

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

TSB-A-96 (22) C
Corporation Tax
September 12, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C960501A

On May 1, 1996, a Petition for Advisory Opinion was received from Stulmaker, Kohn & Richardson, LLP, 524 Broadway, Albany, New York 12207.

The issues raised by Petitioner, Stulmaker, Kohn & Richardson, LLP, are: (1) Whether a group self-insurance workers' compensation trust is subject to tax under Article 33 of the Tax Law. (2) If yes, how is the tax on premiums applied to the entity? (3) If no, under which Article of the Tax Law is it taxable?

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

A group self-insurance workers' compensation trust ("TRUST") is issued a "Notice of Qualification as Group Self-Insurer Under the Workers' Compensation Law" by the New York State Workers' Compensation Board, pursuant to the Board's authority under section 50.3-a of the Workers' Compensation Law. An employer participating in group self-insurance shall not be relieved from any liability for compensation under section 50 of the Workers' Compensation Law. Each employer participating in the trust is jointly and severally liable for any lawful obligations of the TRUST; no indemnification exists. An employer becomes a member of the TRUST by signing the trust agreement and an indemnity agreement.

Petitioner states that TRUST is not licensed by the Superintendent of Insurance. Nor is it required to file, with the Superintendent of Insurance, the annual statement that insurers authorized to do an insurance business in New York State are required to file pursuant to section 307 of the Insurance Law.

Petitioner states that the amounts received by TRUST from the participating employers are held until the workers' compensation benefits are required to be paid to the employees. The funds held by TRUST are invested until needed. Since TRUST does not have any employees, it has a third-party manage the funds for which TRUST pays a management fee and an administrative fee.

Petitioner states that TRUST files Form 1120PC for Federal income tax purposes pursuant to Rev Rul 83-172, 1983-2 CB 107. This Internal Revenue Ruling provides that a group that has been created for the purpose of providing self-insured workers' compensation under state law is taxable as an insurance company under the provisions of section 831 of the Internal Revenue Code, even though it is not recognized as an insurance company under state law.

Section 50 of the Workers' Compensation Law provides that an employer must provide for the payment of benefits to its employees as required by the Workers' Compensation Law under one of three methods. An employer may (1) purchase a Workers' Compensation Insurance policy from an insurance company authorized to provide such coverage by the New York Superintendent of

Insurance, (2) purchase a policy from the State Insurance Fund, or (3) self-insure with the permission of the Chairman of the Workers' Compensation Board upon proof of financial security and ability to pay benefits when an injury occurs.

Employers in a particular industry who conduct related activities may choose to organize together for group self-insurance under section 50.3-a of the Workers' Compensation Law. However, an employer participating in group self-insurance is not relieved from the liability for compensation prescribed by the Workers' Compensation Law except by the payment thereof by the group self-insurer or by itself. That is, if the group fund fails to pay benefits, the individual employer will still be liable to make the payments. Section 53 of the Workers' Compensation Law provides that an employer is released from all liability for the payment of workers' compensation if it has purchased a policy from the State Insurance Fund. Otherwise, an employer is not relieved from liability for the payment of workers' compensation except by payment made by itself or its insurance carrier.

Section 50.5 of the Workers' Compensation Law states that the Chairman of the Workers' Compensation Board shall administer all matters relating to self-insurance under the Workers' Compensation Law and that the amount of deposit or bond to be filed with the Chairman shall be jointly determined by the Chairman and the Superintendent of Insurance. The Chairman may from time to time request the Superintendent of Insurance for such other assistance as may be necessary to insure the financial ability of the self-insurance groups to pay compensation for the employers in the industries covered by the plans.

Pursuant to Article 33 of the Tax Law, two of the franchise taxes imposed on insurance corporations are contained in sections 1501 and 1510 with a cap contained in section 1505.

The tax imposed pursuant to section 1501(a) of the Tax Law provides:

[e]very 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 1510(a) of the Tax Law provides for an additional premiums tax on insurance corporations as follows:

[e]xcept as hereinafter provided, every domestic insurance corporation, every foreign insurance corporation and 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 . . . 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 1500(a) of Article 33 of the Tax Law provides that 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.

Under Article 33 of the Tax Law, "doing an insurance business" is not defined. Historically, the Department of Taxation and Finance has looked to whether a company must be licensed by the Superintendent of Insurance to determine if it is doing an insurance business. Under section 187 of Article 9 (the predecessor to Article 33), the Court of Appeals held that the premiums tax was "in pari materia" with the provisions of the Insurance Law (Guardian Life Ins v Chapman, 302 NY 226 (1951)). In KPMG Peat Marwick, Adv Op Comm T & F, January 12, 1993, TSB-A-93(4)C, the Department held that an HMO that was exempt from licensing by the Superintendent of Insurance was not considered to be doing an insurance business under Article 33 and was subject to tax under Article 9-A.

Petitioner states that TRUST is not required to be licensed by the New York State Superintendent of Insurance to do an insurance business and it is not regulated under the Insurance Law. The Chairman of the Workers' Compensation Board administers all matters relating to TRUST. Therefore, TRUST is not doing an insurance business as contemplated by section 1500 of the Tax Law. Accordingly, TRUST is not an insurance corporation for purposes of Article 33 of the Tax Law and is not subject to the taxes imposed under Article 33 of the Tax Law.

With respect to the New York State personal income tax under Article 22 of the Tax Law, the tax is imposed on resident and nonresident trusts. However, section 601(g) of the Tax Law provides that a trust which is taxable as a corporation for Federal income tax purposes is not subject to tax under Article 22 of the Tax Law. Section 7701(a)(3) of the Internal Revenue Code provides that the term "corporation" includes an insurance company. In this case, TRUST is considered to be an insurance company under the Internal Revenue Code and taxable as a corporation. Accordingly, TRUST is not subject to the personal income tax imposed under Article 22 of the Tax Law.

However, section 209.1 of Article 9-A of the Tax Law imposes an annual franchise tax on a domestic or foreign corporation for the privilege of exercising its corporate franchise, doing business, employing capital, owning or leasing property in a corporate or organized capacity, or maintaining an office, in New York State during the taxable year. Section 209.4 of the Tax Law provides that a corporation liable for tax under Article 33 of the Tax Law is not subject to tax under Article 9-A of the Tax Law.

Section 208.1 of Article 9-A of the Tax Law provides that the term "corporation" includes any business conducted by a trustee or trustees wherein interest or ownership is evidenced by certificate or other written instrument.

Section 1-2.5(b)(2) of the Business Corporation Franchise Tax Regulations provides that:

[a] business conducted by a trustee or trustees in which interest or ownership is evidenced by certificate or other written instrument includes, but is not limited to, an association commonly referred to as a business trust or Massachusetts trust. In determining whether a trustee or trustees are conducting a business, the form of the agreement is of significance but is not controlling. The actual activities of the trustee or trustees, not their purposes and powers, will be regarded as decisive factors in determining whether a trust is subject to tax under article 9-A of the Tax Law. The mere investment of funds and the collection of income therefrom, with incidental replacement of securities and reinvestment of funds, does not constitute the conduct of a business in the case of a business conducted by a trustee or trustees.

In this case, the activities of TRUST exceed the "mere investment of funds and the collection of income therefrom, with incidental replacement of securities and reinvestment of funds" as contemplated in section 1-2.5(b)(2) of the Business Corporation Franchise Tax Regulations. Therefore, the activities of TRUST constitute the conduct of a business. Since the Trust is doing business, and interest in the Trust is evidenced by a written instrument (the trust agreement and the indemnity agreement), Trust is a corporation under section 208.1 of the Tax Law and section 1-2.5(b)(2) of the Business Corporation Franchise Tax Regulations. Accordingly, TRUST is deemed to be a corporation for purposes of Article 9-A of the Tax Law. Since TRUST is doing business in New York State pursuant to section 209.1 of the Tax Law, TRUST is subject to the tax imposed under Article 9-A of the Tax Law.

DATED: September 12, 1996

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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