New York State Department of Taxation and Finance
Office of Counsel

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Corporation Tax
June 10, 2016

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NOS. C120607B and C120607C

The Department of Taxation and Finance received Petitions for Advisory Opinion from [redacted] and [redacted] "Petitioners". Petitioners, both foreign surplus lines insurance corporations that are not authorized to transact business in New York under a certificate of authority (*i.e.*, "unauthorized" insurers), ask whether their franchise tax should be computed under Tax Law § 1502 or § 1502-a.[1] They also ask whether their franchise tax liability is affected by the limitation in Tax Law § 1505(a)(1).

We conclude that each Petitioner, as an unauthorized non-life insurance corporation, must calculate its tax under Tax Law § 1502, and not § 1502-a, for taxable years beginning on or after January 1, 2003. Petitioners' tax liability is not limited by § 1505(a)(1).

Facts

Petitioners are unauthorized foreign insurance corporations that write surplus lines policies for property and casualty insurance risks that are not typically insurable through standard insurance carriers. Their policies are available to New York residents through licensed excess line brokers, who are each separately liable to the Superintendent of Financial Services for a sum equal to 3.6% of gross premiums on these surplus lines policies under Insurance Law § 2118(d).

Beginning in 2003, each Petitioner has filed annually a Form CT-33-NL, entitled "Non-Life Insurance Corporation Franchise Tax Return," and paid $250 in tax, the minimum amount due under Tax Law § 1502-a.

Analysis

Tax Law § 1501 imposes a franchise tax, to be calculated according to Tax Law § 1502, on all insurance corporations doing business in New York, regardless of whether they have a certificate of authority from the Superintendent of Financial Services.

Pursuant to § 1502, tax is calculated on the highest amount computed under four alternative bases: a tax on allocated entire net income (ENI), a tax on allocated business and investment capital, a tax on a prescribed portion of entire net income plus salaries and other compensation of elected or appointed officers and certain stockholders, or a fixed dollar

[1] For purposes of this advisory opinion, it is assumed that both petitioners are doing an insurance business in New York and are subject to taxation pursuant to Article 33.

minimum tax of $250. In addition to the tax computed under the highest of the four alternative bases, there is a tax on subsidiary capital. Tax Law § 1502(b).

Petitioners' status as surplus lines insurers and their issuance of property and casualty insurance prevent them from qualifying as life insurance corporations according to the requirements in Insurance Law § 4205. As such, Petitioners are non-life insurance corporations.[2]

Prior to January 1, 2003, authorized non-life insurance corporations also paid an additional franchise tax under Tax Law § 1510(a), calculated at 1.3% of gross premiums written on risks located in New York.[3] However, Tax Law § 1505(a)(1) limited total tax liability under Article 33 for all non-life insurance corporations, both authorized and unauthorized, to their tax liability under Tax Law § 1510, but calculated at a higher rate that varied according to the year.

Part H3 of Chapter 62 of the Laws of 2003 restructured the tax for authorized non-life insurance corporations, which were no longer subject to the tax imposed by § 1501 or the additional tax imposed under § 1510(a). Instead, authorized non-life insurance corporations became subject to the newly enacted Tax Law § 1502-a and taxable on their total gross premiums, with a minimum tax base of $250. The Legislature did not include a limitation on the amount of tax for which authorized non-life insurance corporations are liable under § 1502-a. In addition, under the 2003 legislation, non-life insurance corporations, authorized or unauthorized, were no longer subject to the limitation on tax in § 1505(a)(1). Because § 1502-a applies only to authorized non-life insurance corporations, an unauthorized non-life insurance corporation remains subject to the tax imposed in § 1501, calculated according to § 1502. This is consistent with the Department's previous guidance in *Service Lloyds Ins. Co.*, TSB-A-09[2]C (Mar. 2, 2009).

Since Petitioners are unauthorized non-life insurance corporations, they are subject to tax under § 1501 and have been required to pay tax calculated according to § 1502 since January 1, 2003. They must pay the tax on the highest of the four Tax Law Article 33 tax bases, plus any applicable tax on allocated subsidiary capital computed pursuant to § 1502(b) of the Tax Law, and these taxes are not limited by § 1505. *See* TSB-M-12(4)C.

Petitioners argue that requiring them to pay franchise tax under the Tax Law would result in double taxation of premiums because the excess lines brokers that sell Petitioners' policies are liable for a sum imposed by Insurance Law § 2118 that is measured by gross premiums. Since we find that Petitioners are taxable under § 1501 and must compute their tax pursuant to section § 1502, they are taxable on their allocated income, allocated capital base, or their allocated

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[2] Petitioners' past filing of Form CT-33-NL indicates that they concur with this classification.

[3] A different rate applied to accident and health insurance premiums, which is not relevant to this discussion.

income and salaries, not on their premiums. [4] Therefore, any potential concerns Petitioners might have regarding double taxation are unfounded.

DATED: June 10, 2016

/S/
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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.

[4] The use of a premiums factor to determine the amount of income or capital allocated to New York does not constitute taxation of these premiums. *See Matter of Disney Enter. v Tax Appeals Tribunal*, 10 NY2d 392, 399 (2008).