

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-03(2)C
Corporation Tax
April 4, 2003

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C021106A

On November 6, 2002, a Petition for Advisory Opinion was received from WaterChef Inc., 1007 Glen Cove Avenue, Glen Head, New York 11545.

The issue raised by Petitioner, WaterChef Inc., is whether it is subject to franchise tax under Article 9-A of the Tax Law for the taxable years 1999, 2000 and 2001.

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

Petitioner, a Delaware corporation, was headquartered in Arizona and manufactured and serviced its product from its factories in Montana and China.

Mr. Conway, a resident of New York State, was retained as an employee of Petitioner in 1998. Mr. Conway, as Petitioner's President, CEO and Chairman of the Board, spent 75 percent to 80 percent of his time at Petitioner's headquarters in Arizona, or traveling on Petitioner's business. Mr. Conway left his family in New York when he accepted the assignment and tried to spend one week a month working in New York.

In 1999, in order to keep the services of Mr. Conway, Petitioner rented a small office in New York State for his convenience in spending the one week a month working from home or at the office in New York. The office was paid for by Petitioner with Petitioner's checks. Petitioner states that the telephone in the New York office was listed in Petitioner's name, but that resulted from the fact that Petitioner paid the bill with Petitioner's checks and that the telephone company automatically listed the name.

Effective December, 2001, Petitioner's water cooler and personal consumer filter businesses were sold, and the Arizona office was closed. Effective with the sale of the business, and the transfer of employees and assets, Petitioner moved its operations to New York and embarked on a new business strategy, the design and manufacture of water purification systems. The employees of Petitioner are now in New York, and the new product line is manufactured under contract by a Long Island based manufacturing company.

Applicable Law and Regulations

Section 209.1 of Article 9-A of the Tax Law imposes an annual franchise tax as follows:

For the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate

or organized capacity, or of maintaining an office in this state, for all or any part of each of its fiscal or calendar years, every domestic or foreign corporation, except corporations specified in subdivision four of this section, shall annually pay a franchise tax, upon the basis of its entire net income base, or upon such other basis [capital base, minimum taxable income bases or the fixed dollar minimum] as may be applicable as hereinafter provided, for such fiscal or calendar year or part thereof, on a report which shall be filed, except as hereinafter provided, on or before the fifteenth day of March next succeeding the close of each such year, or, in the case of a corporation which reports on the basis of a fiscal year, within two and one-half months after the close of such fiscal year, and shall be paid as hereinafter provided.

Section 1-3.2(b) of the Business Corporation Franchise Tax Regulations (“Regulations”) provides that with respect to a foreign corporation:

(1) The term doing business is used in a comprehensive sense and includes all activities which occupy the time or labor of people 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;

(ii) the purposes for which the corporation was organized;

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

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

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

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

The 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 Regulations provides that:

The 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. Also, consigning property to New York State may create taxable status if the consignor retains title to the consigned property.

Section 1-3.2(e) of the Regulations provides that:

A foreign corporation which maintains an office in New York State is engaged in an activity which makes it subject to tax. An office is any area, enclosure or facility which is used in the regular course of the corporate business. A salesman's home, a hotel room, or a trailer used on a construction job site may constitute an office.

Opinion

In this case, Petitioner rented office space in New York during taxable years 1999, 2000 and 2001. Pursuant to section 1-3.2(d) of the Regulations, the leasing of the office space in New York was an activity that subjected Petitioner to tax under Article 9-A of the Tax Law. Further, the office telephone was listed in Petitioner's name, and the office space was used by Mr. Conway, its President, CEO and Chairman of the Board, for approximately one week a month, or about 25 percent of his time. Accordingly, such office space was regularly used by Petitioner for its corporate business and held out as a place of business of Petitioner as contemplated under section 1-3.2(e) of the Regulations. Therefore, pursuant to section 1-3.2(e) of the Regulations, Petitioner maintained an office in New York State during taxable years 1999, 2000 and 2001, and such activity subjected Petitioner to tax under Article 9-A of the Tax Law. Finally, considering the totality of Petitioner's activities in New York during the taxable years at issue, Petitioner was doing business in New York as contemplated under section 1-3.2(b) of the Regulations. Pursuant to section 209.1 of the Tax Law and section 1-3.2 of the Regulations, Petitioner was doing business, leasing property and

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maintaining an office in New York State and was subject to franchise tax under Article 9-A of the Tax Law for taxable years 1999, 2000 and 2001.

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