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

TSB-A-05(13)C
Corporation Tax
October 24, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C050304A

On March 4, 2005, a Petition for Advisory Opinion was received from SafetyCare, Inc., 15 Emerald Street, Hackensack, NJ 07601.

The issue raised by Petitioner, SafetyCare, Inc., is whether it is required to file franchise tax reports under Article 9-A of the Tax Law.

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

Petitioner is incorporated in New Jersey and is located in Hackensack, New Jersey, where it performs monitoring services of its personal emergency response and alarm systems. Most of Petitioner's customers are located in New Jersey, but some sales have been made to customers in New York State. The New York State sales have occurred through word of mouth by friends and family of Petitioner's officers and employees.

Petitioner does not have an office, employees, representatives or inventory in New York State.

Petitioner contracts with a third party to buy and install monitoring equipment in New York homes. Petitioner pays the third party for the installation and the equipment. Petitioner invoices the New York customer for the sale of the equipment, installation, and monitoring services. All servicing of the equipment is performed by a third party. Petitioner only performs the monitoring services from its New Jersey facility over telephone lines and radio signals.

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") 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.

(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.

(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 *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, it appears that Petitioner is not employing capital in New York, does not own or lease property in New York, and does not maintain an office in New York. Therefore, the pertinent question, in determining whether Petitioner is subject to tax under Article 9-A of the Tax Law, is whether Petitioner is doing business in New York State.

Following *Tower Cleaning, supra*, the activities of third parties hired by Petitioner as independent contractors in New York State to install and service the monitoring equipment 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 third party activities in New York. Therefore, Petitioner is not required to annually file a franchise tax report pursuant to Article 9-A of the Tax Law.

However, if it is determined that there is an agency relationship between Petitioner and the third parties, 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 and would be required to annually file franchise tax reports 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: October 24, 2005

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

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