

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-85 (7) C
Corporation Tax
May 17, 1985

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. C830526B

On May 26, 1983 a Petition for Advisory Opinion was received from Russell Reynolds Associates, Inc., 245 Park Avenue, New York, New York 10167.

At issue is which of the following titles of non-officer functioning employees are deemed titles of "elected or appointed officers" under Article 9-A of the Tax Law for purposes of computing the alternative method of taxation pursuant to section 210.1(a)(3) of the Tax Law. The titles in question are Assistant Secretary, Assistant Treasurer, Controller, Managing Director, Director General, Managing Principal, Principal, Executive Director, Associate Director, Associate, Consultant, Director of Management Information Systems, Director of Corporate Research Operations, Director Client Services, Director Regional Research Operations and Director Corporate Administrative Services.

Petitioner presents the following facts. Petitioner is in the business of recruiting executives for employment positions in the United States and overseas. Employee titles are an important part of establishing effective business relationships because an important aspect of Petitioner's business is the contact such employees establish and maintain with clients and prospective clients. Therefore, some employees are nominally awarded titles solely for the purpose of enhancing their status and standing with current and prospective clients. Such employees do not perform any of the regular functions of corporate officers, are not elected by shareholders and are not appointed by the Petitioner's Board of Directors. The Petitioner also has employees who do function as officers and have officer titles such as President and Vice President.

Section 210.1(a)(3) of the Tax Law states, in part:

"(a) a tax. . . (3) computed at the rate of ten per centum on thirty per centum of the taxpayer's entire net income plus salaries and other compensation paid to the taxpayer's elected or appointed officers and to every stockholder owning in excess of five per centum of its issued capital stock minus thirty thousand dollars (except as hereinafter provided) and any net loss for the reported year, or on the portion of such sum allocated within the state as hereinafter provided for the allocation of entire net income, subject to any modification required by paragraphs (d) and (e) of subdivision three of this section. . ."

Section 208.12 of the Tax Law states:

"The term elected or appointed officer shall include the chairman, president, vice-president, secretary, assistant secretary, treasurer, assistant treasurer, comptroller,

and also any other officer, irrespective of his title, who is charged with and performs any of the regular functions of any such officer, unless the total compensation of such officer is derived exclusively from the receipt of commissions. A director shall be considered an elected or appointed officer only if he performs duties ordinarily performed by an officer."

Section 3-3.2(d) of the Business Corporation Franchise Tax Regulations provides that, such term also includes any other officer, irrespective of title, who is charged with and performs any of the regular functions of any such office.

In the Matter of Ter Bush and Powell, Inc. v. State Tax Commission, 58 AD2d 691 (1977) the court held that the statute is not ambiguous and clearly provides for the inclusion of salary and compensation paid to "elected or appointed officers" without regard to the actual duties or functions of such individuals in computing the alternative method of taxation based on entire net income plus salaries and other compensation paid to taxpayer's elected or appointed officers pursuant to section 210.1(a)(3) of the Tax Law. The court also held that the statute should not be read so as to include an implied exemption for compensation paid to individuals who hold the titles of executive positions but arguably do not fulfill the functions thereof. Therefore, the salaries of individuals who were given "honorary" titles to assist them in their sales efforts but did not function as officers are included in such computation.

In the Matter of Lampert Communications, Inc. v. State Tax Commission, September 29, 1976, the Commission determined that an "elected or appointed officer" includes any officer, irrespective of title, who is charged with and performs any of the regular functions of any such officer and that a regular function of the Vice-President of a business corporation is to hold himself out as a Vice-President. Persons held out by the corporation as officers in the conduct of business for the corporation may become de facto officers whether de jure or not (19 Am. Jur. 2d - Corporations 1100.) Therefore, account representatives who were given the title "Vice-President" to enhance their prestige with potential customers are officers whose salaries are included for purposes of computing the alternative method of taxation pursuant to section 210.1(a)(3) of the Tax Law.

Based on the aforementioned statute, regulations and decisions, it is determined that an employee who has the title of Chairman, President, Vice- President, Secretary, Assistant Secretary, Treasurer, Assistant Treasurer or Comptroller is an "elected or appointed officer" pursuant to section 208.12 of the Tax Law regardless of his duties or functions unless the total compensation of such officer is derived exclusively from the receipt of commissions. Any other officer, irrespective of his title, is an "elected or appointed officer" if he is charged with and performs any of the regular functions of any such officer or office, unless the total compensation of such officer is derived exclusively from the receipt of commissions. A director is an "elected or appointed officer" only if he performs duties ordinarily performed by an officer.

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Accordingly, Petitioner's employees who have the titles of Assistant Secretary, Assistant Treasurer and Controller are "elected or appointed officers" and must be included in the computation of the alternative method of taxation pursuant to section 210.1(a)(3) of the Tax Law regardless of their actual duties or functions. Petitioner's employees who have the titles of Managing Director, Director General, Managing Principal, Principal, Executive Director, Associate Director, Associate, Consultant, Director of Management Information Systems, Director of Corporate Research Operations, Director Client Services, Director Regional Research Operations and Director Corporate Administrative Services are not "elected or appointed officers" and therefore not included in the computation of such alternative method of taxation because such titles are nominally awarded solely for the purpose of enhancing their status and standing with current and prospective clients and are not performing any of the regular functions of any such officer or office.

However, if any employee, irrespective of title, performs any of the duties, even one, ordinarily performed by an officer, including holding himself out to be an officer, such employee would be an "elected or appointed officer" and the salary of such employee would be included in the computation of the alternative method of taxation pursuant to section 210.1(a)(3) of the Tax Law.

DATED: May 17, 1985

FRANK J. PUCCIA
Director
Technical Services Bureau

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