

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

TSB-A-99(28)C
Corporation Tax
November 10, 1999

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C990317A

On March 17, 1999, a Petition for Advisory Opinion was received from Pacific Life Insurance Company, 700 Newport Center Drive, Newport Beach, California 92660.

The issues raised by Petitioner, Pacific Life Insurance Company, are (1) whether Petitioner is subject to franchise tax under Article 33 of the Tax Law, and not subject to tax under Article 9-A of the Tax Law, as a result of its ownership interest in general and limited partnerships which conduct business activities in New York, and (2) if taxable under Article 33 of the Tax Law, is it required to file a return if its tax liability under Article 33 is zero due to the limitation under section 1505 of the Tax Law.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner is a California corporation, which is licensed as a life insurance company in all states other than New York. It is domiciled in California. It is engaged in the business of writing life insurance policies and annuities in the states in which it is licensed to do so.

Petitioner neither solicits insurance business in New York State nor is it authorized to transact an insurance business under a certificate of authority from the New York State Insurance Department. Petitioner does not presently conduct any business activity in New York, and will not in the future conduct any business activity in New York, other than through various investment partnerships, including Oppenheimer Capital ("OC") discussed below. Furthermore, (i) Petitioner does not and will not have an office, place of doing business or telephone listing in New York, (ii) Petitioner's directors, officers or employees may visit New York to take part in seminars, visit rating agencies, and attend closings of purchases and sales of securities, and (iii) Petitioner currently has no employees or agents stationed in New York.

Although Petitioner is not registered as an insurance company in New York, it receives "orphan" premiums from New York residents on which it pays the California premiums tax. These are premiums on policies which were originally sold to individuals who were not resident in New York State at the time of the sale, but who subsequently moved to New York State.

Petitioner indirectly owns an interest in a general partnership, OC. OC may convert from a partnership form of business to a limited liability corporation ("LLC") form of business. If OC does convert, it is anticipated this multiple member LLC would be taxed as a partnership for federal income tax purposes.

OC is domiciled in New York State. It has income from the conduct of its investment management business in New York and other states. Thus, a portion of its income has a source in New York State.

Petitioner's indirect ownership in OC is a result of direct and/or indirect ownership interests in various other partnerships and/or LLCs. These LLCs are all single member organizations. These single member LLCs are treated for federal income purposes as if they are a branch of their owner. In addition, one of the existing partnerships might convert to a multiple member LLC. If so, it is anticipated this multiple member LLC would be taxed as a partnership for federal income tax purposes.

Petitioner also directly owns limited partnership interests in other investment partnerships which have New York source income.

Thus, as a result of its indirect ownership in OC, Petitioner has an indirect distributive share of OC's income, a portion of which is attributable to OC's operations in New York which has a source in New York State. Petitioner also has distributive shares of New York source income from the investment limited partnerships in which it has direct ownership interests.

Discussion

Pursuant to Article 33 of the Tax Law, the franchise taxes imposed on insurance corporations are contained in sections 1501 and 1510 with a cap contained in section 1505.

The tax imposed pursuant to section 1501(a) of the Tax Law provides:

[e]very domestic insurance corporation and every foreign or alien insurance corporation, 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 ... shall annually pay a franchise tax ...

Section 1510(b)(1) of the Tax Law provides for an additional premiums tax on insurance corporations as follows:

[e]xcept as hereinafter provided, every domestic life insurance corporation, and every foreign and alien life insurance corporation authorized to transact business in this state under a certificate of authority from the superintendent of insurance, shall, for the privilege of exercising corporate franchises or for carrying on business in a corporate or organized capacity within this state, and in addition to any other

taxes imposed for such privilege, pay a tax on all gross direct premiums, less return premiums thereon, received in cash or otherwise on risks resident in this state

Section 1505 of the Tax Law limits the amount of taxes imposed under Article 33 by providing that, notwithstanding the provisions of sections 1501 and 1510, the amount of taxes imposed under such sections shall not exceed an amount computed as if such taxes were determined solely under section 1510 at the reduced rate of 2 percent.

Section 1500(a) of the Tax Law provides that the term "insurance corporation" includes a corporation, association, joint stock company or association, person, society, aggregation or partnership, by whatever name known, doing an insurance business.

Section 1500(e) of the Tax Law provides that the term "taxpayer" means any insurance corporation subject to the tax imposed under section 1501 or 1510 of the Tax Law, or any captive insurance company subject to the tax imposed under section 1502-b of the Tax Law.

Section 1515 of the Tax Law provides that every taxpayer and every other foreign and alien insurance corporation having an employee, including any officer, in this state or having an agent or representative in this state, shall annually, file a tax return.

The provisions in Article 33 of the Tax Law should be regarded as being *in pari materia* and construed in a like manner as substantially identical provisions contained in Article 9-A of the Tax Law. (Royal Indemnity Co. v NYS Tax App Trib, 75 NY2d 75; L 1974, ch 649, §12.) For purposes of Article 9-A of the Tax Law, section 1-3.2(a)(5) of the Franchise Tax Business Corporation Regulations provides that if a partnership is doing business, employing capital, owning or leasing property or maintaining an office in New York State, then all of its corporate general partners are subject to the tax imposed by Article 9-A of the Tax Law. Section 1-3.2(a)(6) of those Regulations provides that a foreign corporation is doing business, employing capital, owning or leasing property or maintaining an office in New York State, if it is a limited partner of a partnership, other than a portfolio investment partnership, which is doing business, employing capital, owning or leasing property or maintaining an office in New York State and if it is engaged, directly or indirectly, in the participation in or the domination or control of all or any portion of the business activities or affairs of the partnership.

Section 209.4 of Article 9-A of the Tax Law provides that a corporation that is taxable under Article 33 of the Tax Law is not subject to tax under Article 9-A of the Tax Law.

In Mound, Cotton & Wollan, Adv Op Comm T & F, September 16, 1988, TSB-A-88 (20)C, it was held that a foreign insurance company not authorized to transact business in New York State could purchase, for investment purposes, mortgages secured by New York real estate without incurring franchise tax liability under Article 33 of the Tax Law and, pursuant to section 209.4 of

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the Tax Law, was not subject to tax under Article 9-A of the Tax Law because it was an insurance corporation subject to franchise tax under Article 33 of the Tax Law. The company was not licensed or qualified to do business in New York State. The company was considering the purchase of mortgages secured by New York real estate. The mortgages would be purchased through a large corporate broker licensed in New York. Negotiations would take place both in and out of New York and the contracts could be signed either in or out of New York. In addition, an agent, either in or out of New York, would service the mortgages. The company did not incur franchise tax liability under Article 33 because it did not have a certificate of authority from the Superintendent of Insurance and had no taxable premiums under section 1510 of the Tax Law. Therefore, the corporation's tax liability was zero because of the cap computed pursuant to section 1505 of the Tax Law.

In The Manufacturers Life Insurance Company (USA), Adv op Comm T & F, September 3, 1997, TSB-A-97(23)C, the petitioner was not authorized to transact an insurance business under a certificate of authority from the New York State Insurance Department. It received premium payments from persons to whom it sold policies while they were non-New York residents and who subsequently relocated to New York State. It considered making loans that would be secured by mortgages on commercial real property located in New York. For this purpose, petitioner was to obtain a certificate of authority to conduct business in New York, but not a certificate of authority from the Superintendent of Insurance to conduct an insurance business in New York. Its employees were to come into New York to contact potential borrowers, existing borrowers, or mortgage brokers, to gather market information, to perform due diligence and to negotiate and monitor the closing of the loans. Petitioner's directors, officers and employees may also come into New York to take part in seminars, visit rating agencies, and attend closing of purchases and sales of securities (other than loans). Also it may, on occasion, foreclose or otherwise take title to property in New York. It was held that the totality of the petitioner's proposed activities in New York would constitute doing business and would subject petitioner to the tax imposed under section 1501 of the Tax Law. However, since petitioner would not have a certificate of authority from the Superintendent of Insurance to conduct an insurance business in New York, petitioner would not have taxable premiums under section 1510 of the Tax Law, and therefore, pursuant to section 1505 of the Tax Law, petitioner's tax liability under Article 33 of the Tax Law would be zero. Also, petitioner would not be subject to tax under Article 9-A of the Tax Law because it is a corporation taxable under Article 33 of the Tax Law.

In this case, Petitioner will have income through its ownership interest in various general and limited partnerships and LLCs (that are treated as partnerships for federal income tax purposes) which conduct business activities in New York. Accordingly, through Petitioner's ownership interests in the partnerships and LLCs, Petitioner would be considered to be doing business, employing capital, owning or leasing property or maintaining an office in New York for purposes of Article 9-A, and following Royal, supra, such activity constitutes doing business, employing capital, owning or leasing property or maintaining an office in New York for purposes of section

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1501 of the Tax Law, and Petitioner is subject to the tax imposed under section 1501 of the Tax Law.

However, like Manufacturer's Life Insurance, supra, Petitioner will not have a certificate of authority to conduct an insurance business in New York State, but will have "orphan" premiums. Since Petitioner does not have a certificate of authority from the Superintendent of Insurance to conduct an insurance business in New York, these "orphan" premiums are not taxable premiums under section 1510 of the Tax Law. Pursuant to section 1505 of the Tax Law, Petitioner's tax liability under Article 33 of the Tax Law will be zero. Further, as in Mound, Cotton, & Wollan, supra, Petitioner will not be subject to tax under Article 9-A of the Tax Law because it is a corporation taxable under Article 33 of the Tax Law.

Even though Petitioner's tax liability will be zero, pursuant to section 1515 of the Tax Law, Petitioner must annually file a tax return .

DATED: November 10, 1999

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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