

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

TSB-A-90(20)C
Corporation Tax
September 26, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C900525B

On May 25, 1990, a Petition for Advisory Opinion was received from Cargill Financial Services Corporation, P.O. Box 9300 Loc. #26, Minneapolis, Minnesota 55440.

The issue raised by Petitioner, Cargill Financial Services Corporation, is whether it is doing business in New York State for purposes of Article 9-A of the Tax Law if it takes title to precious metals that are the subject of futures contracts traded on the Commodity Exchange, Inc. in New York City.

Petitioner is a Delaware corporation with its principal place of business in Minneapolis, Minnesota. Petitioner is engaged in the business of trading financial instruments. Petitioner is a wholly owned subsidiary of Cargill, Incorporated, a Delaware corporation with its principal place of business in Minneapolis, Minnesota. Cargill, Incorporated is engaged in the business of procuring, processing, and selling commodities.

Petitioner has no employees either working or residing within the State of New York. Petitioner does not maintain an office, branch or other facility in New York State. Petitioner does not maintain any inventory, raw materials, work-in-process or other tangible personal property in New York State. Petitioner does not own or lease real property in New York State.

Petitioner currently trades in stocks, bonds, currencies, commodities and other financial instruments on the various exchanges in New York City. However, all such transactions are executed by independent brokers.

Under the proposed transaction, Petitioner would employ independent brokers to trade in commodity futures contracts in precious metals on the floor of the Commodity Exchange, Inc. (hereinafter "COMEX") in New York City. A futures contract is a right to receive at a future date a specific quantity of a commodity for a fixed price. Generally, Petitioner would not take title to the commodity and the futures contract would be closed out with an offsetting contract. However, in certain situations, when Petitioner holds a contract to buy a commodity, for example 100 oz. of gold, it may be prudent to take title to the gold for a short period of time. In such a case, Petitioner would not receive actual possession of the commodity, but rather would receive a warehouse receipt signifying ownership in a specific quantity of the commodity. The physical commodities would be held in warehouses or vaults in the City of New York licensed by COMEX.

Section 209.1 of Article 9-A of the Tax Law imposes the business corporation franchise tax on every foreign corporation, unless specifically exempt, for the privilege of doing business, or of employing capital, or of owning or leasing property in New York State in a corporate or organized capacity, or of maintaining an office in New York State.

Section 1-3.2(b) of the Business Corporation Franchise Tax Regulations (hereinafter "Article 9-A Regulations") provides that:

(1) [t]he term doing business is used in a comprehensive sense and includes all activities which occupy the time or labor of men for profit. Regardless of the nature of its activities, every corporation organized for profit and carrying out any of the purposes of its organization is deemed to be doing business for the 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.

(2) 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:

(i) the nature, continuity, frequency, and regularity of the activities of the corporation in New York State, compared with the nature, continuity, frequency, and regularity of its activities elsewhere;

(ii) the purposes for which the corporation was organized, compared with its activities in New York State;

(iii) the location of its offices and other places of business;

(iv) the income of the corporation and the portion thereof derived from activities in New York State;

(v) the employment in New York State of agents, officers and employees; and

(vi) the location of the actual seat of management or control of the corporation.

Section 1-3.2(c) of the Article 9-A Regulations provides that:

[t]he term employing capital is used in a comprehensive sense. Any of a large variety of uses, which may overlap other activities, may give rise to taxable status. In general, the use of assets in maintaining or aiding the corporate enterprise or activity in New York State will make the corporation subject to tax. Employing capital includes such activities as:

(1) maintaining stockpiles of raw materials or inventories; or

(2) owning materials and equipment assembled for construction.

Section 1-3.2(d) of the Article 9-A Regulations provides that:

[t]he owning or leasing of real or personal property within New York State constitutes an activity which subjects a foreign corporation to tax. Property owned by or held for the taxpayer in New York State, whether or not used in the taxpayer's

business, is sufficient to make the corporation subject to tax. Property held, stored or warehoused in New York State creates taxable status. Property held as a nominee for the benefit of others creates taxable status

Section 1-3.3 of the Article 9-A Regulations provides that:

[a] foreign corporation will not be deemed to be doing business, employing capital owning or leasing property in a corporate or organized capacity or maintaining an office in New York State because of:

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

(b) 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 security exchange;

(c) 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
....

Herein, Petitioner is engaged in the business of trading in stocks, bonds, currencies, commodities and other financial instruments on various exchanges in New York City. The transactions are executed by independent brokers. This activity by itself is not sufficient to deem Petitioner to be doing business in New York State.

Additionally, Petitioner proposes to trade in commodity futures contracts in precious metals on the floor of COMEX in New York City. Because of market conditions, it may be prudent for Petitioner to occasionally take title to the precious metal for a short period of time. The physical commodities would be held in warehouses or vaults in New York City.

Pursuant to section 1-3.2(d) of the Article 9-A Regulations, the ownership of real or tangible personal property located in New York State is sufficient to make a corporation subject to the franchise tax imposed under Article 9-A of the Tax Law even though the corporation is not deemed to be doing business in New York State.

However, there are situations where the ownership of property in New York is not sufficient in magnitude to subject a foreign corporation to tax. For example, section 1-3.4(a)(9) of the Article 9-A Regulations provides that a foreign corporation whose income is derived from interstate commerce is not subject to tax if its New York activities do not exceed those prescribed by Public Law 86-272, even where the corporation has samples or automobiles in New York, used exclusively for solicitation. Similarly, it has been held that a foreign corporation which ships raw materials or partially finished goods to an unrelated contractor in this state, by whom the goods are processed or finished, is not taxable solely because of the ownership of such property in New York,

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assuming that the contractor returns the goods to the foreign corporation or ships them to another contractor outside the state. American Association of Advertising Agencies, Inc., Adv Op St Tax Comm, November 7, 1980, TSB-H-80(32)G.

Also, a foreign corporation manufacturing aluminum, is not subject to tax because it only has minimal ownership of property in New York when it ships its by-product, dross, to a processor in New York who reclaims some aluminum from the dross and then ships the reclaimed metal back to the foreign corporation and disposes of the waste product. Aluminum Company of Canada, Ltd., Adv Op St Tax Comm, August 12, 1983, TSB-A-83(9)C.

Herein, it appears that Petitioner's occasional ownership of property in New York State is similarly minimal, and if Petitioner is not otherwise doing business in New York, Petitioner would not be subject to the franchise tax imposed under Article 9-A because of such minimal ownership.

However, the actual determination of whether Petitioner will be subject to tax under Article 9-A is a factual matter dependent on the totality of the corporation's circumstances and 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, subd twenty-fourth; 20 NYCRR 901.1(a).

DATED: September 26, 1990

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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