

**New York State Department of Taxation and Finance
Office of Counsel**

TSB-A-16(6)C
Corporation Tax
July 1, 2016

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C141201A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner asks whether, in acting as the broker in the sale of two pieces of real property located in the state of New York, for which it received two commissions, it is subject to tax under Article 9-A of the Tax Law.

We conclude that, under the facts of this case, as described herein, Petitioner is subject to tax under Article 9-A of the Tax Law for tax year 2014.

Facts

Petitioner, which is incorporated in the state of Washington, is a corporation organized for the purpose of providing real estate services, specifically real estate consulting, which includes research and analysis regarding warehouse site selection. Petitioner has five offices, one of which is located in the state of Connecticut and serves the New York metropolitan area. Petitioner currently does not have an office in New York. Petitioner maintained an office in New York through September, 2011, after which its operations serving the New York metropolitan area were moved to Connecticut. During the time that it maintained an office in New York, Petitioner received commissions totaling \$665,000 on the sale of properties located in New York. After relocating its New York metropolitan office to Connecticut, Petitioner received two New York commissions for the 2014 tax year, which are the subject of this Advisory Opinion. During the same period but in a prior tax year, Petitioner received a commission in the amount of \$315,000 also on the sale of a property located in New York. Petitioner identifies itself as “the premier provider of comprehensive real estate advisory services” for the buyer in the 2014 sales of real property discussed in this Advisory Opinion (Petitioner’s “client”), serving as its client’s “de facto real estate department” for approximately 17 years, at the time of the sales, and managing the client’s “entire real estate process.”¹

Petitioner received its two commissions for the 2014 tax year when it acted as broker in the sale of two pieces of real property located in New York. Petitioner received the commissions in the amounts of \$150,000 and \$125,000 for the sale of the two properties, located in Upstate New York. The buyer in both sales, Petitioner’s client, is a non-New York corporation; two New York corporations were the respective sellers.

The employee that worked on the sales for Petitioner was assigned to the New York metropolitan office, located in Danbury, Connecticut (the “employee”). The employee worked twelve days in New York on the sale of one of the properties and fourteen days in New York on

¹ Information is from Petitioner’s Web site.

the sale of the other property. The employee's work on both sales was comprised of visits to the two sites, as well as meetings in New York with representatives of the respective sellers.

Petitioner's offices located in Bellevue, Washington and in Danbury, Connecticut are where its two principals and owners maintain their respective offices, and together are where management and control of the corporation reside. Each of the five offices is managed on its own, and each location has one or more employees working directly on real estate sales, as well as administrative and support staff.

Analysis

Tax Law § 209(1) provides:

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 as may be applicable as hereinafter provided, for such fiscal or calendar year or part thereof, on a report which shall be filed, except as hereinafter provided, on or before the fifteenth day of March next succeeding the close of each such year, or, in the case of a corporation which reports on the basis of a fiscal year, within two and one-half months after the close of such fiscal year, and shall be paid as hereinafter provided.

Section 209(2) then lists the specific circumstances under which a "foreign corporation shall not be deemed to be doing business, employing capital, owning or leasing property, or maintaining an office" in New York. Petitioner's activities are not limited to those listed in Tax Law § 209(2), and Petitioner therefore will be subject to tax under Article 9-A if it is "deemed to be doing business, employing capital, owning or leasing property, or maintaining an office" in New York. Petitioner is not a corporation that is specified as an exception in Tax Law § 209 pursuant to which it would "not be subject to tax" (see Tax Law § 209[4]; see also NYCRR § 1-3.4[b]).

Under the facts in this Petition, pursuant to Tax Law § 209(1), Petitioner is not "employing capital" in New York (*see* 20 NYCRR § 1-3.2[c]); nor does Petitioner own or lease property in New York (*see* 20 NYCRR § 1-3.2[d]); nor does Petitioner maintain an office in New York (*see* 20 NYCRR § 1-3.2[e]). Therefore, Petitioner will be subject to tax under Article 9-A only if it is "doing business" in New York. Under the Tax Department's regulations, the term "doing business" is described as follows:

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. *See* 20 NYCRR § 1-3.2(b)(1).

A determination of whether a foreign corporation is doing business in New York is based on “the facts in each case” (*see* 20 NYCRR § 1-3.2[b][2]). Factors to be considered include the following:

- (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.

Petitioner is a corporation organized for the purpose of providing real estate services, specifically real estate consulting, which includes research and analysis regarding warehouse site selection for its client, serving as the client’s “de facto real estate department” and managing the client’s “entire real estate process.”

Petitioner has a regional office located in the state of Connecticut and serving the New York metropolitan area, which office is one of two seats of management and control of the corporation. Before moving its office out of New York, Petitioner received New York commissions totaling \$665,000. After relocating, but before the 2014 tax year, Petitioner received a New York commission in the amount of \$315,000.

Petitioner’s employee worked in New York on the two sales for a total of twenty-six days in 2014, visiting the properties and meeting in the state with representatives of the respective sellers.

Therefore, considering the factors listed above, under the facts of this case, including the nature, continuity, frequency, and regularity of Petitioner’s activities in the state, we conclude that Petitioner is “doing business” in New York and is therefore subject to tax under Article 9-A of the Tax Law for tax year 2014.

DATED: July 1, 2016

/S/

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.