

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-05(16)C
Corporation Tax
December 2, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C050331A

On March 31, 2005, a Petition for Advisory Opinion was received from State Farm Life Insurance Company, One State Farm Plaza, Life Tax, D2, Bloomington, Illinois 61710.

The issues raised by Petitioner, State Farm Life Insurance Company, are:

1. Whether Petitioner is subject to franchise tax under Article 33 of the Tax Law rather than Article 9-A of the Tax Law.
2. If the answer to issue 1 is yes, what, if any, is Petitioner's tax liability under Article 33 of the Tax Law based on the facts presented.

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

Petitioner is an Illinois corporation that is licensed as a life insurance company in every state but New York and Wisconsin. Petitioner neither solicits insurance business in New York State nor is it authorized to transact an insurance business under a certificate of authority issued by the New York State Insurance Department.

Petitioner does not and will not have an office, place of business or telephone listing in New York, and Petitioner does not have any employees or agents stationed in New York.

Although not registered as a life insurance company in New York, Petitioner receives premiums ("orphan premiums") from New York residents on policies which Petitioner sold to customers who at the time of sale were not residents of New York but who later became New York State residents.

Petitioner intends to form a single member limited liability company ("SMLLC") under the laws of Delaware to make commercial real estate mortgage loans secured by New York real property. Petitioner will be the sole and managing member of the SMLLC. The purpose of the SMLLC shall be "to engage in any lawful business permitted under the laws of Delaware or the laws of any jurisdiction in which the limited liability company may do business, including specifically the conduct of commercial real estate mortgage lending, but specifically excluding the conduct of an insurance business." In the course of considering whether to make a prospective loan or approve a loan application, employees of State Farm Mutual Automobile Insurance Company, the parent company of Petitioner, will travel to New York to review, on behalf of the SMLLC, the prospective property that would secure the loan and may, on occasion, perform other due diligence activities related to a prospective loan transaction.

It is assumed for purposes of this Advisory Opinion that Petitioner will not be required to hold a certificate of authority to transact an insurance business issued by the New York State Insurance Department. The SMLLC will register as a foreign limited liability company under the New York Limited Liability Company Law. For federal income tax purposes, the SMLLC will be treated as a disregarded entity.

Applicable law

Section 209.4 of Article 9-A of the Tax Law provides, in part:

Corporations ... taxable under articles thirty-two and thirty-three of this chapter ... shall not be subject to tax under this article.

Section 1500 of Article 33 of the Tax Law contains general definitions, and provides, in part:

(a) 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

* * *

(c) The term "foreign insurance corporation" means an insurance corporation incorporated or organized under the laws of any other state of the United States, the District of Columbia or the Commonwealth of Puerto Rico.

* * *

(e) The term "taxpayer" means any insurance corporation subject to the tax imposed under section fifteen hundred one, fifteen hundred two-a, or fifteen hundred ten or any captive insurance company subject to the tax imposed under section fifteen hundred two-b of this article.

Section 1501(a) of the Tax Law provides, in part:

Every 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 1505 of the Tax Law provides, in part:

(a)(2) Domestic, foreign and alien life insurance corporations. The provisions of this paragraph shall apply to taxpayers subject to tax under paragraph one of subdivision (b) of section fifteen hundred ten of this article. Notwithstanding the provisions of sections fifteen hundred one and fifteen hundred ten of this article, the amount of taxes imposed under such sections for taxable years beginning on or after January first, nineteen hundred seventy-seven ... shall not exceed an amount computed as if such taxes were determined solely under section fifteen hundred ten, except that for purposes of the limitation provided herein, the rate of tax under such section shall be deemed to be ... two percent for taxable years beginning on or after January first, nineteen hundred ninety-eight.

(b) Notwithstanding the provisions of sections fifteen hundred one and fifteen hundred ten of this article, in the case of taxpayers subject to tax under subdivision (b) of section fifteen hundred ten, the total amount of tax imposed under this article ... shall in no event be less than the amount computed as if such tax was determined solely under section fifteen hundred ten, except that the rate of tax under section fifteen hundred ten shall be deemed to be one and five-tenths percent.

Section 1510(b)(1) of the Tax Law provides, in part:

Except 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 1515(a) of the Tax Law provides, in part:

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, on or before the fifteenth day of the third month following the close of its taxable year, transmit to the [commissioner of taxation and finance] a return in a form prescribed by [the commissioner] setting forth such information as the [commissioner] may prescribe.

Opinion

The classification accorded a limited liability company for federal income tax purposes will be followed for New York State corporate franchise tax purposes. (See *McDermott, Will & Emery*, Adv Op Comm T&F, July 24, 1996, TSB-A-96(19)C; *FGIC CMRC Corp.*, Adv Op Comm T&F, April 1, 1996, TSB-A-96(11)C; and New York State Department of Taxation and

Finance Publication 16 (1/03), *New York Tax Status of Limited Liability Companies and Limited Liability Partnerships.*) Accordingly, if the SMLLC is considered a branch or division of Petitioner for federal income tax purposes (i.e., if the SMLLC is a disregarded entity), it will be considered a branch or division of Petitioner for New York State corporate franchise tax purposes.

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-88-(20)C, it was held that a foreign life 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 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 provisions of 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 orphan premium payments from New York residents. It considered making loans that would be secured by mortgages on commercial real property located in New York. For this purpose, the petitioner obtained a certificate of authority to conduct business in New York pursuant to section 1301 of the New York Business Corporation Law, 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. The petitioner's directors, officers and employees may also have come into New York to take part in seminars, visit rating agencies, and attend closings of purchases and sales of securities (other than loans). Also the petitioner may have, on occasion, foreclosed or otherwise taken 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 the petitioner to the tax imposed under section 1501 of the Tax Law. However, since the petitioner would not have a certificate of authority from the Superintendent of Insurance to conduct an insurance business in New York, the petitioner would not have taxable premiums

under section 1510 of the Tax Law, and therefore, pursuant to section 1505 of the Tax Law, the petitioner's tax liability under Article 33 of the Tax Law would be zero. Also, the petitioner would not be subject to tax under Article 9-A of the Tax Law because it was a corporation taxable under Article 33 of the Tax Law.

Issue 1. In this case, Petitioner will be the sole and managing member of the SMLLC, which will be treated as a disregarded entity for federal income tax purposes. The SMLLC will conduct business activities in New York. Accordingly, the SMLLC will be considered to be a branch or division of Petitioner and Petitioner will be considered to be doing business, employing capital, owning or leasing property or maintaining an office in New York for purposes of section 1501 of Article 33 of the Tax Law. Since Petitioner is a life insurance corporation, it will be subject to the tax imposed under section 1501 of the Tax Law. Petitioner will not be subject to tax under Article 9-A of the Tax Law because it will be a corporation subject to Article 33 of the Tax Law. See section 209.4 of the Tax Law and *Mound, Cotton, & Wollan, supra*.

Issue 2. Like the insurance company in *Manufacturer's Life Insurance, supra*, Petitioner does 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, Petitioner will not have premiums subject to tax 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.

However, even though Petitioner's tax liability will be zero, Petitioner is a taxpayer under section 1500(e) of the Tax Law, and pursuant to section 1515 of the Tax Law, Petitioner must annually file a tax return. See *Washington National Insurance Company, Adv Op Comm T & F*, April 1, 2004, TSB-A-04(5)C.

DATED: December 2, 2005

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