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

TSB-A-98(1)C
Corporation Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C961105E

On November 5, 1996, a Petition for Advisory Opinion was received from The Daiwa Bank, Limited, 2-1, Bingomachi 2-Chome, Chuo-Ku, Osaka, Japan 541.

The issue raised by Petitioner, The Daiwa Bank, Limited, is whether it is doing business pursuant to section 16-2.7(a) and (b) of the Franchise Tax on Banking Corporations Regulations ("Article 32 Regulations") and taxable under Article 32 of the Tax Law.

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

Petitioner was a banking corporation subject to Article 32 of the Tax Law. By Order of the Board of Governors of the Federal Reserve System, the Superintendent of Banks of New York State and the state banking departments and commissions of the States of California, Illinois, Massachusetts, Florida and Georgia on November 1, 1995 (the "Order"), Petitioner was required to cease operations in the United States and to cooperate with the investigations of federal and state bank regulators into its affairs.

The Order required that Petitioner, no later than February 2, 1996, terminate completely all the banking operations it conducted through its branches, agencies and representative offices in the United States. The termination was to be conducted under the supervision of the Board of Governors and, with respect to the New York branches, the New York State Superintendent of Banks. The Order permitted Petitioner to establish and maintain one or more offices, liquidating entities, or service subsidiaries in the United States, at which no banking or other business is conducted, solely for the purposes of (a) administering any books and records that it may be required to maintain in the United States pursuant to the order or pursuant to any other judicial or legal requirement applicable to Petitioner or its institution-affiliated parties or insiders, (b) administering its ongoing affairs with federal, state and local taxing authorities and regulatory bodies, (c) defending or prosecuting any criminal or civil action, inquiry or investigation to which Petitioner or any of its institution-affiliated parties or insiders may become a party, and (d) administering the orderly termination of Petitioner's banking operations in the United States. After termination of its banking operations in the United States by February 2, 1996, Petitioner was required to surrender the licenses of its branches, agencies and representative offices to the New York State Superintendent of Banks and to the other states' appropriate state supervisory authorities.

Petitioner has a wholly-owned subsidiary ("Subsidiary") which performs services on behalf of Petitioner which are necessary or appropriate to resolve any matters relating to, or arising from, the termination of banking activities and the closing of offices in New York State by Petitioner. The Order requires that no other business be conducted by the Subsidiary. Essentially, the

Subsidiary is responsible for taking care of all of Petitioner's outstanding obligations that are unrelated to banking. Petitioner has executed a Power of Attorney granting two employees of the Subsidiary limited authority to act on Petitioner's behalf in performing the services set forth above to wind up Petitioner's affairs. Petitioner does not have direct control over the manner in which the Subsidiary performs these activities. The Subsidiary and Petitioner operate independently of each other. There are no common officers or directors and no overlap of personnel between the entities. Petitioner and Subsidiary hold themselves out to the public as separate and distinct businesses, each conducting business under its own name.

Since it ceased operations in New York, Petitioner has not had an office in New York and does not conduct any banking business in New York. Upon ceasing operations in New York, Petitioner assigned its leased office space to the Subsidiary. As a condition of the landlord's approval of the assignment, Petitioner was required to guarantee the lease.

For a short period of time after the termination of Petitioner's operations, Petitioner maintained a few employees in New York in order to respond to inquiries by the bank regulatory agencies as contemplated by the orders issued by the New York State Banking Department and the Federal Reserve Board. The employees were not in New York to conduct any activities for profit.

The majority of Petitioner's business assets were sold to an unrelated third party ("Purchaser"). Petitioner also entered into a servicing agreement with the Purchaser to service certain loans Petitioner was unable to sell. The Purchaser has contracted with Petitioner to service Petitioner's outstanding loans at an arm's length price.

This Advisory Opinion does not address the taxability of the Subsidiary or the Purchaser under Article 9-A of the Tax Law.

The specific activities at issue are:

1. The Subsidiary's performance of non-banking activities on behalf of Petitioner, as follows: administering any books and records required by bank regulatory agencies; administering ongoing affairs and other matters with federal, state and local tax authorities and regulatory bodies; fulfilling all obligations contained in the leases and other agreements assigned to it by Petitioner; and paying all liabilities and obligations assigned to it by Petitioner.

2. Executing a Power of Attorney granting limited authority to two employees of the Subsidiary.

3. Assigning leased office space to the Subsidiary in New York State.

4. Guaranteeing a lease assigned to the Subsidiary in New York State.

5. Having temporary employees in New York solely to answer questions as required by bank regulatory agencies.

6. The Purchaser's performance of the following activities, at an arm's length price, on behalf of Petitioner: collecting interest, principal, premiums, penalties, charges, fees and other payments on Petitioner's outstanding loans; disbursing funds to borrowers, agents and other persons; and arranging sales of the loans, if requested to do so by Petitioner's head office (where Petitioner receives the interest income collected on the loans).

With respect to this servicing agreement, the Subsidiary acts as a liaison between the Purchaser and Petitioner. It also assists in monitoring, servicing, and liquidating the loans, and may assist in foreclosure or other actions to protect the interests of Petitioner. Petitioner ultimately receives the interest income that the Purchaser collects on the loans.

Discussion

Section 1451 of Article 32 of the Tax Law imposes an annual franchise tax on every banking corporation for the privilege of exercising its franchise or doing business in New York State in a corporate or organized capacity during the taxable year.

Section 1452(a) of the Tax Law defines "banking corporation" for purposes of Article 32 of the Tax Law. Section 1452(a)(2) of the Tax Law provides that "every corporation or association organized under the laws of any other state or country which is doing a banking business" is a banking corporation.

Section 16-2.7 of the Article 32 Regulations states that:

(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 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:

(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.

(c) Examples of activities of a corporation which would constitute doing business in New York State include the following:

(1) operating a branch in New York State;

(2) operating a loan production office in New York State;

(3) operating a representative office in New York State; or

(4) operating a bona fide office in New York State.

(d) A corporation will not be deemed to be doing business in New York State because of:

(1) the maintenance of cash balances with banks or trust companies in New York State;

(2) the ownership of shares of stock or securities kept in New York State in a safe deposit box, safe, vault or other receptacle rented for this purpose, or if pledged as collateral security, or if deposited in safekeeping or custody accounts with one or more banks or trust companies, or brokers who are members of a recognized securities exchange;

(3) the taking of any action by any such bank or trust company or broker, which is incidental to the rendering of safekeeping or custodian service to such corporation;

(4) the maintenance of an office in New York State by one or more officers or directors of the corporation who are not employees of the corporation if the corporation is not otherwise doing business in New York State;

(5) the keeping of books or records of a corporation in New York State, if such books or records are not kept by employees of such corporation and such corporation does not otherwise do business in New York State; or

(6) any combination of the foregoing activities....

In Bleakley Platt & Schmidt, Adv Op Comm of T & F, December 13, 1990, TSB-A-90(25)C, it was held that a foreign bank that had no employees, offices or agents in New York was not subject to tax under Article 32 if its contacts with the state were limited to security interests in property located in New York. The bank made loans to New York residents and businesses which were accepted, processed, approved and serviced at the corporation's Connecticut office. The

fact that the bank acquired a security interest in property within New York and acquired title to property located in New York through foreclosure of security interests did not, by itself, deem the bank to be doing business in New York. Also, the hiring of independent contractors located in New York did not constitute doing business in New York. However, the bank could be subject to franchise tax if corporate officers regularly visited New York to negotiate the loans or if an agency relationship existed between the corporation and a person or entity conducting business in New York. Furthermore, the closing of loans in New York might constitute doing business in New York. In all cases, the totality of circumstances determined the bank's taxable status.

For purposes of Article 9-A of the Tax Law, the definition of doing business contained in section 1-3.2(b) of the Business Corporation Franchise Tax Regulations is identical to the definition of doing business for purposes of section 16-2.7(a) of the Article 32 Regulations. In GEF Funding Corp, Adv Op Comm T & F, January 26, 1988, TSB-A-88(2)C, it was held that for purposes of Article 9-A of the Tax Law, the activities of a corporation do not constitute doing business in New York State where the corporation is engaging in mortgage loan activities when the loans are secured by real property located in New York State but the acceptance of application, processing, approval and servicing of the loans are conducted at the corporation's office outside New York State. However, it was also held that a corporation could be subject to tax if it is determined that an agency relationship exists between such corporation and a person or entity and the agent is conducting the corporation's business in New York State.

To ascertain the existence of an agency relationship, the relationship of the parties must be examined. "An agency is a fiduciary relationship which results from a manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and the consent by the other to act." Custom Management Corp v NY St Tax Commn, 148 AD2d 919, 920, citing Meese v Miller, 79 AD2d 237, 241. (emphasis added) Generally, the existence of an agency relationship is a question of fact not susceptible of determination in an Advisory Opinion. However, a Power of Attorney is a written authorization to an agent to perform specified acts in behalf of his principal, which acts, when performed, shall have a binding effect upon the principal. It is an instrument by which the authority of one person to act in the place and stead of another as attorney in fact is set forth. It is a mere contract of agency, that is, an authorization by a principal for the accomplishment on his behalf of a particular purpose or the performance of a particular act. (2 NY Jur 2d Agency §62)

In this case, Petitioner, a bank organized outside of the United States, was a banking corporation subject to tax under Article 32 of the Tax Law. After Petitioner was required to cease its operations in New York State by the New York State Superintendent of Banks and the Board of Governors of the Federal Reserve System, Petitioner surrendered its New York banking license to maintain a branch in New York City on February 2, 1996. Since then, Petitioner has not conducted a banking business in New York State or operated a branch, agency, loan production office, representative office or bona fide office in New York State.

However, Petitioner continues to be a banking corporation (because of its activities in Japan) and may continue to be subject to tax under Article 32 if it is considered to be doing business in New York State, pursuant to section 16-2.7 of the Article 32 Regulations, after it ceased its banking operations in New York.

It appears that pursuant to the Order, the sole business of the Subsidiary is limited to administering the books and records required by bank regulatory agencies, administering the ongoing affairs and other matters with federal, state and local tax authorities and regulatory bodies, defending or prosecuting any action, inquiry or investigation to which Petitioner may become a party, and administering the orderly termination of Petitioner's banking operations in the United States. To accomplish this, Petitioner executed a Power of Attorney granting limited authority to two employees of the Subsidiary. Accordingly, an agency relationship exists between Petitioner and the Subsidiary.

Section 16-2.2 of the Article 32 Regulations provides that a corporation that continues to do business after it has been dissolved by the filing of a certificate of dissolution, by proclamation or otherwise is subject to tax under Article 32 of the Tax Law. However, where the activities of a dissolved corporation are limited to the liquidation of its business and affairs, the disposition of its assets (other than in the regular course of business), and the distribution of proceeds, it is not taxable under Article 32.

In this case, Petitioner has not dissolved. However, Petitioner was required by banking regulatory authorities to cease all of its banking activities in the United States and surrender its certificate of authority to do a banking business in New York State. The circumstances in this particular case are similar to the dissolution of a corporation. Therefore, to the extent that the activities conducted by the Subsidiary on behalf of Petitioner are limited to winding up Petitioner's business and affairs after it ceased its banking business, as directed by banking regulatory authorities, these activities would not rise to the level of doing business by Petitioner under section 16-2.7 of the Article 32 Regulations.

However, the activities of the Subsidiary include acting as a liaison between the Petitioner and Purchaser with respect to Petitioner's servicing agreement with the Purchaser. In addition, the Subsidiary assists in monitoring, servicing and liquidating the loans and may assist in foreclosure or other actions to protect the interests of Petitioner. These activities may go beyond activities conducted in winding up the affairs of Petitioner and rise to the level of doing business under section 16-2.7 of the Article 32 Regulations. Therefore, in the absence of a concerted effort on a regular and continuous basis to dispose of the held assets as may be evidenced by periodic sales of the assets, these activities could make Petitioner subject to tax under Article 32 of the Tax Law.

The determination of whether the totality of the Subsidiary's activities as agent for Petitioner are sufficient to deem Petitioner to be doing business in New York is a question of fact that is not susceptible of determination in an Advisory Opinion. An Advisory Opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to "a specified set of facts." Tax Law, §171.Twenty-fourth; 20 NYCRR 2376.1(a).

It must also be determined whether an agency relationship exists between Petitioner and the Purchaser. Petitioner may have an agency relationship with the Purchaser because of its agreement to service Petitioner's outstanding loans that were not sold and, when instructed by Petitioner's head office, its arrangement for the sale of Petitioner's loans. However, Petitioner pays the Purchaser an arm's length fee for these services and Petitioner holds only bare legal title to the loans. Therefore, it appears that Petitioner does not have an agency relationship with the Purchaser, but the existence of an agency relationship in this case is a question of fact that is not susceptible of determination in an Advisory Opinion.

If Petitioner is considered to be doing business in New York State as contemplated in section 16-2.7 of the Article 32 Regulations, Petitioner is subject to tax under Article 32 of the Tax Law for those years that it is doing business, unless the extent of the business conducted in New York is considered to be *de minimis*.

/s/
DATED: February 2, 1998 John W. Bartlett
Deputy Director
Technical Services Bureau

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