

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

TSB-A-06(9)C
Corporation Tax
December 28, 2006

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C050721B

On July 21, 2005, a Petition for Advisory Opinion was received from Lansdown Atlantic Ltd., 32 Finch Road, Douglas, Isle of Man IM1 2PS. Petitioner, Lansdown Atlantic Ltd., provided additional information with respect to the Petition on October 3, 2006.

The issues raised by Petitioner are:

1. Whether Lansdown Atlantic Life Settlement Fund (hereinafter the Fund), a non-U.S. corporation, will be subject to the franchise tax imposed under Article 9-A of the Tax Law, if the Fund purchases traded life policies from a New Jersey life settlement provider and some of these life policies were originally held by New York State residents.
2. Whether the Fund would be subject to any other tax under the New York State Tax Law when it collected the proceeds of the policies upon the death of the insured when the insured was a New York resident.

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

The Fund was incorporated in the Isle of Man, and its registered office and principal place of business is in the Isle of Man. The Fund is controlled and managed from the Isle of Man. The Fund has no offices in New York State. The Fund does not employ any agents, officers, or employees in New York State. The Fund's sole activity is purchasing and holding life insurance that has been acquired in life settlements. Shares in the Fund have not been, and will not be, registered under the United States Securities Act of 1933 or under the securities legislation of any state of the United States of America. Accordingly, shares will not be directly or indirectly offered or sold in the United States of America or any of its territories or to or for the benefit of a United States person.

The Fund is not required to be licensed by the New York State Superintendent of Insurance to do an insurance business, and it is not regulated under the New York State Insurance Law.

The Fund is designed to provide investors with capital growth through its investments in a diversified portfolio of traded life policies, specifically life settlements, issued primarily, but not exclusively, by U.S.-based life insurance companies. A life settlement is the transfer, via a sale, of a life insurance policy from the policyholder. Individual life insurance policy owners may wish to unlock a portion of the value of their policies. They may do so by selling their personal policies for less than the death benefit. On the death of the insured, the insurance company that issued the policy will pay the death benefit to the person who owns the policy. A

life settlement provider or broker typically purchases the policies directly from the individual policy owners and then resells the policies to investors such as the Fund.

The Fund proposes to purchase the traded life policies from a U.S. life settlement provider based in New Jersey. The actual investment or purchase would take place in New Jersey through the Fund's New Jersey-based escrow agent. The life settlement provider is one of the largest life settlement providers in the U.S., and it purchases life insurance policies all across the U.S. Therefore, it is possible that some of the policies that it purchased and plans to resell to the Fund may have been originally held by New York State residents.

The whole transaction essentially breaks down in the following manner: 1) the life settlement provider purchases a life insurance policy directly from the original insured, 2) it then resells the policy to the Fund, and 3) on the death of the insured, the insurance company that issued the policy will pay the death benefit to the Fund.

Applicable law and regulations

Section 209.1 of Article 9-A of the Tax Law imposes an annual franchise tax and provides, in part, as follows:

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, for all or any part of each of its fiscal or calendar years, every domestic or foreign corporation, except corporations specified in subdivision four of this section, shall annually pay a franchise tax, upon the basis of its entire net income base, or upon such other basis [capital base, minimum taxable income bases or the fixed dollar minimum] as may be applicable as hereinafter provided, for such fiscal or calendar year or part thereof

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.

(d) The term “alien insurance corporation” means an insurance corporation incorporated or organized under the laws of any other foreign nation, or of any province or territory not included under the definition of “foreign insurance corporation.”

Section 1501(a) of Article 33 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 1101 of the New York State Insurance Law provides, in part:

(a) In this article: (1) "Insurance contract" means any agreement or other transaction whereby one party, the "insurer", is obligated to confer benefit of pecuniary value upon another party, the "insured" or "beneficiary", dependent upon the happening of a fortuitous event in which the insured or beneficiary has, or is expected to have at the time of such happening, a material interest which will be adversely affected by the happening of such event.

(2) "Fortuitous event" means any occurrence or failure to occur which is, or is assumed by the parties to be, to a substantial extent beyond the control of either party.

(3) "Contract of warranty, guaranty or suretyship" means an insurance contract only if made by a warrantor, guarantor or surety who or which, as such, is doing an insurance business.

(b)(1) Except as provided in paragraph two, three or three-a of this subsection, any of the following acts in this state, effected by mail from outside this state or otherwise, by any person, firm, association, corporation or joint-stock company shall constitute doing an insurance business in this state and shall constitute doing business in the state within the meaning of section three hundred two of the civil practice law and rules:

(A) making, or proposing to make, as insurer, any insurance contract, including either issuance or delivery of a policy or contract of insurance to a resident of this state or to any firm, association, or corporation authorized to do business herein, or solicitation of applications for any such policies or contracts;

(B) making, or proposing to make, as warrantor, guarantor or surety, any contract of warranty, guaranty or suretyship as a vocation and not as merely incidental to any other legitimate business or activity of the warrantor, guarantor or surety;

(C) collecting any premium, membership fee, assessment or other consideration for any policy or contract of insurance;

(D) doing any kind of business, including a reinsurance business, specifically recognized as constituting the doing of an insurance business within the meaning of this chapter;

(E) doing or proposing to do any business in substance equivalent to any of the foregoing in a manner designed to evade the provisions of this chapter.

Section 1102(a) of the New York State Insurance Law provides, in part:

No person, firm, association, corporation or joint-stock company shall do an insurance business in this state unless authorized by a license in force pursuant to the provisions of this chapter, or exempted by the provisions of this chapter from such requirement....

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

(b) *Foreign corporation – doing business.* (1) The term doing business is used in a comprehensive sense and includes all activities which occupy the time or labor of people for profit. Regardless of the nature of its activities, every corporation organized for profit and carrying out any of the purposes of its organization is deemed to be doing business for the purposes of the tax. In determining whether a corporation is doing business, it is immaterial whether its activities actually result in a profit or a loss.

(2) Whether a corporation is doing business in New York State is determined by the facts in each case. Consideration is given to such factors as:

(i) the nature, continuity, frequency, and regularity of the activities of the corporation in New York State;

(ii) the purposes for which the corporation was organized;

(iii) the location of its offices and other places of business;

(iv) the employment in New York State of agents, officers and employees; and

(v) the location of the actual seat of management or control of the corporation.

(c) *Foreign corporation – employing capital.* The term employing capital is used in a comprehensive sense. Any of a large variety of uses, which may overlap other activities, may give rise to taxable status. In general, the use of assets in maintaining or aiding the corporate enterprise or activity in New York State will make the corporation subject to tax. Employing capital includes such activities as:

(1) maintaining stockpiles of raw materials or inventories; or

(2) owning materials and equipment assembled for construction.

(d) *Foreign corporation – owning or leasing property.* The owning or leasing of real or personal property within New York State constitutes an activity which subjects a foreign corporation to tax. Property owned by or held for the taxpayer in New York State, whether or not used in the taxpayer's business, is sufficient to make the corporation subject to tax. Property held, stored or warehoused in New York State creates taxable status. Property held as a nominee for the benefit of others creates taxable status. Also, consigning property to New York State may create taxable status if the consignor retains title to the consigned property.

(e) *Foreign corporation – maintaining an office.* A foreign corporation which maintains an office in New York State is engaged in an activity which makes it subject to tax. An office is any area, enclosure or facility which is used in the regular course of the corporate business. A salesperson's home, a hotel room, or a trailer used on a construction job site may constitute an office.

Opinion

In order for a corporation to be an insurance corporation subject to tax under Article 33 of the Tax Law, the corporation must be "doing an insurance business." See section 1500(a) of the Tax Law. Under Article 33 of the Tax Law, "doing an insurance business" is not defined. However, the Department of Taxation and Finance has historically looked to whether a corporation is doing a business which, if done in New York, would require the corporation to be licensed by the Superintendent of Insurance. (See *Stulmaker, Kohn & Richardson, LLP*, Adv Op Comm T & F, September 12, 1996, TSB-A-96(22)C.) In *Mound, Cotton & Wollan*, Adv Op Comm T & F, September 16, 1988, TSB-88(20)C, it was held that a foreign life insurance company not authorized to transact an insurance business in New York State was an insurance corporation subject to franchise tax under Article 33 of the Tax Law.

Petitioner states that the Fund is not required to be licensed by the New York State Superintendent of Insurance to do an insurance business, and it is not regulated under the New York State Insurance Law. Petitioner states that the Fund's sole activity is purchasing and

holding life insurance that has been acquired in life settlements. Therefore, the Fund will not be doing an insurance business as contemplated by section 1500 of the Tax Law, will not be an insurance corporation for purposes of Article 33 of the Tax Law and will not be subject to the taxes imposed under Article 33 of the Tax Law.

Section 209.4 of Article 9-A of the Tax Law provides, in essence, that if a corporation is subject to one of the other franchise taxes imposed under the Tax Law, the corporation is not subject to the franchise tax on general business corporations imposed by Article 9-A. Since the Fund is not an insurance corporation, for purposes of the franchise taxes imposed on insurance corporations by Article 33 of the Tax Law, the issue is whether it is subject to the franchise tax on general business corporations imposed by Article 9-A of the Tax Law.

Pursuant to section 209.1 of the Tax Law and section 1-3.2(b), (c), (d), and (e) of the Article 9-A Regulations, a corporation organized outside of New York State is subject to the tax imposed under Article 9-A of the Tax Law if the corporation is doing business, employing capital, owning or leasing property in a corporate or organized capacity, or maintaining an office in New York State.

Petitioner states that the Fund's principal place of business is in the Isle of Man and the business is controlled and managed in the Isle of Man. Petitioner also states that the Fund has no offices in New York State and does not employ any agents, officers, or employees in New York State. Accordingly, with regard to the Fund's proposed activities described in this Opinion, since the Fund will not be doing business, employing capital, owning or leasing property, or maintaining an office in New York State pursuant to section 209.1 of the Tax Law and as described in section 1-3.2(b), (c), (d), and (e) of the Article 9-A Regulations, the Fund will not be subject to tax under Article 9-A of the Tax Law.

Accordingly, with regard to the Fund's proposed activities described in this Opinion, the Fund will not be subject to the franchise tax imposed by Article 9-A or Article 33 of the Tax Law.

DATED: December 28, 2006

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