New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-A-08(3)C
Corporation Tax
April 29, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C080122A

On January 22, 2008, a Petition for Advisory Opinion was received from Service Life and Casualty Insurance Company, P.O. Box 26800, Austin, Texas, 78755. Petitioner, Service Life and Casualty Company, submitted additional information relating to the Petition on April 4, 2008.

The issue raised is whether Petitioner is subject to tax in New York State under Article 33 or Article 9-A of the Tax Law.

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

Petitioner is a life insurance corporation domiciled in the state of Texas that is not licensed to do an insurance business in the state of New York and has never generated any premiums allocable to New York since its incorporation on October 21, 1969.

Petitioner actively invests in a variety of investment vehicles such as stocks and bonds. In order to achieve higher returns, Petitioner sought the advice of an equity investor for more aggressive investments such as limited partnerships. Accordingly, Petitioner made an initial investment of $1.4 million in a limited partnership (LP), on July 27, 2006. Petitioner plans to make additional investments in the partnership in the future. Petitioner is a limited corporate partner whose investment is less than 1% of the partnership and its only involvement in partnership activities is the investment of funds and receipt of quarterly and annual data on its operating results for financial and tax reporting purposes. Petitioner has no other authority to direct or control the operations of the partnership.

LP is an investment-driven partnership investing in underlying hedge fund managers, many of which operate in New York City. Most of the underlying hedge fund managers invest in stocks and bonds and generate passive income in the form of dividends, interest, and capital gains. However, some of the underlying hedge fund managers participate in lending and loan origination activities that generate both New York State and New York City income. This income is allocated to the funds and ultimately to the partners of these funds from the flow through nature of the partnership investment.

LP is not a regulated investment company under section 851 of the Internal Revenue Code or a dealer in securities within the meaning of section 1236 of the Internal Revenue Code. The partnership derives more than 90% of its income from passive sources.

Applicable law and regulations

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 which shall be computed as provided in section fifteen hundred two.

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)(6) of the Business Corporation Franchise Tax Regulations (Regulations) provides, in part:

(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. A foreign corporation is engaged in such manner in the business activities or affairs of the partnership if one or more of certain factual situations, including but not limited to the following, exist during the taxable year or, except for clause (*a*) of this subparagraph, any previous taxable year:

(a) The foreign corporation has a one percent or more interest as a limited partner in a partnership and/or the basis of the foreign corporation's interest in the limited partnership, determined pursuant to section 705 of the Internal Revenue Code, is more than $1,000,000. For purposes of determining whether the level of interest in the partnership or level of basis of the interest in the partnership is met, the percentage of interest in the partnership and basis of interest in the partnership of members of the foreign corporation's affiliated group, of officers or directors of the foreign corporation or of officers or directors of members of the foreign corporation's affiliated group are added to the foreign corporation's interest in the partnership or the basis of its interest in the partnership, respectively.

* * *

(iii) As used in this paragraph, the following terms shall have these meanings:

* * *

(d) The term *portfolio investment partnership* means a limited partnership which meets the gross income requirement of section 851(b)(2) of the Internal Revenue Code…The term *portfolio investment partnership* shall not include a dealer (within the meaning of section 1236 of the Internal Revenue Code) in stocks or securities.

Section 851(b)(2) of the Internal Revenue Code provides:

(2) at least 90 percent of its gross income is derived from-

(A) dividends, interest, payments with respect to securities loans (as defined in section 512(a)(5)), and gains from the sale or other disposition of stock or securities (as defined in section 2(a)(36) of the Investment Company Act of 1940, as amended) or foreign currencies, or other income (including but not limited to gains from options, futures or forward contracts) derived with respect to its business of investing in such stock, securities or currencies, and

(B) net income derived from an interest in a qualified publicly traded partnership (as defined in subsection (h));

Opinion

Section 1501(a) of Article 33 of the Tax Law imposes a franchise tax on every foreign insurance corporation for the privilege of doing business, or of employing capital, or of owning or leasing property in New York State in a corporate or organized capacity, or of maintaining an office in New York State.

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; L1974, ch 649, §12.) For purposes of Article 9-A of the Tax Law, section 1-3.2(a)(6) of the Regulations provides that a foreign corporation is doing business, employing capital, owning or leasing property, or maintaining an office in New York if it is a limited partner in a partnership, other than a portfolio investment partnership, that is doing business, employing capital, owning or leasing property, or maintaining an office in New York State and such foreign corporation is engaged directly or indirectly in the participation in or the domination and control of the partnership's business activities. A portfolio investment partnership is a limited partnership that meets the gross income requirement outlined in section 851(b)(2) of the Internal Revenue Code. Whether LP is a portfolio investment partnership as defined in section 1-3.2(a)(6)(iii) of the Regulations is a factual matter that cannot be determined in the scope of this Advisory Opinion. However, if LP is a portfolio investment partnership, Petitioner will not be deemed to be doing business in New York, and will not be subject to tax, solely by reason of its ownership in LP.

If it is determined that LP is not a portfolio investment partnership within the meaning of section 1-3.2(a)(6)(iii) of the Regulations, Petitioner's ownership interest in the partnership must be examined to determine whether Petitioner is engaged directly or indirectly in the participation in or the domination and control of the partnership's business activities. Section 1-3.2(a)(6)(i)(*a*) of the Regulations provides that a foreign corporation that owns a limited partnership interest of 1% or more, or that has an interest with a basis of more than $1 million at any time during a taxable year, is engaged in the participation in or the domination and control of the partnership's activities.

Petitioner is a limited corporate partner in LP, a partnership that is conducting business in New York State. Petitioner's ownership interest in LP is less than 1% of the partnership and its only involvement in partnership activities is the investment of funds and receipt of quarterly and annual data on its operating results for financial and tax reporting purposes. However, Petitioner's basis in LP at the time of the initial investment in 2006 was $1.4 million. Therefore, pursuant to section 1-3.2(a)(6) of the Regulations, Petitioner is deemed to be engaged in the participation in or domination and control of the partnership during 2006 and any subsequent tax year in which Petitioner's ownership interest or basis in the partnership meets either the ownership interest or basis threshold established in section 1-3.2(a)(6) of the Regulations.

In *Bankers Life and Casualty Company*, Adv Op Comm T & F, April 1, 2004, TSB-A-04(2)C, it was held that the petitioner was doing business, employing capital, owning or leasing property, or maintaining an office in New York through its ownership interests in partnerships and LLCs conducting business activities in New York. As in *Bankers Life, supra,* Petitioner will be deemed to be doing business, employing capital, owning or leasing property, or maintaining an office in New York State for purposes of Article 9-A through its ownership interest in LP, provided that LP is not a portfolio investment partnership. Activity that constitutes doing business, employing capital, owning or leasing property, or maintaining an office in New York for purposes of Article 9-A would also constitute such activities for

section 1501 of the Tax Law. Since Petitioner is a life insurance corporation that will be doing business, employing capital, owning or leasing property, or maintaining an office in New York State, it will be subject to tax under Article 33 of the Tax Law. See *Royal Indemnity, supra*.

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 *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 interests 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.

As in *Pacific Life, supra,* Petitioner will be subject to tax under section 1501 of Article 33 of the Tax Law, provided that LP is not a portfolio investment partnership. However, 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 taxable premiums under section 1510 of Article 33. Section 1505 of Article 33 of the Tax Law requires life insurance corporations to compute a limitation on the amount of tax imposed based on taxable premiums. Since Petitioner does not have taxable premiums, the limitation computed under section 1505 of Article 33 is zero. However, Petitioner will be a taxpayer under section 1500(e) of Article 33, and pursuant to section 1515 of Article 33, will be required to file annual returns.

DATED: April 29, 2008

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Taxpayer Guidance Division

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.