

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

TSB-H-81(4)C
Corporation Tax
January 8, 1981

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. C800716B

On July 16, 1980 a Petition for Advisory Opinion was received from Clipper Oil Corporation, 20 Exchange Place, New York, New York 10005.

The issue raised is whether Petitioner's activities in New York, described below, render it subject to the Franchise Tax on Business Corporations imposed under Article 9-A of the Tax Law. Petitioner also inquires whether, should it be held subject to such tax, its short-term borrowings would be deductible from its assets in determining its business capital within the meaning of section 208.7 of the Tax Law.

Petitioner is a foreign corporation authorized to do business in New York. As described in the Petition for Advisory Opinion its "only activities will be (1) to borrow by selling its promissory notes, known as commercial paper notes, of maturities of 270 days or less or by drawing on a bank line of credit and (2) to lend the proceeds of these borrowings to a subsidiary (the "Fuel Owner") of a utility located outside New York in the southern United States (the "Utility"). The loans will be secured by a security interest in fuel owned from time to time by the Fuel Owner and in accounts receivable therefor.

"Clipper will lend funds to the Fuel Owner, up to a maximum of \$100,000,000, whenever the Fuel Owner purchases fuel for use by the Utility. To finance this loan, Clipper will sell its commercial paper notes or, if commercial paper notes cannot be sold, will draw on a line of credit with a bank. The borrowing under the line of credit will be repaid by selling commercial paper notes when commercial paper notes can again be sold. The financing agreement between Clipper and the Fuel Owner will terminate on May 28, 1981, unless extended at that time.

"Clipper will pay the principal amount of its maturing commercial paper notes in one of three ways. First, the Fuel Owner will make periodic principal payments on Clipper's loan to it. These principal payments will be applied to paying maturing commercial paper notes. If the Fuel Owner has not repaid sufficient principal, Clipper will sell additional commercial paper notes, using the proceeds to redeem the maturing commercial paper notes. If commercial paper notes cannot be sold at the time, Clipper will draw on its line of credit until such time as commercial paper can be sold.

"Interest payments on the loans from Clipper to the Fuel Owner will be in an amount equal to the discount or interest payable on Clipper's outstanding commercial paper notes and borrowings on the line of credit, if any, plus amounts necessary to defray other expenses of Clipper. Clipper will also receive a nominal administrative fee. Because the interest payments from the Fuel Owner to Clipper are directly tied to the interest and other expenses of Clipper, Clipper will have a taxable income for federal income tax purposes equal to the nominal administrative fee paid to it.

"Because Clipper's borrowings will be by sale of commercial paper notes and temporary drawings under the line of credit, it is anticipated that all of its liabilities by their terms will have a maturity of less than one year. At all times Clipper will have a substantial amount of outstanding borrowings.

"Clipper's only activities carried on in New York State, other than those listed in Section 209.2 of the Tax Law, will be borrowing money as described above and relending it to the Fuel Owner."

Article 9-A of the Tax Law imposes a tax on foreign corporations "doing business" in New York in a corporate or organized capacity. Tax Law, §209.1. The Franchise Tax Regulations, noting that the term "doing business" is used in the statute in "a comprehensive sense," provides that "...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" imposed under Article 9-A. 20 NYCRR §1-3.2(b)(1). Whether a corporation is doing business in New York is a matter determined on a case by case approach, giving due consideration to the following factors:

- "(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)(2)

The statement of facts contained in the Petition for Advisory Opinion indicates that the activities therein described constitute all of Petitioner's activities. That is, Petitioner performs all of its corporate activities in New York, doing there and nowhere else that which it was formed to do. Thus, for example, all of its income may fairly be said to "be derived from activities in New York State." Giving due consideration to the factors set forth in Section 1-3.2(b)(2) of the Franchise Tax Regulations, and viewing Petitioner's activities in a comprehensive sense, it is hereby determined that such activities constitute "doing business" within the meaning of section 209.1 of the Tax Law and that Petitioner is therefore subject to the Franchise Tax on Business Corporations.

Petitioner's second question is whether its liabilities may be deducted from its assets in determining its business capital. Section 208.7 of the Tax Law defines the term "business capital," one of the factors utilized in determining the tax due under Article 9-A, as "...all assets, other than subsidiary capital, investment capital and stock issued by the taxpayer, less liabilities not deducted from subsidiary or investment capital which are payable by their terms on demand or within one year from the date incurred, other than loans or advances outstanding for more than a year as of any date during the year covered by the report" Accordingly, so long as all of Petitioner's liabilities by their terms will have a maturity of less than one year, and so long as none of these liabilities will be renewed so as to be outstanding for more than one year as of any date occurring within the year covered by the report, the Petitioner's liabilities may properly be deductible from its assets in determining its business capital.

DATED: December 24, 1980

s/LOUIS ETLINGER
Deputy Director
Technical Services Bureau