

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

TSB-A-88 (22)C
Corporation Tax
September 29, 1988

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C880121B

On January 21, 1988, a Petition for Advisory Opinion was received from Ernst and Whinney, 317 Sixth Avenue, Suite 1100, Des Moines, Iowa 50309.

The issue raised is whether any of the following activities of a corporate insurance agent establish the nexus required for imposition of the corporate franchise tax under Article 9-A of the Tax Law. The activities are (1) the licensing of the company in New York State; (2) the licensing or appointing of independent agents in New York State; (3) the reviewing of insurance applications from residents of New York State; (4) the selling of the insurance policy for the issuing company in New York State or (5) the acceptance of the insurance application by the issuing company in New York State. If nexus is established, on what basis should the income be apportioned.

Facts

X Corporation is incorporated in Delaware, has its principal place of business in Iowa, and is admitted to do business in all states. X Corporation markets insurance as a general agency. X Corporation is licensed to do business as a corporate insurance agent in those states in which this is allowed. In those states that require a statement of business purpose to be filed, X Corporation has indicated that its purpose is to conduct business related to operation as a corporate insurance agent.

X Corporation has no employees and owns no property in New York State. It appoints licensed agents as associated independent contractors, who sell the insurance products of several unrelated insurance companies.

X Corporation reviews the insurance applications generated by the sales activities of its agents. These applications are remitted by X Corporation to the insurers, along with the initial premium. All underwriting decisions are made by the issuing company. The issuing company then sends the policy and the total agreed upon commissions to X Corporation. X Corporation forwards the policy and the agent's commission to the agent. The agent is responsible for delivery of the policy to the customer. X Corporation has no other involvement in the direct sales activity, but negotiates contracts and commission agreements between it (X Corporation) and the issuing insurers, and enters into contracts, including commission agreements, between it and its marketers (independent contractor agents). The income of X Corporation consists solely of that portion of the commissions which is paid to and retained by it.

Discussion

A foreign corporation is authorized to do business in New York State pursuant to Article 13 or Article 15-a of the Business Corporation Law. However, such authorization does not of itself make a foreign corporation subject to the franchise tax under Article 9-A of the Tax Law. Section

209.1 of Article 9-A of the Tax Law imposes the business corporation franchise tax on every foreign corporation, unless specifically exempt, 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.

Section 1-3.2(b) of the Business Corporation Franchise Tax Regulations (hereinafter "Article 9-A Regulations") provides that:

(1) [t]he term doing business is used in a comprehensive sense and includes all activities which occupy the time or labor of men 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, compared with the nature, continuity, frequency, and regularity of its activities elsewhere;

(ii) the purposes for which the corporation was organized, compared with its activities in New York State;

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

(iv) the income of the corporation and the portion thereof derived from activities in New York State;

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

(vi) the location of the actual seat of management or control of the corporation. 20 NYCRR 1-3.2(b)

Section 1-3.2(c) of the Article 9-A Regulations provides that:

[t]he 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. 20 NYCRR 1-3.2(c)

Section 1-3.2(d) of the Article 9-A Regulations provides that:

[t]he 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. 20 NYCRR 1-3.2(d)

The fact that X Corporation is licensed by the New York State Insurance Department to conduct an insurance agency business in New York and the fact that the issuing company accepts insurance applications in New York State are not relevant in determining whether X Corporation is subject to franchise tax under Article 9-A. It appears from the facts presented, that X Corporation is not employing capital in New York, does not own or lease property in New York and does not maintain an office in New York. Therefore, the pertinent question in determining whether X Corporation is subject to tax under Article 9-A is whether X Corporation is "doing business" in New York State.

When determining if X Corporation is doing business in New York State, the residence of the applicant or insured is not considered. Based on the definition of doing business, it is clear that when the review of insurance applications is conducted outside New York State, such activity does not constitute "doing business" within New York State. In addition, it is determined that, the licensing or appointing of independent agents in New York State and the selling of insurance policies in New York State by such agents for the issuing company do not constitute "doing business" in New York State by X Corporation for purposes of Article 9-A of the Tax Law.

Accordingly, based on the facts presented, X Corporation does not have nexus in New York State and, therefore, X Corporation is not subject to the franchise tax imposed under Article 9-A of the Tax Law.

DATED: September 29, 1988

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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