

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C131104B

The Department of Taxation and Finance received a Petition for an Advisory Opinion from [REDACTED]. Petitioner asks under which circumstances its office located [REDACTED] [(“NY Office”)] would be considered a “branch” under Tax Law § 1454 (a)(5)(B) such that Petitioner would be required to include deposits from [REDACTED] [NY Office] in its deposits factor.

Based on the information Petitioner has provided about [REDACTED] [NY Office] current loan repayment procedures, we conclude that [REDACTED] [NY Office] is not a “branch” under Tax Law § 1454(a)(5)(B) and consequently, Petitioner cannot include deposits from [REDACTED] [NY Office] in its deposit factor. This Advisory Opinion concerns an issue under Article 32 of the Tax Law, which was repealed by chapter 59 of the Laws of 2014, effective for taxable years beginning on or after January 1, 2015. The facts in this Advisory Opinion are based on the Petitioner’s operations prior to January 1, 2015.

Facts

We are advised that Petitioner is a [REDACTED] [non-U.S.] banking organization headquartered [REDACTED] [outside the U.S.] that does business in various states throughout the United States directly through branches, representative offices, and agency offices and indirectly through various other legal entities.

We are also advised that, from a United States bank regulatory perspective, Petitioner operates five branches in the United States of which [REDACTED] [NY Office] is one of three within New York State. We are also informed that the vast majority of deposits booked by Petitioner at the [REDACTED] [NY Office] location are in excess of \$100,000 and that the [REDACTED] [NY Office] deposits are not handled by any other U.S. office – only [REDACTED] [NY Office] and Petitioner’s headquarters in [REDACTED].

Under Petitioner’s procedures, all loans require credit approval by its Group Risk Management (“GRM”) department. Most GRM staff members are located in [REDACTED] [an office outside the U.S.], but there are several GRM employees at [REDACTED] [NY Office] who provide credit approval for [REDACTED] [NY Office’s] loans in certain industries.

After a loan receives credit approval, Petitioner prepares a written loan agreement for signing. The bank is not legally bound to perform until its representative has signed the loan

agreement. [REDACTED] [NY Office] employees and officers sign some, but not all, of the loan agreements for [REDACTED] [NY Office] loans.

[REDACTED] [NY Office] does not permit its borrowers to make loan repayments by cash or check at the [REDACTED] [NY Office] office. In fact, all borrowers of [REDACTED] [NY Office] loans are required, by the terms of their loan agreements, to make repayments via wire transfer into “a New York bank deposit account maintained by the Bank in an *unrelated* United States depository institution.” (emphasis added).¹

Once loan payments are made to the New York bank deposit account, Petitioner’s staff “debit cash and credit an internal deposit account in the Bank’s financial records.” After being notified of the deposit, Petitioner’s loan administration department, located in [REDACTED] [outside the U.S.], processes the payment and updates Petitioner’s financial records.

Analysis

Introduction

It is conceded that [REDACTED] [NY Office] is a location where Petitioner “carries on its business in a regular and systematic manner” and that it is “continuously maintained, occupied, and used by employees of the Bank.” As such, it qualifies as a “bona fide office” as defined in Tax Law § 1454 (a)(5)(A).

In order for deposits from a bank location to be included in the numerator and denominator of a taxpayer’s deposits factor, the bank location at which the deposits are maintained must also qualify as a “branch.” *See* Tax Law § 1454 (a)(3).

According to Tax Law § 1454 (a)(5)(B), a “branch” is defined as:

a bona fide office which is used by the taxpayer on a regular and systematic basis to (i) approve loans (regardless of whether the approval of certain classes of loans requires review or final approval by another office of the taxpayer), (ii) accept loan repayments, (iii) disburse funds, *and* (iv) conduct one or more other functions of a banking business (emphasis added).

Petitioner agrees that [REDACTED] [NY Office] is used to disburse funds and conduct other banking business functions, two of the activities required to consider a location a “branch” under Tax Law § 1454 (a)(5)(B). Therefore, the only issue is whether the Petitioner uses [REDACTED] [NY Office] “on a regular and systematic basis” to approve loans and accept loan repayments.

¹ The Bank has a few outstanding loans made to its prior employees that are repaid by means other than by wire transfer. These former employees repay their loans by remitting checks to a location of the Bank other than [REDACTED] [NY Office], and the checks are deposited into the same New York Bank deposit account into which wire transfers from other borrowers are received.

A. [REDACTED] [NY Office] is used to approve loans

Petitioner asks whether [REDACTED] [NY Office's] activities relating to loan approval are sufficient to satisfy the loan approval requirement under Tax Law § 1454 (a)(5)(B)(i). The term "approval" in Tax Law § 1454 (a)(5)(B), according to 20 NYCRR 16-2.9 (c), has the same meaning as the term "final approval" in 20 NYCRR 19-6.2 (d)(4), which is defined as:

the act of employees or the board of directors of the taxpayer which legally binds the taxpayer to perform under an agreement. Such activity is located at the office which the taxpayer's employees are regularly connected with, regardless of where the services of such employees were actually performed. If the board of directors make such final approval, such activity occurred where the actual seat of management and control of the taxpayer is located.

Because many of [REDACTED] [NY Office's] loans are signed by a [REDACTED] [NY Office] employee (the act that legally binds [REDACTED] [NY Office] to perform), [REDACTED] [NY Office] is being used to approve loans according to 20 NYCRR 19-6.2(d)(4).

It should be noted that an office does not have to be used to approve (or review for final approval) 100% of its own loans in order to meet the branch definition found in Tax Law § 1454 (5)(B) and 20 NYCRR 16-2.9(5). Even an office that was not used to approve any loans in a given taxable year can be classified as a branch. In some cases, an office may not approve any of its own loans during a taxable year because none of its loans during that taxable year were under the dollar amount threshold that office was authorized to approve. According to 20 NYCRR 16-2.9 (d), as long as the office actually was regularly and subsequently used to approve loans within the given threshold in previous years, it still could potentially be classified as a branch.

It is also worth noting that 20 NYCRR 16-2.9 (b)(5) contains an exception to the general rule in Tax Law § 1454 (a)(5)(B)(i), under which a bank's office that is used to approve loans is not considered a branch if all of the office's loans,

pursuant to the taxpayer's business policies or practices, receive on a regular and systematic basis review for final approval or final approval by another office or all of whose loans in fact receive on a regular and systematic basic review for final approval or final approval by another office.

According to Petitioner, its GRM department reviews all of [REDACTED] [NY Office's] loans for final approval. However, because some [REDACTED] [NY Office] loans are reviewed for credit approval by GRM staff members who work at the [REDACTED] [NY Office] office, [REDACTED] [NY Office] does not trigger the exception in 20 NYCRR 16-2.9 (b)(5).

B. [REDACTED] [NY Office] is not used to accept loan repayments

Petitioner indicates that [REDACTED] [NY Office] does not accept loan repayments because it does not permit payments made by cash or check at its [REDACTED] [NY Office] office and instead requires that all repayments be made by wire transfer to a deposit account in an unrelated United State depository institution.

The statute and regulations do not limit a bank's receipt of "loan repayment" to any specific method of payment, or require that the payment be made at the physical location of the bank office. Tax Law § 1454 (a)(5)(B)(ii); 20 NYCRR 16-2.9. Therefore, the fact that [REDACTED] [NY Office] does not accept cash or checks for loan repayment at its branch office is not necessarily dispositive.

However, in order for a bank office to accept loan repayments "on a regular and systematic basis," the loan repayment process "must be conducted through its own employees who are regularly in attendance at such office during normal business hours." 20 NYCRR 16-2.9 (a); 20 NYCRR 16-2.8 (a). Loan repayment for [REDACTED] [NY Office] loans is not handled by [REDACTED] [NY Office] employees. Instead, repayments on all [REDACTED] [NY Office] loans are deposited into an account at an unrelated bank. Therefore, [REDACTED] [NY Office] is not used by Petitioner to accept loan repayments "on a regular and systematic basis" for purposes of Tax Law § 1454 (a)(5)(B)(ii).

Consequently, because [REDACTED] [NY Office] does not accept loan repayments on a regular and systematic basis, [REDACTED] [NY Office] is not a branch according to Tax Law § 1454 (a)(5)(B). Petitioner therefore cannot include deposits from [REDACTED] [NY Office] in its deposits factor, as described in Tax Law §§ 1454 (a)(3) and 1454 (a)(4).

DATED: December 16, 2016

/S/
DEBORAH R. LIEBMAN
Deputy Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.