

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

TSB-A-04(3)C
Corporation Tax
April 1, 2004

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C031114B

On November 14, 2003, a Petition for Advisory Opinion was received from Conseco Annuity Assurance Company, 222 Merchandise Mart Plaza, Chicago, Illinois 60654.

The issues raised by Petitioner, Conseco Annuity Assurance Company, are:

1. Whether Petitioner is subject to franchise tax under Article 33 of the Tax Law rather than Article 9-A of the Tax Law.
2. If the answer to issue 1 is yes, what, if any, is Petitioner's tax liability under Article 33 of the Tax Law based on the facts presented.

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

Petitioner is an Illinois corporation that is licensed as a life insurance company in every state but New York. Petitioner neither solicits insurance business in New York State nor is it authorized to transact an insurance business under a certificate of authority issued by the New York State Insurance Department.

Petitioner is a party to a New York lease that it assumed upon the liquidation of an investment partnership of which it was a partner. Petitioner never occupied the underlying real property. It has subleased the property and has contracted with an unrelated third party to manage the property. Otherwise, Petitioner does not conduct any business in New York and does not plan to conduct any business activity in New York other than through various investment partnerships similar to the entity discussed below. Petitioner does not have an office, place of business or telephone listing in New York, and Petitioner does not have any employees or agents stationed in New York.

Although not registered as a life insurance company in New York, Petitioner receives premiums ("orphan premiums") from New York residents on policies which Petitioner sold to customers who at the time of sale were nonresidents of New York but who later relocated to New York.

Petitioner has an indirect interest (through various entities treated for federal income tax purposes as either disregarded entities or partnerships) in 767 Fifth Avenue LLC ("767 LLC"), a Delaware limited liability company ("LLC") treated as a partnership for federal income tax purposes. Petitioner acquired its indirect interest in 767 LLC on May 27, 1998. 767 LLC's sole asset was a building located at 767 Fifth Avenue, New York, New York (the "Building"). On

August 28, 2003, 767 LLC entered into an agreement to sell the Building to an unrelated third party. The sale transaction closed on September 26, 2003. Prior to the sale, 767 LLC recognized only operating losses for federal income tax purposes from the Building. The sale of the Building resulted in the recognition by 767 LLC of a gain for federal income tax purposes. Petitioner, therefore, will include its distributive share of 767 LLC's gain from the sale in its federal taxable income.

Applicable law

Section 209.4 of Article 9-A of the Tax Law provides, in part:

Corporations ... taxable under articles thirty-two and thirty three of this chapter ... shall not be subject to tax under this article.

Section 1500 of Article 33 of the Tax Law contains general definitions, and provides, in part:

(a) The term "insurance corporation" includes a corporation, association, joint stock company or association, person, society, aggregation or partnership, by whatever name known, doing an insurance business....

* * *

(c) The term "foreign insurance corporation" means an insurance corporation incorporated or organized under the laws of any other state of the United States, the District of Columbia or the Commonwealth of Puerto Rico.

* * *

(e) The term "taxpayer" means any insurance corporation subject to the tax imposed under section fifteen hundred one, fifteen hundred two-a, or fifteen hundred ten or any captive insurance company subject to the tax imposed under section fifteen hundred two-b of this article.

Section 1501(a) of the Tax Law provides, in part:

Every domestic insurance corporation and every foreign or alien insurance corporation, for the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity, or of maintaining an office in this state ... shall annually pay a franchise tax....

Section 1505 of the Tax Law provides, in part:

(a)(2) Domestic, foreign and alien life insurance corporations. The provisions of this paragraph shall apply to taxpayers subject to tax under paragraph one of subdivision (b) of section fifteen hundred ten of this article. Notwithstanding the provisions of sections fifteen hundred one and fifteen hundred ten of this article, the amount of taxes imposed under such sections for taxable years beginning on or after January first, nineteen hundred seventy-seven ... shall not exceed an amount computed as if such taxes were determined solely under section fifteen hundred ten, except that for purposes of the limitation provided herein, the rate of tax under such section shall be deemed to be ... two percent for taxable years beginning on or after January first, nineteen hundred ninety eight.

(b) Notwithstanding the provisions of sections fifteen hundred one and fifteen hundred ten of this article, in the case of taxpayers subject to tax under subdivision (b) of section fifteen hundred ten, the total amount of tax imposed under this article ... shall in no event be less than the amount computed as if such tax was determined solely under section fifteen hundred ten, except that the rate of tax under section fifteen hundred ten shall be deemed to be one and five-tenths percent.

Section 1510(b)(1) of the Tax Law provides, in part:

Except as hereinafter provided, every domestic life insurance corporation, and every foreign and alien life insurance corporation authorized to transact business in this state under a certificate of authority from the superintendent of insurance, shall, for the privilege of exercising corporate franchises or for carrying on business in a corporate or organized capacity within this state, and in addition to any other taxes imposed for such privilege, pay a tax on all gross direct premiums, less return premiums thereon, received in cash or otherwise on risks resident in this state....

Section 1515(a) of the Tax Law provides, in part:

Every taxpayer and every other foreign and alien insurance corporation having an employee, including any officer, in this state or having an agent or representative in this state, shall annually, on or before the fifteenth day of the third month following the close of its taxable year, transmit to the [commissioner of taxation and finance] a return in a form prescribed by [the commissioner] setting forth such information as the [commissioner] may prescribe....

Section 1-3.2(a) of the Business Corporation Franchise Tax Regulations (Article 9-A Regulations) provides, in part:

(5) If a partnership is doing business, employing capital, owning or leasing property or maintaining an office in New York State, then all of its corporate general partners are subject to the tax imposed by article 9-A of the Tax Law.

(6)(i) A foreign corporation is doing business, employing capital, owning or leasing property or maintaining an office in New York State if it is a limited partner of a partnership, other than a portfolio investment partnership, which is doing business, employing capital, owning or leasing property or maintaining an office in New York State and if it is engaged, directly or indirectly, in the participation in or the domination or control of all or any portion of the business activities or affairs of the partnership....

Opinion

The provisions in Article 33 of the Tax Law should be regarded as being *in pari materia* and construed in a like manner as substantially identical provisions contained in Article 9-A of the Tax Law. (*Royal Indemnity Co. v NYS Tax App Trib*, 75 NY2d 75; L 1974, ch 649, §12.) For purposes of Article 9-A of the Tax Law, section 1-3.2(a)(5) of the Article 9-A Regulations provides that if a partnership is doing business, employing capital, owning or leasing property or maintaining an office in New York State, then all of its corporate general partners are subject to the tax imposed by Article 9-A of the Tax Law. Section 1-3.2(a)(6) of the Article 9-A Regulations provides that a foreign corporation is doing business, employing capital, owning or leasing property or maintaining an office in New York State, if it is a limited partner of a partnership, other than a portfolio investment partnership, which is doing business, employing capital, owning or leasing property or maintaining an office in New York State and if it is engaged, directly or indirectly, in the participation in or the domination or control of all or any portion of the business activities or affairs of the partnership.

Section 209.4 of Article 9-A of the Tax Law provides that a corporation that is taxable under Article 33 of the Tax Law is not subject to tax under Article 9-A of the Tax Law.

In *Mound, Cotton & Wollan*, Adv Op Comm T & F, September 16, 1988, TSB-A-88 (20)C, it was held that a foreign life insurance company not authorized to transact business in New York State could purchase, for investment purposes, mortgages secured by New York real estate without incurring franchise tax liability under Article 33 of the Tax Law and, pursuant to section 209.4 of the Tax Law, was not subject to tax under Article 9-A of the Tax Law because it was an insurance corporation subject to franchise tax under Article 33 of the Tax Law. The company was not licensed or qualified to do business in New York State. The company was considering the purchase of mortgages secured by New York real estate. The mortgages would be purchased through a large corporate broker licensed in New York. Negotiations would take place both in and out of New York and the contracts could be signed either in or out of New York. In addition, an agent, either in or

TSB-A-04(3)C
Corporation Tax
April 1, 2004

out of New York, would service the mortgages. The company did not incur franchise tax liability under Article 33 because it did not have a certificate of authority from the Superintendent of Insurance and had no taxable premiums under section 1510 of the Tax Law. Therefore, the corporation's tax liability was zero because of the cap computed pursuant to section 1505 of the Tax Law.

In *The Manufacturers Life Insurance Company (USA)*, Adv Op Comm T & F, September 3, 1997, TSB-A-97(23)C, the petitioner was not authorized to transact an insurance business under a certificate of authority from the New York State Insurance Department. It received orphan premium payments from New York residents. It considered making loans that would be secured by mortgages on commercial real property located in New York. For this purpose, the petitioner was required to obtain a certificate of authority to conduct business in New York, but not a certificate of authority from the Superintendent of Insurance to conduct an insurance business in New York. Its employees were to come into New York to contact potential borrowers, existing borrowers, or mortgage brokers, to gather market information, to perform due diligence and to negotiate and monitor the closing of the loans. The petitioner's directors, officers and employees may also have come into New York to take part in seminars, visit rating agencies, and attend closings of purchases and sales of securities (other than loans). Also it may have, on occasion, foreclosed or otherwise taken title to property in New York. It was held that the totality of the petitioner's proposed activities in New York would constitute doing business and would subject the petitioner to the tax imposed under section 1501 of the Tax Law. However, since the petitioner would not have a certificate of authority from the Superintendent of Insurance to conduct an insurance business in New York, the petitioner would not have taxable premiums under section 1510 of the Tax Law, and therefore, pursuant to section 1505 of the Tax Law, the petitioner's tax liability under Article 33 of the Tax Law would be zero. Also, the petitioner would not be subject to tax under Article 9-A of the Tax Law because it was a corporation taxable under Article 33 of the Tax Law.

In *Pacific Life Insurance Company*, Adv Op Comm T & F, November 10, 1999, TSB-A-99(28)C, the petitioner had orphan premiums from New York residents and income through its direct and indirect ownership interest in various general and limited partnerships and LLCs that conducted business activities in New York, but did not have a certificate of authority from the Superintendent of Insurance to conduct an insurance business in New York. It was held that the petitioner's activities in New York through the partnerships and LLCs would constitute doing business and would subject the petitioner to the tax imposed under section 1501 of the Tax Law. However, since the petitioner did not have a certificate of authority from the Superintendent of Insurance to conduct an insurance business in New York, the petitioner did not have taxable premiums under section 1510 of the Tax Law. Therefore, pursuant to section 1505 of the Tax Law, the petitioner's tax liability under Article 33 of the Tax Law was zero, but pursuant to section 1515 of the Tax Law the petitioner was required to file annual returns.

TSB-A-04(3)C
Corporation Tax
April 1, 2004

Issue 1. In this case, Petitioner has leased property in New York, and has ownership interests in various investment partnerships, including its indirect ownership of 767 LLC which is treated as a partnership for federal income tax purposes and conducts business activities in New York. Accordingly, through the New York property and Petitioner's ownership interests in the partnerships and LLCs, Petitioner is considered to be doing business, employing capital, owning or leasing property or maintaining an office in New York for purposes of Article 9-A. See *Pacific Life, supra*. Following *Royal, supra*, such activity constitutes doing business, employing capital, owning or leasing property or maintaining an office in New York for purposes of section 1501 of the Tax Law. Since Petitioner is a life insurance corporation, it is subject to the tax imposed under section 1501 of the Tax Law. Petitioner will not be subject to tax under Article 9-A of the Tax Law because it is a corporation subject to Article 33 of the Tax Law. See *Mound, Cotton, & Wollan, supra*.

Issue 2. Like the insurance companies in *Manufacturer's Life Insurance, supra*, and *Pacific Life, supra*, Petitioner does not have a certificate of authority to conduct an insurance business in New York State, but will have "orphan premiums." Since Petitioner does not have a certificate of authority from the Superintendent of Insurance to conduct an insurance business in New York, Petitioner will not have premiums subject to tax under section 1510 of the Tax Law. Pursuant to section 1505 of the Tax Law, Petitioner's tax liability under Article 33 of the Tax Law will be zero.

However, even though Petitioner's tax liability will be zero, Petitioner is a taxpayer under section 1500(e) of the Tax Law, and pursuant to section 1515 of the Tax Law, Petitioner must annually file a tax return.

DATED: April 1, 2004

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