

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

TSB-A-05(5)C
Corporation Tax
March 10, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C041020A

On October 20, 2004, a Petition for Advisory Opinion was received from Utility Engineering Corp., 500 S. Taylor LB 239, Amarillo, Texas 79101-2446.

The issues raised by Petitioner, Utility Engineering Corp., are whether (1) it is subject to franchise tax under Article 9-A of the Tax Law, and (2) it needs to register with the New York State Department of State for authorization to do business in New York.

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

Petitioner is a Texas corporation and maintains that it does not conduct business in New York. In January 2002, Petitioner purchased a subsidiary, Walter Kidde, which is licensed to perform engineering services in New York. Subsequently, Petitioner changed Walter Kidde's name to Proto-Power New York ("PPNY"). PPNY commenced doing business in New York in July 2003. PPNY's payroll function is conducted at Petitioner's level. Petitioner is responsible for paying the workers and reporting and paying New York State withholding and unemployment taxes under Petitioner's federal employer identification number.

Applicable law and regulations

Section 181.2 of Article 9 of the Tax Law imposes an annual maintenance fee, and provides, in part:

(a) Imposition. Every foreign corporation..which is authorized to do business in this state pursuant to article thirteen or article fifteen-A of the business corporation law shall pay an annual maintenance fee of three hundred dollars for each year or portion thereof for which it is so authorized...

* * *

(c) Credit for fee paid. There shall be allowed as a credit against the tax due under this article..article nine-A or thirty-two of this chapter for any fiscal year, calendar year, or taxable period or portion thereof, the amount of the fee paid for the same fiscal or calendar year or portion of a year or the tax for such year or portion thereof, whichever is less.

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.

Section 4-5.2(b) of the Regulations provides that:

Generally, the relationship of employer and employee exists when the taxpayer has the right to control and direct the individual not only as to the result to be accomplished by him but also as to the means by which such result is to be accomplished. If the relationship of employer and employee exists, the designation or description of the relationship, and the measure, method or designation of the compensation are immaterial.

For purposes of federal income tax withholding from wages, Treasury Employment Tax Regulations section 31.3401(d)-1 describes an *employer*, and provides, in part:

(a) The term "employer" means any person for whom an individual performs or performed any service, of whatever nature, as the employee of such person.

* * *

(f) If the person for whom the services are or were performed does not have legal control of the payment of the wages for such services, the term "employer" means (except for the purpose of the definition of "wages") the person having such control....

Opinion

Petitioner states that it performs the payroll function for PPNY. Based on the facts presented, it appears that for the purpose of federal income tax withholding under Treasury Regulation section 31.3401(d)-1, Petitioner is the person having control of the payment of the wages of PPNY's employees and is treated as the *employer* of PPNY's employees for this purpose.

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However, if PPNY's employees perform services only for PPNY and are under the direction and control of PPNY, such individuals are not employees, as described in section 4-5.2(b) of the Regulations, of Petitioner merely because Petitioner pays the individuals' wages and is treated as the *employer* for purposes of the federal income tax withholding provisions under Treasury Regulation section 31.3401(d)-1. Under these circumstances, such individuals working in New York State would not be employees of Petitioner located in New York State for purposes of section 1-3.2(b)(2)(iv) of the Regulations.

If Petitioner does not have employees, officers or agents in New York, otherwise do business in New York, employ capital in New York, own or lease property in New York or maintain an office in New York, Petitioner does not meet the conditions under section 209.1 of the Tax Law and section 1-3.2 of the Regulations to be subject to franchise tax under Article 9-A of the Tax Law. If Petitioner is not subject to franchise tax under Article 9-A of the Tax Law, Petitioner is not required to file a franchise tax report under such Article 9-A.

However, if the individuals employed by PPNY are *employees* of Petitioner under section 4-5.2(b) of the Regulations, Petitioner would have employees in New York State. Petitioner would be doing business in New York State under section 1-3.2(b) of the Regulations and would be subject to tax under Article 9-A of the Tax Law. If Petitioner is subject to tax under Article 9-A of the Tax Law, Petitioner is required to file an annual franchise tax report under such Article 9-A.

The determination of whether Petitioner is required to register with the New York State Department of State as a corporation authorized to do business in New York is not within the jurisdiction of the Tax Department.

Note that if Petitioner is authorized by the Secretary of State to do business in New York, and Petitioner disclaims tax liability under Article 9-A of the Tax Law, Petitioner must file Form CT-245, *Maintenance Fee and Activities Return For a Foreign Corporation Disclaiming Tax Liability*, and pay the annual maintenance fee pursuant to section 181.2 of the Tax Law. Further, if Petitioner is not authorized to do business in New York but has employees or officers in New York State and is disclaiming tax liability under Article 9-A of the Tax Law, Petitioner must file such Form CT-245 but is not required to pay the maintenance fee.

DATED: March 10, 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.