

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

TSB-A-86 (5.1) C
Corporation Tax
April 30, 1986

STATE OF NEW YORK
STATE TAX COMMISSION

MODIFIED ADVISORY OPINION PETITION NO. C850520A

On January 30, 1986, an Advisory Opinion was issued to Banco Popular de Puerto Rico, Box 2708, G. P. O., San Juan, Puerto Rico 00936.

After reexamining the facts as presented by Petitioner, such Advisory Opinion is modified by annulling the discussion and conclusion regarding the allocation of interest income from U.S. obligations that is treated as income which is effectively connected with the conduct of a trade or business within the U.S. pursuant to section 882(e) of the Internal Revenue Code, and substituting the following discussion and conclusion.

For taxable years 1975 through 1980, the taxable years at issue, section 1454(a) of the Tax Law provided that when entire net income is derived from business carried on both within and without New York State, such entire net income may be allocated within and without New York State under the rules and regulations prescribed by the Tax Commission. However, for the taxable years at issue, there were no regulations promulgated in accordance with section 1454 of the Tax Law regarding allocation methods. Therefore, the allocation methods described in Part 35 of the Tax on State Banks, other Financial Corporations and National Banking Associations regulations issued under Articles 9-B and 9-C (hereinafter Articles 9-B and 9-C regulations) of the Tax Law remain applicable.

Section 35.1 of the Articles 9-B and 9-C regulations provides that a corporation which is doing business or carries on its business through offices maintained both within and without New York State must apportion its net income as provided in the regulations.

Section 35.2 of the Articles 9-B and 9-C regulations states:

"(a) A corporation or association is regarded as "doing business" or "carrying on business" within or without the State when it occupies, has or maintains an office, agency or branch where its functions are systematically and regularly carried on.

(b) In order to require an apportionment of the income from business carried on within and without New York State, it is not necessary that the branch or agency maintained without the State, in the case of a domestic corporation or association, or within the State, in the case of a foreign corporation or association, shall necessarily conduct all functions of the banking business of the corporation or association. It is sufficient if the branch conducts some of the functions which the corporation or association is authorized to exercise regularly and with a fair measure of permanency and continuity."

Technical Services Bureau memorandum TSB-M-78(23)C provides that a banking corporation which is doing a banking business both within and without New York State may allocate its entire net income within and without New York State when it is carrying on a full service banking business both within and without New York State through its offices, branches and agencies. The memorandum then defines an office, branch or agency as follows:

"...For purposes of Article 32, an office, branch or agency is a permanent place of business which is regularly and systematically maintained, occupied and used by the taxpayer to carry on a full service banking business. Such business must be conducted through its own employees who are regularly in attendance at such place of business during normal business hours. It is not necessary that the office, branch or agency maintained without New York State conduct all the functions of a banking business.

For an office, branch or agency to do a full service banking business, it must conduct the following functions on a regular basis:

1. Approve loans and disburse the funds and
2. Accept loan repayments

plus conduct one or more of the other functions of a banking business on a regular basis, such as:

1. Accept deposits
2. Pay withdrawals
3. Cash checks, drafts and other similar items
4. Issue cashier's checks, treasurer's checks, money orders and other similar items
5. Buy, sell, pay or collect bills of exchange
6. Issue letters of credit
7. Receive money for transmission or transmitting the same by draft, check, cable or otherwise
8. Exercise fiduciary powers

A bank which acts as an agent for another bank, is not an office, branch or agency of such bank for New York State tax purposes."

Section 35.3 of the Articles 9-B and 9-C regulations provides that a corporation which is doing business or carrying on business both within and without New York State and which keeps accounts of the income and expenses of each office, branch or agency which in the opinion of the Tax Commission actually reflect the net income from business carried on within New York State of each office, branch or agency, may allocate its net income based on such accounts. Where the corporation does not keep accounts of the income and expenses of each office, branch or agency separately in such a way as to reflect accurately the net income from business carried on within New York State, an allocation of net income is made based on the proportion that gross income derived from business carried on within New York State bears to the gross income derived from all business carried on both within and without New York State.

For purposes of Article 32 of the Tax Law, a taxpayer which allocates its entire net income by separate accounting allocates only items included in the computation of entire net income within and without New York State. When allocating entire net income, each item of gross income, gain, loss and deduction included in the computation of Federal taxable income and each adjustment or modification required by subdivisions (b) through (h) of section 1453 of the Tax Law is allocated to the office, branch or agency of the taxpayer to which such gross income, gain, loss, deduction, adjustment or modification is attributable. The taxpayer must maintain separate books and records that, in the opinion of the Tax Commission, properly reflect the gross income, gains, losses, deductions, adjustments and modifications directly or indirectly attributable to its offices, branches and agencies both within and without New York State.

Petitioner states that it has branches in Puerto Rico, New York and California and that for the taxable years at issue it allocates entire net income within and without New York State using the principles of separate accounting.

Accordingly, as stated in Petitioner's Advisory Opinion dated January 30, 1986, when computing its tax pursuant to Article 32 of the Tax Law for taxable years 1975 through 1980, Petitioner must include in entire net income the interest income from U.S. obligations that is treated as income effectively connected with the conduct of a trade or business within the U.S. pursuant to section 882(e) of the Internal Revenue Code. However, Petitioner may allocate entire net income within and without New York State by the principles of separate accounting if, in the opinion of the Tax Commission, such separate accounting records properly reflect the gross income, gains, losses, deductions, adjustments and modifications directly or indirectly attributable to its offices, branches and agencies both within and without New York State. In such case, interest income from U.S. obligations that is treated as income effectively connected with the conduct of a trade or business within the U.S. pursuant to section 882(e) of the Internal Revenue Code is allocated without New York State.

DATED: April 30, 1986

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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