

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

TSB-A-88 (13)C
Corporation Tax
June 1, 1988

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C880125A

On January 25, 1988, a Petition for Advisory Opinion was received from Cuddy & Feder, 90 Maple Avenue, White Plains, New York 10601.

Issues

The issues raised are applicable to the franchise tax under Article 32 of the Tax Law for taxable years 1987 and 1988. The issues are:

1. (a) Do the activities of Hypothetical Corporation Inc. ("HCI") constitute "doing business"?
(b) Do the activities of the secondary market investors constitute "doing business"?
2. Does the answer to Issue 1 change if
 - (a) HCI purchases existing loan commitments and closes the loans in New York
or
 - (b) HCI extends the commitments itself and closes the loans in New York.
3. Do the answers to Issues 1 and 2 change with
 - (a) the dollar amount of the aggregated mortgage loans, or
 - (b) the number of transactions entered into.

Facts

HCI is a banking corporation organized under the laws of a state other than New York and has not applied for authorization to do business in New York.

HCI purchases on a regular basis, from New York bankers, certain mortgage loans secured by New York residential property. HCI purchases the loans through an agent located in New York. Sometimes HCI's chief operating officer travels to New York to negotiate the purchases; sometimes the agent negotiates the purchases for HCI. HCI also purchases such loans from bankers in other states, secured by residential property in such other states.

In some cases, HCI retains and services the loans itself. In other cases, HCI sells the loans to secondary market investors; that is, corporations such as FNMA that buy large blocks of residential mortgages at a time. On occasion, both HCI and the secondary market investors are forced to foreclose and take title to the New York real property.

Neither HCI nor the secondary market investors maintain any branches or offices in New York, nor do they maintain any employees in New York. Both do maintain offices and employees

in their "home" state and/or in sister states other than New York.

Both HCI and the secondary market investors collect tax and insurance escrows in connection with servicing the loans. Both HCI and the secondary market investors employ New York counsel in connection with the above-described activities.

Discussion

Section 1451 of Article 32 imposes, annually, a franchise tax on banking corporations for the privilege of doing business in New York State in a corporate or organized capacity.

Section 1452(a)(2) of the Tax Law provides that every corporation or association organized under the laws of any state other than New York which is doing a banking business, anywhere, is a banking corporation.

Petitioner states that HCI is a banking corporation. As a banking corporation organized outside New York State, HCI would be subject to the Franchise Tax on Banking Corporations imposed by Article 32 of the Tax Law if it is doing business within New York State.

Section 16-2.7 of the Franchise Tax on Banking Corporations Regulations (hereinafter "Article 32 Regulations") defines "doing business" as follows:

(a) The term "doing business" is used in a comprehensive sense and includes all activities which occupy the time or labor of people for profit. Every corporation organized for profit and carrying out any of the purposes of its organization is deemed to be doing business for purposes of the tax. In determining whether a corporation is doing business, it is immaterial whether its activities actually result in a profit or a loss.

(b) Whether a corporation is doing business in New York State is determined by the facts in each case. Consideration is given to such factors as:

- (1) the nature, continuity, frequency and regularity of the activities of the corporation in New York State;
- (2) the purposes for which the corporation was organized;
- (3) the location of its offices and other places of business;
- (4) the employment in New York State of agents, officers and employees; and

(5) the location of the actual seat of management or control of the corporation.

...

(e) A corporation will not be deemed to be doing business in New York State if its activities in New York State are limited to such things as:

(1) occasionally acquiring a security interest in real or personal property located in New York State without otherwise doing business;

(2) occasionally acquiring title to property located in New York State through the foreclosure of a security interest without otherwise doing business

When determining whether HCI is doing business in New York State many factors must be considered. However, it is immaterial whether HCI is authorized to do business in New York and the activities of the secondary market investors are irrelevant. The fact that HCI occasionally acquires title to property located in New York through foreclosure of a security interest in New York is not sufficient activity, by itself, to constitute "doing business" in New York.

Petitioner states that HCI does not maintain any branches or offices in New York nor does it have any employees in New York. It has been determined that a foreign corporation engaged in the business of making and servicing mortgage loans was not "doing business" under Article 9-A where the corporation did not make loans in New York, did not own loans secured by real property in New York, did not have an office in New York and its only contact with New York was with a New York bank that delivered FNMA and GNMA certificates to buyers and received payment for them. GEF Funding Corp., Advisory Opinion of the Commissioner of Taxation and Finance, January 26, 1988 (TSB-A-88(2)C). However, it was also determined, in GEF Funding Corp., that a foreign corporation could be subject to tax if the corporation has an arrangement with an unrelated bank whereby the corporation does all of the work regarding a loan but the unrelated bank actually makes the loan (extends the funds) to the borrower and subsequently the corporation purchases the loan from the bank. The totality of the corporation's circumstances and whether it has an agency relationship with the bank would determine the corporation's taxable status in such case.

The instant inquiry is distinguished from GEF Funding Corp. because herein, HCI's chief operating officer comes into New York on a regular basis to negotiate mortgage loan purchases secured by New York residential property. Additionally, HCI's agent in New York, on a regular basis, negotiates mortgage loan purchases for HCI that are secured by New York residential property. In both cases, HCI is regularly acquiring a security interest in real property located in New York.

Accordingly, after considering the factors set forth in section 16-2.7 of the Article 32 Regulations and reviewing HCI's activities as stated herein, it is determined that such activities constitute "doing business" within the meaning of section 1451 of the Tax Law and that HCI would

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be subject to the franchise tax on banking corporations for taxable years 1987 and 1988.

With respect to Issue 2, if HCI purchases existing loan commitments and closes the loans in New York or extends the commitments itself and closes the loans in New York such activity, by itself, would constitute doing business in New York.

With respect to Issue 3, the dollar amount of the aggregated mortgage loans and the number of transactions entered into would be considered when reviewing the totality of a banking corporation's circumstances. However, based on the facts presented in Issue 1 and Issue 2, HCI would be "doing business" in New York State regardless of the dollar amount of the aggregated mortgage loans or the number of transactions entered into.

It should be noted that the existence of an agency relationship between HCI and its agent in New York is a question of fact not susceptible of determination in an Advisory Opinion. An Advisory Opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to "a specified set of facts." Tax Law, §171, subd. twenty-fourth; 20 NYCRR 901.1(a).

DATED: June 1, 1988

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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