

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

TSB-A-96 (15) C
Corporation Tax
May 10, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C960108A

On January 8, 1996, a Petition for Advisory Opinion was received from Mactras (Bermuda) Ltd., Victoria Hall, Victoria Street, P.O. Box HM 1826, Hamilton HM HX, Bermuda.

The issue raised by Petitioner, Mactras (Bermuda) Ltd., is whether the payments with respect to New York risks made by the parent company to its captive insurance company ("CAPCO") domiciled in Bermuda are "premiums" subject to the additional franchise tax on insurance corporations imposed by section 1510 of the Tax Law.

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

CAPCO is a captive insurance company domiciled in Bermuda. It has no place of business outside of Bermuda and does business only in Bermuda. The United States parent company holds 100 percent of CAPCO through an intermediary company. Payments are made directly from the parent company to CAPCO. These payments are for risks covered by CAPCO pertaining to professional liability. The risks are located in New York State.

Petitioner states that (1) the payments made by the parent to CAPCO are not tax deductible for federal, state and city income tax purposes because CAPCO is not considered to be a "true insurance company" by the Internal Revenue Service; (2) the payments are not treated as premium income by CAPCO for income tax purposes; and (3) the payments are not subject to the federal excise tax because they are not considered insurance premiums by the Internal Revenue Service.

Section 1510 of the Tax Law imposes an additional franchise tax on insurance corporations and states that:

(a) ... every alien insurance corporation, other than such corporations transacting the business of life insurance, (1) authorized to transact business in this state under a certificate of authority from the superintendent of insurance or (2) which is a risk retention group as defined in [section 5902(n) of the Insurance Law], 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, written on risks located or resident in this state

Section 5902(n) of the Insurance Law defines a "risk retention group" as:

any corporation or other limited liability association formed pursuant to the federal liability risk retention act of 1986:

(1) whose primary activity consists of assuming and spreading all, or any portion, of the liability exposure of its group members;

(2) which is organized for the primary purpose of conducting the activity described under paragraph one of this subsection;

(3) which:

. . .

(B) before January first, nineteen hundred eighty-five, was chartered or licensed and authorized to engage in the business of insurance under the laws of Bermuda ... and, before such date, had certified to the insurance commissioner of at least one state that it satisfied the capitalization requirements of such state, except that any such group shall be considered to be a risk retention group only if it has been engaged in business continuously since such date and only for the purpose of continuing to provide insurance to cover product liability or completed operations liability;

. . .

(8) the name of which includes the phrase "risk retention group".

In this case, it is not necessary to determine whether CAPCO is an insurance corporation. CAPCO is not authorized to transact business in New York State under a certificate of authority from the Superintendent of Insurance. Further, it appears that CAPCO is not a risk retention group pursuant to section 5902(n) of the Insurance Law. Therefore, CAPCO is not a corporation that is subject to the additional franchise tax imposed on insurance corporations under section 1510 of the Tax Law.

Since CAPCO is not subject to tax under section 1510 of the Tax Law, the question of whether the payments made by the parent corporation to CAPCO, for risks located in New York, are considered "premiums" for purposes of section 1510 is moot.

DATED: May 10, 1996

/s/
DORIS S. BAUMAN
Director
Technical Services Bureau

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