

**New York State Department of Taxation and Finance  
Office of Counsel  
Advisory Opinion Unit**

TSB-A-15(5)C  
Corporation Tax  
July 10, 2015

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C141117A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (Petitioner). Petitioner asks whether it will be subject to New York franchise tax pursuant to Article 9-A of the Tax Law if the limited liability company of which Petitioner is the sole member relocates its business office to New York City from out-of-state. Petitioner further asks, if it is not subject to the franchise tax, what documentation it may be required to submit to substantiate this.

We conclude that, if the limited liability company of which Petitioner is the sole member opens an office in New York, and provided that its activities continue to come within the meaning of Internal Revenue Code (“IRC”) § 864(b)(2), as described herein, then Petitioner will not be subject to the franchise tax imposed under Tax Law Article 9-A. We further conclude that Petitioner may be required to provide any documentation necessary to substantiate that it is not subject to the franchise tax.

**Facts**

Petitioner, an alien corporation, is a Swiss holding company and the sole member of a Delaware limited liability company (the “LLC”) that is treated as a disregarded entity for federal and state tax purposes. The LLC is an investment company engaged exclusively in investing in securities in various private equity funds, hedge funds and operating-companies for its own account.

The LLC currently has an office in New Jersey and has never owned or leased any real property in New York.

Petitioner is not otherwise engaged in the conduct of a U.S. trade or business, either directly or through any legal entity. Therefore, Petitioner does not have income effectively connected with the conduct of a U.S. trade or business as determined under IRC § 882.

**Analysis**

Tax Law § 209(2-a) provides that an alien corporation is not deemed to be doing business, employing capital, owning or leasing property, maintaining an office, or deriving receipts from activity in New York if its activities in the state are limited solely to investing or trading in either stocks and securities or commodities, or any combination of these, for its own account within the meaning of IRC § 864(b)(2).

Section 209(2-a) also provides that an alien corporation that, under any provision of the IRC, is not treated as a "domestic corporation" as defined in IRC § 7701 and has no effectively connected income for the taxable year pursuant to Tax Law § 208(9)(iv), will not be subject to tax for such taxable year. Tax Law § 208(9)(iv) provides that the entire net income of such an alien corporation is equal to the entire

taxable income that “is effectively connected with the conduct of a trade or business within the United States” pursuant to IRC § 882.

Since the LLC, which is treated as a disregarded entity, is an investment company engaged exclusively in investing in securities in various private equity funds, hedge funds and operating-companies for its own account, its activities in New York would be limited solely to those described in IRC § 864(b)(2).<sup>1</sup> Therefore, and to the extent of such activities, Petitioner, which is the LLC’s sole member, will not be deemed to be doing business, employing capital, owning or leasing property, maintaining an office, or deriving receipts from activity in New York under Tax Law § 209(2-a).

Also, since Petitioner is an alien corporation and would have no effectively connected income, i.e., no income that is effectively connected with the conduct of a U.S. trade or business, Petitioner will not be subject to New York’s franchise tax.

Therefore, Petitioner will not be subject to the franchise tax imposed under Tax Law Article 9-A if the LLC opens an office in New York, provided that the LLC’s activities continue to come within the meaning of IRC § 864(b)(2) and Petitioner has no income that is effectively connected with the conduct of a U.S. trade or business.

Finally, Petitioner may be required to provide any documentation, without qualification, that may be necessary to substantiate that it is not subject to the franchise tax imposed under Tax Law Article 9-A. *See* Tax Law § 1096(b). Prior to tax year 2015, alien corporations were subject to an annual filing requirement. However, pursuant to corporate tax reform (*see* Part A of Chapter 59 of the Laws of 2014, as amended by Part T of Chapter 59 of the Laws of 2015), the filing requirement has been repealed. Nevertheless, there remain instances where an alien corporation will be required to substantiate its claim that it is not subject to tax, which may include the production of the corporation’s books and records. In such instances, entries in the alien corporation’s books and records will be examined to determine, for example, whether the corporation’s activities in New York are limited solely to investing or trading in either stocks and securities or commodities, or any combination of these, for its own account within the meaning of IRC § 864(b)(2).

DATED: July 10, 2015

/S/  
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DEBORAH R. LIEBMAN  
Deputy Counsel

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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.

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<sup>1</sup> A “disregarded entity” is defined as an entity separate from its owner which nonetheless elects not to be treated, i.e., to be disregarded, as separate from the owner of the entity for federal tax purposes. *See* 26 C.F.R. § 301.7701-3.