

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

TSB-A-90(8)C
Corporation Tax
February 8, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C890816A

On August 16, 1989, a Petition for Advisory Opinion was received from The Tolland Bank, Olde Tolland Common, P.O. Box 156, Tolland, Connecticut 06084.

The issue raised by Petitioner, The Tolland Bank, is whether a banking corporation is subject to tax under Article 32 of the Tax Law because it purchases retail installment contracts secured by property in New York and, in the event of default, such contracts are enforced by foreclosure or other appropriate legal action.

Petitioner is a Connecticut chartered stock saving bank. Petitioner, at its offices in Connecticut, purchases retail installment contracts from an above-ground swimming pool dealer who enters into such contracts with consumers in several states. The dealer permits its customers to finance their purchases of swimming pools by entering into retail installment contracts which are initially payable to the dealer, but assigned to Petitioner virtually simultaneously upon execution with the consumer. Petitioner has a hand in preparing the installment contract forms, but is otherwise uninvolved with the sales of the swimming pools. The installment contracts provide for a purchase money security interest in the swimming pool or, in very few instances, a second mortgage on the consumer's home. The dealer wishes to expand its business activities into New York and wishes Petitioner to purchase installment contracts entered into between New York consumers and the swimming pool dealer.

All activity with respect to Petitioner's purchase of the installment contracts will occur in Connecticut. No personnel of Petitioner will come to New York. Petitioner does not operate a New York office, own or rent real or personal property in New York or maintain any employees in New York. However, in the event of a default with respect to an installment contract secured by property located in New York, Petitioner would ask an attorney located in New York to sue the defaulting debtor here and/or enforce its security interest.

Section 1451 of the Tax Law imposes, annually, a franchise tax on banking corporations for the privilege of doing business in New York State in a corporate or organized capacity.

Section 1452(a)(2) of the Tax Law provides that every corporation or association organized under the laws of any other state or country which is doing a banking business, anywhere, is a banking corporation.

Section 16-2.7 of the Franchise Tax on Banking Corporations Regulations (hereinafter "Regulations") defines "doing business" as follows:

(a) The term "doing business" is used in a comprehensive sense and includes all activities which occupy the time or labor of people for profit. Every corporation organized for profit and carrying out any of the purposes of its organization is deemed to be doing business for 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.

(b) 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:

- (1) the nature, continuity, frequency and regularity of the activities of the corporation in New York State;
- (2) the purposes for which the corporation was organized;
- (3) the location of its offices and other places of business;
- (4) the employment in New York State of agents, officers and employees; and
- (5) the location of the actual seat of management or control of the corporation.

* * *

(e) A corporation will not be deemed to be doing business in New York State if its activities in New York State are limited to such things as:

- (1) occasionally acquiring a security interest in real or personal property located in New York State without otherwise doing business;
- (2) occasionally acquiring title to property located in New York State through the foreclosure of a security interest without otherwise doing business

Section 16-2.7(e) of the Regulations provides that a corporation that occasionally acquires a security interest in real or personal property located in New York State or occasionally acquires title to property in New York State through foreclosure of a security interest but is not otherwise doing business in New York State, will not be deemed to be doing business in New York State because of such security interest or such foreclosure. For purposes of such section, the term "occasionally" has not been defined. However, it was not intended that a corporation would be deemed to be doing business in New York State when a corporation, that has no other contact with New York State, merely acquires, outside New York State, security interests in property located in New York State, regardless of the frequency of the transactions.

The rationale for such policy is consistent with Peat, Marwick, Mitchell & Co., Adv Op St Tax Comm, April 16, 1987, TSB-A-87(8)C and in GEF Funding Corp. Adv Op Comm of T&F, January 26, 1988, TSB-A-88(2)C, an interpretation of Article 9-A under similar circumstances. In Peat, Marwick, it was held that, under Article 32 of the Tax Law, the activity of a national banking association as a trustee for New York State industrial development bonds where all of the services are provided outside New York State, except for the signing of the trust

agreement and the delivery of the securities to the underwriter in New York, was not sufficient to constitute doing business in New York State.

For purposes of Article 9-A of the Tax Law, the definition of doing business contained in section 1-3.2(b) of the Business Corporation Franchise Tax Regulations is identical to the definition of doing business for purposes of section 16-2.7(a) of the Regulations. In GEF Funding Corp., it was determined that for purposes of Article 9-A of the Tax Law, the activities of a corporation do not constitute doing business in New York State where the corporation is engaging in mortgage loan activities when the loans are secured by real property located in New York State but the acceptance of application, processing, approval and servicing of the loans are conducted at the corporation's office outside New York State. However, it was also determined in GEF Funding Corp., that a corporation could be subject to tax if it is determined that an agency relationship exists between such corporation and a person or entity conducting business in New York State.

It should be noted, that under Article 32 of the Tax Law where a corporation acquires security interests in property located in New York State and such corporation conducts activities in New York State, such corporation could be deemed to be doing business in New York State. For instance, in Cuddy & Feder, Adv Op Comm T&F, June 1, 1988, TSB-A-88(13)C, it was determined that, for purposes of Article 32 of the Tax Law, where a corporation's chief operating officer comes into New York on a regular basis to negotiate mortgage loan purchases secured by New York residential property, and the corporation's agent in New York, on a regular basis, negotiates mortgage loan purchases for the corporation that are secured by New York residential property, the corporation was deemed to be doing business in New York State.

Herein, Petitioner does not maintain an office in New York State, does not have any personnel in New York State, and does not conduct any activities in New York State. Petitioner's only contact with New York State is through the purchase, in Connecticut, of the retail installment contracts that are secured by property located in New York State and through occasionally acquiring title to property in New York State through foreclosure of such security interest.

Accordingly, while Petitioner is a banking corporation pursuant to section 1452(a)(2) of the Tax Law, Petitioner is not doing business in New York State as contemplated by section 16-2.7 of the Regulations. Therefore, Petitioner is not subject to the franchise tax under Article 32 of the Tax Law.

DATED: February 8, 1990

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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