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

TSB-A-04(15)C
Corporation Tax
August 31, 2004

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C031002A

On October 2, 2003, a Petition for Advisory Opinion was received from Hamilton Manufacturing Corp., 1026 Hamilton Drive, Holland, Ohio 43528. Petitioner, Hamilton Manufacturing Corp., submitted additional information pertaining to the Petition on April 21, 2004.

The issue raised by Petitioner is whether it is subject to tax under Article 9-A of the Tax Law based on the facts as presented below.

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

Petitioner is incorporated in Ohio and has its corporate offices in Ohio. Petitioner is a federal S corporation that has 20 shareholders. Karen L. Sherwood and her brother are the majority owners. Ms. Sherwood is on Petitioner's Board of Directors, but is not an officer or employee of Petitioner. All Board meetings are held in Ohio. Ms. Sherwood is not actively involved in the operations of Petitioner and does not have detailed knowledge about its products. Ms. Sherwood's involvement in Petitioner is limited to attendance of the Board meetings in Ohio.

Petitioner designs and manufactures currency changing and validation equipment, for various applications, at its manufacturing facility in Ohio. Petitioner's customers are located throughout the United States. Petitioner's only contacts with New York are described below.

Ms. Sherwood is a New York State resident and she had a telephone listing for Petitioner included in a local New York telephone book since 1990, without the knowledge of Petitioner. The telephone number and address in the listing are the same as for her personal phone and residence. When Petitioner became aware of the telephone listing it requested that it be removed from the telephone book, and the listing has subsequently been removed.

Ms. Sherwood has never solicited or taken orders for Petitioner's products. All orders for Petitioner's products are taken at Petitioner's Ohio headquarters. No sales activity is conducted in person by an employee or agent of Petitioner in New York. Its sales solicitation is conducted by telephone from outside of New York. Petitioner states that it does not have any physical presence in New York.

Included in Petitioner's Web site is a list of authorized service centers. This list includes various independent repair organizations throughout the United States. These are all independent organizations that have been designated as *authorized* to provide warranty and nonwarranty repairs to equipment that Petitioner has sold. These repair organizations are fully independent organizations, with no contractual obligations with Petitioner. They have simply been trained to repair the machines, and are therefore, *authorized* to make warranty repairs and bill Petitioner for

the service per the terms of the warranty. All training is provided at Petitioner's facility in Ohio. Petitioner's employees do not come into New York to train personnel of the service centers.

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 of the Business Corporation Franchise Tax Regulations ("Regulations"), as amended January 22, 2004, provides, in part:

> (b) *Foreign corporation – doing business.* (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.
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> (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:
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> (i) the nature, continuity, frequency, and regularity of the activities of the corporation in New York State;
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> (ii) the purposes for which the corporation was organized;
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> (iii) the location of its offices and other places of business;
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> (iv) the employment in New York State of agents, officers and employees; and
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> (v) the location of the actual seat of management or control of the corporation.

(c) *Foreign corporation – employing capital.* 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.

(d) *Foreign corporation – owning or leasing property.* 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.

(e) *Foreign corporation – maintaining an office.* 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 salesperson's home, a hotel room, or a trailer used on a construction job site may constitute an office.

Opinion

Pursuant to section 209.1 of the Tax Law and section 1-3.2(b), (c), (d) and (e) of the Regulations, a corporation organized outside of New York State is subject to the tax imposed under Article 9-A of the Tax Law if the corporation is doing business, employing capital, owning or leasing property in a corporate or organized capacity, or maintaining an office in New York State.

In *Gulf Homes, Inc.*, Adv Op Comm T&F, August 3, 1984, TSB-A-84(10)C, the petitioner solicited business in New York for its construction business by advertising in New York newspapers. The advertisements contained, among other things, the New York telephone number of the Long Island home of one of the petitioner's officers who was also an employee of the corporation. The officer would arrange to meet with the people who responded to the ads at the officer's home or elsewhere in the New York metropolitan area. All contracts for the construction of homes were approved, accepted, finalized and consummated in Florida. The opinion held that the petitioner held the officer's New York residence out as a place of business by including the telephone number in the New York ads and by the officer actually using his residence for meetings with prospective customers. Since the officer was using his home for the business purposes of the petitioner, such usage constituted the maintenance of an office within the intent of section 209.1 of the Tax Law.

In *Tower Cleaning Systems, Inc.,* Adv Op Comm T&F, May 31, 2002, TSB-A-02(6)C, the petitioner was organized outside of New York State and provided janitorial service for its customers. It did not have an office, employees, representatives or inventory in New York State, and hired subcontractors in New York to conduct the janitorial services for the petitioner's New York customers. The opinion held that the hiring of subcontractors as independent contractors in New York to provide the janitorial services for the petitioner's New York customers did not constitute *doing business* in New York by the petitioner, and did not cause the petitioner to be subject to tax under Article 9-A of the Tax Law. (See *Ernst and Whinney*, Adv Op Comm T&F, September 29, 1988, TSB-A-88(22)C.) However, if it was established that the subcontractors had an agency relationship with the petitioner, the opinion further held that pursuant to section 1-3.2(b)(2) of the Regulations, the petitioner would be considered to be doing business in New York State and it would be subject to tax under Article 9-A of the Tax Law. (See *GEF Funding Corp.*, Adv Op Comm T&F, January 26, 1988, TSB-A-88(2)C.)

In this case, Petitioner states that it does not have physical presence in New York State. Its solicitation of orders in New York is conducted by telephone from Ohio, and all orders for Petitioner's products are taken at its Ohio headquarters. One of Petitioner's shareholders, Ms. Sherwood, lives in New York State and has a telephone listing for Petitioner in her local telephone book with her home address listed. However, unlike *Gulf Homes, Inc., supra*, Ms. Sherwood is not an employee actively involved in the operations of the corporation. She does not conduct Petitioner's business from her home, and neither solicits or takes orders for Petitioner's products. Therefore, Petitioner is not deemed to be maintaining an office in New York State under section 1-3.2(e) of the Regulations because of such telephone listing.

Petitioner does train various independent repair organizations in the repair of Petitioner's products. All training is conducted at Petitioner's facility in Ohio. Once trained, the independent organizations are designated as *authorized* to provide warranty and nonwarranty repairs to the products that Petitioner has sold. Petitioner's Web site lists the service centers *authorized* to repair Petitioner's products. However, these repair organizations are fully independent organizations, and have no contractual obligations with Petitioner. When they make warranty repairs, they bill Petitioner for the service per the terms of the warranty. Petitioner does not come into New York to train the employees of the *authorized* service centers. It appears that the authorized service centers are independent contractors, and following *Tower Cleaning, supra*, the activities of such authorized service centers in New York State are not considered activities conducted by Petitioner. Petitioner is not deemed to be doing business in New York under section 1-3.2(b)(2) of the Regulations as a result of such independent contractor activities in New York.

Considering the totality of Petitioner's activities in New York as presented by the facts, Petitioner is not doing business, employing capital, owning or leasing property or maintaining an office in New York State as contemplated under section 209.1 of the Tax Law and section 1-3.2 of the Regulations. Accordingly, Petitioner is not subject to franchise tax under Article 9-A of the Tax Law.

However, if it is determined that there is an agency relationship between Petitioner and the authorized service centers, then pursuant to section 1-3.2(b)(2) of the Regulations, and following *GEF Funding, supra*, Petitioner would be considered to be doing business in New York. In that case, Petitioner would be subject to the tax imposed under Article 9-A of the Tax Law. The determination of whether an agency relationship exists is a factual matter 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).

DATED: August 31, 2004

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