any other provision of this Agreement to the contrary, the Company is organized exclusively for one or more of the following purposes: religious, charitable, scientific, testing for public safety, literary, or educational purposes as specified in Section 1116(a)(4) of the New York State Tax Law and shall not carry on any activities not permitted to be carried on by an organization exempt from the New York State Sales and Compensating Use Tax under said Section 1116(a)(4) or corresponding provisions of any subsequent New York State tax laws.

Section 6.5 of the Agreement provides:

Restriction on Distributions. Notwithstanding any other provision of this Agreement, no distribution shall be made to any Member who, at the time the distribution is made, is not an organization which would qualify for exemption under Section 1116(a)(4) of the Tax Laws of the State of New York.

Section 11.2(c) of the Agreement, relating to the liquidation and termination of Petitioner, provides, in part:

The liquidating trustee(s) shall distribute the proceeds of such liquidation and any other assets of the Company (subject to any requirement under the Act) in the following order of priority:

(i) First, to payment of all of the debts, liabilities and obligations of the Company...

(ii) Second, to the establishment of such adequate reserve for payment and discharge of all debts, liabilities and obligations of the Company, including, without limitation, contingent, conditional or unmatured liabilities in such amount and for such term as the liquidating trustee(s) may reasonably determine.

(iii) Third, to the Members in accordance with their respective positive Capital Account balances, as determined after giving effect to all allocations and Distributions under this Agreement (other than the Distributions to be made pursuant to this sentence) provided, however, that notwithstanding any other

provision of this Agreement, no distribution shall be made to any Member who, at the time the distribution is made, is not an organization which would qualify for exemption under Section 1116(a)(4) of the Tax Laws of the State of New York.

Applicable Law and Regulations

Section 1116(a) of the Tax Law exempts from sales and use tax any sale or amusement charge by or to any of the following or any use or occupancy by any of the following:

(4) Any corporation, association ... organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, ... no part of the net earnings of which inures to the benefit of any private shareholder or individual...

Section 529.7 of the Sales and Use Tax Regulations provides, in part:

* * *

(b) *Qualifications.* (1) In order to qualify for exemption, an organization must be formally organized. An organization will not be considered formally organized unless it has an organizing document defining its purposes and activities and a code of regulations describing how it will function and select the officers empowered to act for it. Evidence of a formal organization structure includes:

- (i) a certificate of incorporation and bylaws;
- (ii) a declaration of trust and bylaws;
- (iii) articles of association and bylaws; or
- (iv) a constitution and bylaws.

(2) In addition to the formal organization requirement, an organization must prove that it is both organized and operated exclusively for one or more of the purposes specified in subdivision (e) of this section. If an organization fails to meet either the organizational test or the operational test, it is not exempt.

(c) *Organizational test.* (1) General. The organizational test relates solely to the provisions of the organizing documents.

(i) An organization is organized exclusively for one or more exempt purposes only if its organizing documents:

(a) limit the purposes of such organization to one or more exempt purposes; and

(b) do not expressly empower the organization to participate, other than as an insubstantial part of its activities, in activities which in themselves are not in furtherance of one or more exempt purposes.

(ii) In no case will an organization be considered organized exclusively for one or more exempt purposes, if, by the terms of its organizing documents, the purposes for which such organization is created are broader than the purposes specified in section 1116(a)(4) of the Tax Law. The fact that the actual operations of such an organization have been exclusively in the furtherance of one or more exempt purposes is not sufficient to permit the organization to meet the organizational test. Similarly, such an organization will not meet the organizational test as a result of statements or other evidence that the members thereof intend to operate only in the furtherance of one or more exempt purposes.

(iii) An organization is not organized exclusively for one or more exempt purposes if its articles expressly empower it to carry on, otherwise than as an insubstantial part of its activities, activities which are not in furtherance of one or more exempt purposes, even though such organization is, by terms of such articles, created for a purpose that is no broader than the purposes specified in section 1116(a)(4) of the Tax Law. Thus an organization that is empowered by its articles to engage in a manufacturing business, or to engage in the operation of a social club, does not meet the organizational test regardless of the fact that its articles may state that such organization is created for charitable purposes within the meaning of section 1116(a)(4) of the Tax Law.

* * *

(3) Distribution of assets on dissolution. An organization is not organized exclusively for one or more exempt purposes unless its assets are dedicated to an exempt purpose. An organization's assets will be considered dedicated to an exempt purpose if, upon dissolution such assets would, by reason of a provision in the organization's organizing documents or by operation of law, be distributed for one or more exempt purposes, or to the Federal or a state government or to a local government, for a public purpose. An organization does not meet the organizational test if, by operation of law or through the provisions of its organizing documents, the organization's assets could, upon dissolution, be distributed to its members or shareholders or for a nonexempt purpose.

(d) *Operational Test.* (1) General. The operational test relates solely to an organization's activities.

(2) Activities. An organization will be regarded as "operated exclusively" for one or more exempt purposes only if almost all of its activities accomplish one or more exempt purposes specified in section 1116(a)(4) of the Tax Law and described in subdivision (e)

of this section. An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.

(3) Distribution of earnings. An organization is not operated exclusively for one or more exempt purposes if its net earnings inure in whole or in part to the benefit of private shareholders or individuals. Private shareholders or individuals refers to persons having a personal and private interest in the activities of the organization.

* * *

(e) *Exempt purposes.* (1) In order to be exempt from the sales and use tax as an organization described in section 1116(a)(4) of the Tax Law, an organization must be both organized and operated exclusively for one or more of the purposes listed in this subdivision.

* * *

(iii) Scientific.

(a) Since an organization may meet the requirement of section 1116(a)(4) of the Tax Law only if it serves a public rather than a private interest, a "scientific" organization must be organized and operated in the public interest. Therefore, the term "scientific" includes the carrying on of scientific research in the public interest. Research when taken alone is a word with various meanings; it is not synonymous with "scientific"; and the nature of particular research depends upon the purpose which it serves. For research to be "scientific", it must be carried on in furtherance of a "scientific" purpose.

(b) Scientific research does not include activities of a type ordinarily carried on as an incident to commercial or industrial operations, as, for example, the ordinary testing or inspection of material or products or the designing or construction of equipment, buildings, etc.

(c) Scientific research will be regarded as carried on in the public interest:

(2) if such research is performed for the United States or any of its agencies or instrumentalities, or for a State or political subdivision thereof;...

* * *

(v) *Educational* shall mean the instruction or training of the individual for the purpose of improving or developing his capabilities or the instruction of the public on subjects useful to the individual and beneficial to the community. An organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion. On the other hand, an organization is not educational if its principal function is the mere presentation of unsupported opinion....

Opinion

Section 1116(a)(4) of the Tax Law is modeled after Section 501(c)(3) of the Internal Revenue Code. Only those organizations which meet the requirements of paragraph three of Section 501(c) qualify for sales tax exemption pursuant to Section 1116(a)(4) of the Tax Law. Jamestown Campus of the Jamestown Community College Faculty-Student Association, Adv Op St Tx Comm, September 16, 1985, TSB-A-85(44)S. Section 529.7(b) of the Sales and Use Tax Regulations provides that in order to qualify for exemption under Section 1116(a)(4) of the Tax Law, an organization must be formally organized and prove that it is both organized and operated exclusively for one or more of the purposes specified in Section 1116(a)(4).

Petitioner has filed a Certificate of Formation as a limited liability company with the Secretary of State of the State of Delaware. The Agreement defines Petitioner's purposes and activities, and describes its management procedures and selection of officers. If the Agreement is executed by Petitioner's members, Petitioner will be formally organized for purposes of Section 529.7(b)(1) of the Sales and Use Tax Regulations.

Section 2.4 of the Agreement limits the purposes of Petitioner to scientific research, educational activities and other exempt purposes described in Section 1116(a)(4) of the Tax Law. The Agreement does not expressly empower Petitioner to participate in activities which are not in furtherance of the specifically stated exempt purposes. Sections 6.5 and 11.2(c)(iii) of the Agreement limit, respectively, the distribution of Petitioner's earnings, and the distribution of Petitioner's assets upon dissolution after payment of all debts, liabilities and obligations, to members which qualify for exemption under Section 1116(a)(4) of the Tax Law. Accordingly, the Agreement dedicates Petitioner's assets to an exempt purpose, as required by Section 529.7(c)(3) of the Sales and Use Tax Regulations, and also would limit Petitioner's distribution of earnings in accordance with the prohibition in Section 529.7(d)(3) of the Sales and Use Tax Regulations against inurement of net earnings to the benefit of persons having a private interest in the organization.

Accordingly, under the Agreement, Petitioner would be organized exclusively for the purposes specified in Section 1116(a)(4) of the Tax Law. However, in order to establish its exempt status and to receive an exempt organization

certificate, Petitioner must demonstrate that it meets the requirements of the operational test of Section 529.7(d) of the Sales and Use Tax Regulations, and obtain approval from the Taxpayer Assistance Bureau as provided in Section 529.7(f) of the Regulations.

This Advisory Opinion presumes that all provisions of the Agreement are valid under the laws of the State of Delaware and would be given effect under such laws.

DATED: February 26, 1998

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

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