STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C120806A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [redacted]. Petitioner asks whether its activities in New Jersey in 2008 and 2009 ("the period at issue") constituted "doing business" in that state such that it was doing business both within and without New York State, and therefore entitled to allocate its income for purposes of Article 32.[1]

We conclude that Petitioner was doing business in New Jersey during the period at issue because, when taken together, the nature and frequency of Petitioner's employees' trips to New Jersey, Petitioner's purchase of a long-term license to use business space in a facility located in New Jersey, and its maintenance of computer equipment (which its employees used to conduct business) in that New Jersey facility demonstrate that Petitioner's New Jersey activities satisfy the factors found in the Article 32 regulations that are used to determine if a taxpayer is doing business in a state. Accordingly, Petitioner may allocate its income. We do not reach any conclusions as to what portion of Petitioner's income might be attributable to its activities in New Jersey.

Facts

Petitioner is a wholly-owned U.S. subsidiary of a global group. Its principal activity is the provision of a settlement service that mitigates settlement risk (*i.e.*, the risk that only one party to a financial transaction will pay what it owes) through a global multi-currency settlement system. Petitioner maintains accounts with central banks in a number of countries to provide this global service and its customers are some of the world's largest financial institutions.

The Petitioner's revenues are derived principally from the fees that it charges its global customer base.

During the period at issue, the Petitioner's principal office was located in New York and its employees were based in New York.

However, in January 2004, the Petitioner entered into a service agreement called an "e-business Hosting Agreement" with a third party provider. Under the terms of that contract, the Petitioner was supplied with hosting space and related services at supplier's e-business Hosting Center in Secaucus, New Jersey ("Secaucus Hosting Center") for a ten-year period. Section 11.3 of the agreement, "No Lease of Real Property," states that the agreement "is a services agreement and not a lease of any real property."

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[1] Article 32 of the Tax Law was repealed by chapter 59 of the Laws of 2012, which became effective for taxable years beginning on or after January 1, 2015. All the facts stated in this Advisory Opinion relate to the 2008 and 2009 tax years.

During the period at issue, Petitioner housed some of its data processing equipment at the Secaucus Hosting Center. The Petitioner's New York employees shared the responsibility for daily monitoring of the Petitioner's settlement service and addressing any exceptions related to carrying out that settlement service with the employees of the Petitioner's overseas affiliate. Occasionally, the Petitioner's employees performed the monitoring function, which required significant technical expertise, at the Secaucus Hosting Center using the Petitioner's data processing equipment.

Frequently, the exceptions that needed to be addressed were related to out-of-trend settlement member payment issues. When employees working at the Secaucus Hosting Center encountered this type of exception, they used the Petitioner's computers located on-site to detect at what stage of the settlement process the issue had occurred. The employee responding to the exception would create a log to manage the issue, contact relevant parties, document any actions taken on the issue and conversations related to the issue, and ultimately resolve any issue arising by verifying that the "pay-in" funding for the related settlements had taken place.

During 2008, at least five of the Petitioner's employees travelled to the Secaucus Hosting Center on a regular basis for a total of approximately 60-70 trips. During 2009, the Petitioner's employees made approximately 50 trips to the Secaucus Hosting Center; a single employee accounted for most of these trips.

Petitioner filed franchise tax returns in New Jersey during 2008 and 2009.

Analysis

Under former Tax Law §1454(b)(1), a banking corporation whose "entire net income is derived from business carried on both within and without the state" may allocate its income based on a formula that includes a wage factor, a receipts factor, and a deposits factor.

20 NYCRR 19-1.1(c) defines the term "business carried on" for purposes of allocation under Article 32 to mean "doing business" as defined in section 20 NYCRR 16-2.7, "provided the income or expenses from such business are required to be included in the computation of the taxpayer's alternative net income."

20 NYCRR 16-2.7 provides, in part:

> (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:
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> (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.

In situations where it is necessary to determine whether a taxpayer is doing business *outside* of New York, the same factors apply. *See Sumitomo Trust and Banking Co.*, TSB-A-01(18)C (May 30, 2001).

Although 20 NYCRR 16-2.7(c) provides several examples of activities that would constitute "doing business," it is not necessary for a taxpayer to be engaged in one of these specific activities in order to be doing business within the state. Therefore, the conclusion that the Secaucus Hosting Facility is not a "bona fide office" or "branch" of Petitioner (two of the examples listed) does not mean that Petitioner is not doing business there. Similarly, it is clear from the details of Petitioner's contract with IBM that the contract is a license to use, not a lease of real property. *See Matter of Peter Pan Bus Lines, Inc.*, Tax Appeals Tribunal (July 28, 2005). But again, Petitioner does not have to own or lease real property in New Jersey in order to be doing business there.

The nature of the Petitioner's employees' activities in Secaucus supports Petitioner's claim that it is doing business there because its employees resolve potential transaction errors there. This work is critical to Petitioner's successful functioning as a financial institution.

The Article 9-A regulations defining "doing business" within a state (20 NYCRR 1-3.2[b]) are almost identical to the Article 32 regulations quoted above.[2] Therefore, Article 9-A advisory opinions interpreting section 20 NYCRR 1-3.2(b) can be used as a guide to interpreting 20 NYCRR 16-2.7. *See Sumitomo*, *supra*.

The Article 9-A regulations consistently have been interpreted to mean that, if a taxpayer's employees regularly perform any work in a state, the taxpayer is doing business in that state. *See G&S Creations, Inc.*, TSB-A-01(18)C (July 21, 2004). Here, Petitioner's employees traveled to the Secaucus Hosting Facility on a regular basis: on average, more than once a week throughout 2008 and 2009. A bank's employees coming into a state may constitute doing business in a state. *See Bleakley Platt & Schmidt*, TSB-A-90(25)C (Dec. 13, 1990).

Petitioner's agreement with the third party provider to use space at the Secaucus Hosting Center to house some of its computer equipment and as workspace for its employees was for a 10-year term. This demonstrates the continuity of Petitioner's presence outside New York. The fact that a significant amount of the equipment used by Petitioner's employees to conduct business was installed at the Secaucus Hosting Center also supports the conclusion that the nature of Petitioner's activities there was business-related, and that the Secaucus Hosting Center could be considered one of Petitioner's places of business.

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[2] The allocation formula used in Article 32 to determine what portion of a taxpayer's entire net income is attributable to New York was modeled after the allocation formula in Article 9-A. See Governor's Approval Mem, Bill Jacket, L 1985, ch 298 at 28-29.

Given the facts in this case, we conclude that Petitioner conducted business outside the state during the period at issue and, therefore, it has the right to allocate its income for the period at issue. Because Petitioner did not provide any information about what part of its income for the period at issue was attributable to its activities in New Jersey, we do not reach any conclusions as to what portion of its income might be attributable to Petitioner's out-of-state activities.

DATED: May 27, 2016

/S/
DEBORAH R. LIEBMAN
Deputy Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.