

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

TSB-A-85 (8) C
Corporation Tax
June 5, 1985

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. C840515A

On May 15, 1984 a Petition for Advisory Opinion was received from Manufacturers Hanover Corporation, 270 Park Avenue, New York, New York 10017.

Manufacturers Hanover Corporation, a bank holding company and a taxpayer under Article 32 of the Tax Law, requested that its recently organized subsidiary Manufacturers Hanover Futures, Inc. ("MHFI") be allowed to allocate its entire net income within and without New York State pursuant to regulation section 35.2(a) and (b) which was promulgated pursuant to Articles 9-B and 9-C of the Tax Law, the predecessor to Article 32.

Petitioner presents the following statement of facts. MHFI is a Delaware corporation organized on July 25, 1983 to act as a futures advisory and brokerage firm. MHFI will rent offices in Chicago and New York. These offices will be authorized to execute futures contracts for third parties and give related investment advice to third parties, but will not engage in any futures transactions for MHFI's own account. MHFI will be staffed by its own employees who will perform services exclusively for and be compensated exclusively by MHFI. MHFI will meet the requirements of section 1452(a)(9) of Article 32 and will file a consolidated return with its parent, Manufacturers Hanover Corporation.

Section 1454(a) of Article 32 states:

"If the taxpayer's entire net income is derived from business carried on both within and without the state, the portion thereof which is derived from business carried on within the state shall be allocated under rules and regulations prescribed by the tax commission."

The Tax Commission, to date, has not promulgated regulations in accordance with section 1454 of Article 32. However, in a letter to Commerce Clearing House, Inc., dated February 26, 1973, the Director of the Corporation Tax Bureau has made the following statement:

"Inasmuch as the provisions of Article 32 conform with Articles 9-B and 9-C, except in areas of privilege period and Federal conformity, regulations issued under Articles 9-B and 9-C remain applicable except when they are in conflict with the provisions of Article 32. Federal taxable income is the starting point in computing entire net income and therefore Federal regulations applicable to such computation will be followed."

Therefore, until such time as the Tax Commission promulgates regulations in accordance with section 1454 of Article 32, Part 35 of the Tax on State Banks, other Financial Corporations and National Banking Associations regulations (hereinafter Article 9-B and 9-C regulations) with regard to the apportionment of income from sources within and without the State are in effect. Such Part 35 has not been revised since the enactment of Article 32.

Section 35.1 of the Articles 9-B and 9-C regulations provides that a corporation which is doing business or carries on its business through offices maintained both within and without New York State must apportion its net income as provided in the regulations.

Section 35.2 of the Articles 9-B and 9-C regulations states:

"(a) A corporation or association is regarded as "doing business" or "carrying on business" within or without the State when it occupies, has or maintains an office, agency or branch where its functions are systematically and regularly carried on.

(b) In order to require an apportionment of the income from business carried on within and without New York State, it is not necessary that the branch or agency maintained without the State, in the case of a domestic corporation or association, or within the State, in the case of a foreign corporation or association, shall necessarily conduct all functions of the banking business of the corporation or association. It is sufficient if the branch conducts some of the functions which the corporation or association is authorized to exercise regularly and with a fair measure of permanency and continuity."

Technical Services Bureau memorandum TSB-M-78(23)C provides that a banking corporation which is doing a banking business both within and without New York State may allocate its entire net income within and without New York State when it is doing a full service banking business. The memorandum then defines an office, branch or agency as follows:

". . . For purposes of Article 32, an office, branch or agency is a permanent place of business which is regularly and systematically maintained, occupied and used by the taxpayer to carry on a full service banking business. Such business must be conducted through its own employees who are regularly in attendance at such place of business during normal business hours. It is not necessary that the office, branch or agency maintained without New York State conduct all the functions of a banking business. . . ."

Corporations that are now taxpayers under Article 32 pursuant to section 1452(a)(9) were not specifically addressed in the Article 9-B and 9-C regulations because when Part 35 of such regulations was promulgated, such corporations were not taxpayers under Articles 9-B and 9-C. Such corporations are not addressed in TSB-M-78(23)C because such corporations are doing business but are not doing a banking business. However, section 1454 of Article 32 allows such

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corporations that derive entire net income from business carried on both within and without New York State to allocate such entire net income under rules and regulations prescribed by the Tax Commission. Therefore, the concepts of Articles 9-B and 9-C regulation Part 35 and TSB-M-78(23)C should be applied to a taxpayer under Article 32 pursuant to section 1452(a)(9), and such taxpayer is doing business or carrying on business within or without New York State if it has an office that is a permanent place of business which is regularly and systematically maintained, occupied and used by the taxpayer to carry on business. Such business must be conducted through its own employees who are regularly in attendance at such place of business during normal business hours.

Accordingly, assuming that MHFI is a banking corporation taxable under Article 32 of the Tax Law pursuant to section 1452(a)(9) (which is not herein at issue), MHFI would be doing business within and without New York State based on the facts presented if its own employees are regularly in attendance at the Chicago office during normal business hours and would be allowed to allocate its entire net income within and without New York pursuant to Articles 9-B and 9-C regulation Part 35.

DATED: June 4, 1985

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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