

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C160401A

The Department of Taxation and Finance received an amended Petition for an Advisory Opinion from [REDACTED] (“Petitioner”), [REDACTED]. Petitioner asks whether premiums that otherwise would not be New York premiums for purposes of Tax Law § 1504(b) become treated as New York premiums if they are related to activities permitted by Insurance Law § 2117(k).

The Department concludes that the premiums related to the § 2117(k)<sup>1</sup> activities do not qualify as “New York premiums” as that term is defined in Tax Law § 1510(b).

**FACTS**

Petitioner is wholly-owned by [REDACTED]. Petitioner is not licensed to conduct an insurance business in New York.

Foreign branches of Petitioner and some of its related alien insurers are not authorized to conduct insurance businesses in New York (collectively, “Alien Insurers”). The Alien Insurers, however, will authorize a New York licensed broker to engage in certain of the activities allowed under Insurance Law § 2117(k) on their behalf. These activities “will all involve insurance provided to multinational entities that are resident outside the United States. The insurance will not cover property or risks located or resident in New York State. The coverage provided will not apply to any activities that are conducted by the entities in New York State, except to the extent of covering employees who might be temporarily present in the State but who are based outside the State.”

Petitioner states that “no premiums will be allocated to New York for purposes of” Insurance Law § 9102.<sup>2</sup> It also claims that the Alien Insurers do not insure property or risks located or resident in New York State for purposes of Tax Law § 1504(b)(2). The only activities

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<sup>1</sup>Insurance Law § 2117(k) became effective as of July 2, 2015. L. 2015, c 64, § 1. Therefore, the Division’s analysis pertains to tax years beginning on or after January 1, 2015.

<sup>2</sup> Insurance Law § 9102 provides that “[i]n determining the amount of direct premiums taxable in this state, all such premiums written, procured or received in this state shall be deemed written on property or risks located or resident in this state except such premiums properly allocated and reported as taxable premiums of any other state or states.”

that the licensed broker will engage in on behalf of the Alien Insurers are those permitted under Insurance Law § 2117(k).

## ANALYSIS

For the privilege of doing business in New York, foreign and alien life insurance corporations are subject to Tax Law § 1501 and thereby compute their respective tax liabilities pursuant to Tax Law § 1502. The tax imposed is the greatest amount of that computed on their allocated entire net income (Tax Law § 1502[a][1]), or their allocated business and investment capital (Tax Law § 1502[a][2]), or a percentage of their entire net income plus certain wage expenses and issued capital stock (Tax Law § 1502[a][3]) or a minimum of \$250.00 (Tax Law § 1502[a][4]) plus a tax computed on their subsidiary capital (Tax Law § 1502[b]).

To determine its allocated entire net income or allocated business capital, a foreign or alien unauthorized life insurance corporation must first compute its entire net income or business capital. Tax Law § 1503. That amount is then allocated to New York by a percentage consisting of two factors, a premiums factor worth 90% and a wage factor worth 10%. Tax Law § 1504(a). The numerator of the Alien Insurers' premiums factor would be their "New York premiums" and the denominator would be their "total premiums." Tax Law § 1504(a)(1).

The term "New York premiums" is defined, in part, as "that portion of total premiums, written, procured or received on ... risks located or resident in New York and shall include premiums written, procured or received on ... risks located or resident in New York and shall also include premiums written, procured or received in this state on business which cannot be specifically assigned as located or resident in any other state or states ...". Tax Law § 1504(b)(2)(A).

The threshold question then is whether the Alien Insurers' premiums related to the brokers' § 2117(k) activities qualify to be treated as "total premiums." For purposes of Tax Law § 1504(a)(1), "[t]otal premiums' shall be reported on a written basis or on a paid-for basis consistent with the basis required by the annual statement filed with the [Superintendent of Financial Services] pursuant to section three hundred seven of the insurance law."<sup>3</sup> Tax Law § 1504 (b)(3).

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<sup>3</sup> Effective October 3, 2011, with the merger of the Department of Insurance and the Banking Department into the new Department of Financial Services, insurance companies are now regulated by the Superintendent of Financial Services (*see* chapter 62 of the Laws of 2011, part A).

Insurance Law § 307(a)(1) directs that:

Every insurer ... that is authorized to do an insurance business in this state ... shall file in the office of the [Superintendent of Financial Services], annually on or before the first day of March, a statement, to be known as its annual statement ... Such statement shall be in such form and shall contain such matters as the superintendent shall prescribe.

Insurance Law § 307(a)(3) provides that:

The annual statement of an alien insurer ... shall be a ... statement ... of the business done in the United States and of the assets held by or for it within the United States for the protection of policyholders and creditors within the United States ... and shall not contain any statement in regard to its assets and business elsewhere.

The Alien Insurers are not authorized insurance corporations and, as such, do not file annual statements with the Superintendent of Financial Services nor do they report premiums to the Department of Financial Services. Moreover, the life insurance risks associated with the § 2117(k) activities reside outside the United States. Insurance Law § 2117 (k)(1)(A). The Alien Insurers' premiums associated with the § 2117(k) activities do not qualify to be treated as "total premiums" and, therefore, cannot be treated as "New York premiums." Tax Law § 1504(b)(2)(A).

DATED: October 4, 2017

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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.