

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

TSB-A-97(23)C
Corporation Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C970528A

On May 28, 1997, a Petition for Advisory Opinion was received from The Manufacturers Life Insurance Company (USA), 73 Tremont Street, Suite 1300, Boston, Massachusetts 02108-3915.

The issue raised by Petitioner, The Manufacturers Life Insurance Company (USA), is whether an insurance company, that does not conduct an insurance business in New York State and does not have a certificate of authority from the New York State Insurance Department, is subject to New York State franchise tax if it makes loans secured by mortgages on commercial real property in the state.

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

Petitioner, a stock life insurance company organized under the laws of Michigan, is engaged in the business of writing life insurance policies and annuities ("policies") for all states other than New York. Petitioner is a wholly owned subsidiary of The Manufacturers Life Insurance Company, a mutual life insurance company, organized under the laws of Canada.

Petitioner is authorized by the insurance departments of 49 states and the District of Columbia to conduct an insurance business in those jurisdictions. Petitioner does not solicit insurance business in New York State and is not authorized to transact an insurance business under a certificate of authority from the New York State Insurance Department. In a very limited number of cases, Petitioner receives premium payments from persons to whom it sold policies while they were non-New York residents and who subsequently relocated to New York State.

Petitioner is considering making loans that are secured by mortgages on commercial real property located in New York (the "Loans"). Petitioner currently has no loans secured by New York real property. In making the Loans, Petitioner will not maintain any office in New York, but will occasionally send employees to New York to contact potential borrowers, existing borrowers, or mortgage brokers (who will be unaffiliated independent contractors representing the potential borrowers), gather market information and perform due diligence. Petitioner's employees or the mortgage brokers will solicit and aid in the preparation of applications for Loans and, in connection therewith, assemble credit information (including property inspection reports and appraisals) and title information. All information assembled will be sent to Petitioner to be reviewed and approved in Massachusetts and/or Canada. Petitioner occasionally may send employees to New York to negotiate and monitor the closing of the Loans, but will enter into and execute all the documentation evidencing the Loans outside of New York.

Petitioner maintains a significant majority of its U.S. assets in New York custodial accounts, but will open no bank account in New York (other than possibly a "lock box") to facilitate its mortgage lending in New York. Loans made by Petitioner will generally be funded entirely by Petitioner, with the proceeds of any Loan being disbursed to the borrower from one of its existing bank accounts. Petitioner may occasionally sell one or more participations in a Loan to non-New York banks or other non-New York institutions. Petitioner will maintain no employees within New York to service any of the Loans. All Loans will be serviced by Petitioner in Toronto, Canada. Monthly payments of principal of, and interest on, the Loans will be mailed to a post office box in Buffalo, New York, but all payments will be processed in Toronto, Canada. Petitioner will not hold title to real property within New York other than title necessary to secure a Loan or property foreclosed or otherwise taken to satisfy a defaulted Loan, and Petitioner would manage such foreclosed property until an opportune time for resale. Petitioner expects to make only four to ten Loans annually pursuant to the above procedures.

Further, (i) Petitioner does not and will not have an office, place of doing business or telephone listing in New York, (ii) Petitioner's directors, officers and employees may visit New York to take part in seminars, visit rating agencies, and attend closings of purchases and sales of securities (other than Loans), (iii) Petitioner currently has no employees or agents stationed in New York, and (iv) the income to be derived by Petitioner from making Loans in New York will be insubstantial in comparison to the income to be derived by Petitioner from its ordinary and regular insurance activities, all of which are conducted outside of New York.

Petitioner will obtain a certificate of authority to conduct business in New York pursuant to section 1301 of the New York Business Corporation Law, but will not obtain a Certificate of Authority to conduct an insurance business from the New York Insurance Department and will not conduct an insurance business in New York. Petitioner does not presently conduct any business activity in New York and will not in the future conduct any business activity in New York other than the Loan program.

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(b)(1) of the Tax Law provides for an additional premiums tax on insurance corporations as follows:

[e]xcept as hereinafter provided, every domestic life insurance corporation, and every foreign and alien life insurance corporation 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, received in cash or otherwise on risks resident in this state

Section 1505 of the Tax Law limits the amount of taxes imposed by providing that, notwithstanding the provisions of sections 1501 and 1510, the amount of taxes imposed under such sections shall not exceed an amount computed as if such taxes were determined solely under section 1510 at the reduced rate of 2.6 percent.

Section 1500(a) 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.

Section 209.4 of Article 9-A of the Tax Law provides that a corporation that is taxable under Article 33 of the Tax Law is not subject to tax under Article 9-A of the Tax Law.

In Mound, Cotton & Wollan, Adv Op Comm T & F, September 16, 1988, TSB-A-88 (20)C, it was held that a foreign insurance company not authorized to transact business in New York State could purchase, for investment purposes, mortgages secured by New York real estate without incurring franchise tax liability under Article 33 of the Tax Law and, pursuant to section 209.4 of the Tax Law, was not subject to tax under Article 9-A of the Tax Law because it was an insurance corporation subject to franchise tax under Article 33 of the Tax Law. The company was not licensed or qualified to do business in New York State. The company was considering the purchase of mortgages secured by New York real estate. The mortgages would be purchased through a large corporate broker licensed in New York. Negotiations would take place both in and out of New York and the contracts could be signed either in or out of New York. In addition, an agent, either in or out of New York, would service the mortgages. The company did not incur franchise tax liability under Article 33 because it did not have a certificate of authority from the Superintendent of Insurance and had no taxable premiums under section 1510 of the Tax Law. Therefore, the corporation's tax liability was zero because of the cap computed pursuant to section 1505 of the Tax Law.

In this case, Petitioner will obtain a certificate of authority to conduct business in New York State, but will not have a certificate of authority from the Superintendent of Insurance to conduct an insurance business in New York State. Petitioner will occasionally send employees into New York who will contact potential borrowers, existing borrowers, or mortgage brokers, will gather market information, will perform due diligence and will negotiate and monitor the closing of the Loans (although the Loans will be executed outside New York State). Petitioner's directors, officers and employees may also come into New

York to take part in seminars, visit rating agencies, and attend closings of purchases and sales of securities (other than Loans). Petitioner may on occasion, foreclose or otherwise take title to property in New York in satisfaction of a defaulted Loan and manage the property until an opportune time for reselling it.

The totality of Petitioner's proposed activities in New York State would constitute doing business in New York State and Petitioner would be subject to the tax imposed under section 1501 of the Tax Law. However, since Petitioner will not have a certificate of authority from the Superintendent of Insurance to conduct an insurance business in New York State, Petitioner will not have taxable premiums under section 1510 of the Tax Law. Therefore, pursuant to section 1505 of the Tax Law, Petitioner's tax liability under Article 33 of the Tax Law would be zero. Further, as in Mound, Cotton & Wollan, supra, Petitioner would not be subject to tax under Article 9-A of the Tax Law because it is a corporation taxable under Article 33 of the Tax Law.

DATED: September 3, 1997

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

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