

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

TSB-H-81(8)C
Corporation Tax
January 28, 1981

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. C800827B

On August 27, 1980, a Petition for Advisory Opinion was received from Wolverine Energy Company, c/o Broad Street Contract Services, Inc., 55 Broad Street, New York, New York 10005.

The issue raised is whether the Petitioner's activities in New York, described below, render it subject to the Franchise Tax on Business Corporations imposed under Article 9-A of the Tax Law.

Petitioner is a foreign corporation authorized to do business in New York. The facts, as stated in the petition for Advisory Opinion, are as follows:

"It was formed solely for the purpose of taking title to nuclear fuel owned by Consumers Power Company ("Consumers") in connection with a financing transaction and serving as a vehicle for financing the purchase of additional nuclear fuel to be used by that company. Consumers is a Michigan corporation duly authorized to carry on a public utility business in that state. It is engaged in both the generation, transmission, distribution and sale of electric energy and in the production, storage, transmission, distribution and sale of natural gas in the State of Michigan.

"All of the Petitioner's outstanding capital stock is owned by a New York corporation (the "Service Corporation") affiliated with a New York investment banking firm. The Petitioner's officers and directors are New York based employees of either the investment banking firm or the Service Corporation and the Petitioner does not compensate them for their services. The Petitioner has no employees or payroll and has no actual office of its own in New York or in any other state. Instead, the Service Corporation performs all necessary administrative services for the Petitioner for a nominal fee; those services, which include the keeping of all of the Petitioner's books and records, are performed by the Service Corporation in New York.

"As stated above, the Petitioner was organized to serve as a vehicle for purchasing nuclear fuel to be used by Consumers. The Petitioner finances its purchases by issuing long-term notes to a group of five banks, including a major New York bank and the New York branches of two other banks. As security for the notes, the Petitioner has assigned to the New York bank, as agent for all of the lenders, all of Petitioner's rights to receive rents and other sums from Consumers under the lease described below. With the proceeds from its borrowings, the Petitioner purchases title to various nuclear fuel from Consumers and other processors and simultaneously leases it to Consumers. Although the Petitioner acquires title to the fuel, it never obtains possession; the fuel is always located outside of New York at plants of either Consumers or a supplier of either nuclear fuel or services in connection with nuclear fuel.

"The lease between the Petitioner and Consumers is a net lease under which the latter is responsible for maintaining, operating, repairing, replacing and insuring the nuclear fuel and for paying all taxes and other costs arising out of its ownership and possession. Consumers' payments under the lease are calculated to enable the Petitioner to make the payments of principal on its notes (representing all costs of acquisition of the property) together with interest thereon and to pay the nominal administrative fees to the Service Corporation.

"At the conclusion of the lease term, if all required payments of rent have been made when due and no event of default has occurred and is continuing thereunder, title to the leased property passes to Consumers. The lease also provides that upon five days notice, Consumers may terminate the lease without penalty and purchase the nuclear fuel from the Petitioner by paying an amount sufficient to enable the latter to prepay its notes.

"At the insistence of the New York lending banks, all agreements in the above-described financing transaction were executed in New York to provide added assurance that their terms would be governed by and enforceable in accordance with New York law

"The Petitioner asserts that its activities do not rise to the level of "doing business" within the meaning of Section 209 of the Tax Law; its only function is to serve as a vehicle by which Consumers, a Michigan corporation, can finance its purchases of nuclear fuel by borrowing money from a group of lenders which includes a major New York bank and the New York branches of two other banks."

Article 9-A of the Tax Law imposes a tax on foreign corporations "doing business" in New York in a corporate or organized capacity. Tax Law, §209.1. The Franchise Tax Regulations, noting that the term "doing business" is used in the statute in "a comprehensive sense," provides that "...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" imposed under Article 9-A. 20 NYCRR §1-3.2(b)(1). Whether a corporation is doing business in New York is a matter to be determined on a case by case basis, giving due consideration to the following factors:

- "(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." 20 NYCRR §1-3.2(b)(2)

The facts set forth in the Petition for Advisory Opinion indicate that Wolverine was formed solely for the purpose of financing the purchase of nuclear fuel for Consumers. All activities that Petitioner performs in furtherance of this purpose are performed in New York. That is, Petitioner performs all of its corporate activities in New York, doing there and nowhere else that which it was formed to do. Thus, consideration of the facts in light of 20 NYCRR §1-3.2(b)(2) (i) and (ii) indicate that Wolverine is doing business in New York. It may also fairly be said that all of its income is "derived from activities in New York State," thus satisfying 20 NYCRR §1-3.2(b)(2)(iv). The rest of the factors listed above are not dispositive as applied to the facts stated in the petition.

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Giving due consideration to the factors set forth in Section 1-3.2(b)(2) of the Franchise Tax Regulations and viewing Petitioner's activities in a comprehensive sense, it is hereby determined that such activities constitute 'doing business' within the meaning of §209.1 of the Tax Law and that Petitioner is therefore subject to the Franchise Tax on Business Corporations.

DATED: January 22, 1981

s/LOUIS ETLINGER
Deputy Director
Technical Services Bureau