

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

TSB-A-05(7)C
Corporation Tax
April 4, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C041214A

On December 14, 2004, a Petition for Advisory Opinion was received from Daskzal Bolton LLP, 2401 NW Boca Raton Boulevard, Boca Raton, Florida 33431.

The issues raised by Petitioner, Daskzal Bolton LLP, are:

1. Whether a corporation, as described below, is exempt from tax under Article 9-A of the Tax Law pursuant to Public Law 86-272.
2. Whether the corporation is required to annually file an activities report and pay a maintenance fee pursuant to section 181 of Article 9 of the Tax Law.

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

Company A is a foreign corporation which is a supplier of a full range of computer hardware products known as *thin clients*. A *thin client* is a network computer without a hard disk drive that is designed to operate in the server based computing environment and encompasses Mainframe, UNIX, Linux and Microsoft technology. Company A's products are manufactured outside of the United States and are then sold to retailers and other distributors globally and throughout the United States. Some of Company A's customers are located in New York State. Company A never directly sells its products to the ultimate consumer.

The activities of Company A within the boundaries of New York State are limited to those conducted by only one employee. The employee is a sales representative responsible for the solicitation of sales from within and without the state. The sales representative resides in or around Setauket, New York. The sales representative's sales territory consists of the north-eastern United States. All product samples requested by the resellers and distributors are sent directly from Company A's out-of-state office directly to the reseller or distributor.

Company A does not own or lease any real or personal property in New York, nor does Company A furnish a company vehicle to its sales representative. Rather, the employee utilizes his own vehicle in the performance of his job duties and then receives expense reimbursements as outlined below. The only personal property owned by Company A within New York is a laptop computer needed by the sales representative in performing his everyday job. The sales representative purchases office supplies (i.e., paper, pens, etc.) through a local office supply store. Office supplies and other general expenses (i.e., travel expenses, gasoline, etc.) are reimbursed to the sales representative through submission of monthly expense reports. Company A does not provide any other remuneration to the sales representative with regard to his home office expenses.

The sales representative utilizes space at his home for his own convenience. Company A does not hold out the employee's home office space as corporate office space. Company A does not represent itself as having a presence within New York State, either by the efforts of the salesperson or through Company A's own efforts. Any documentation (i.e., business cards, letterhead, etc.) that is provided by the sales representative to customers references only Company A's out-of-state corporate office address and phone number. The sales representative has a voice mailbox at the out-of-state corporate office he can access to retrieve voice mails.

Company A is properly complying with the payroll withholding and unemployment compensation tax requirements of New York State.

The following is a listing of the job responsibilities of the sales representative:

- Fulfilling assigned sales quotas for all company distributed products.
- Visiting territorially designated customers for purposes of solicitation of sales orders.
- Discussing all matters affecting assigned territory with a supervisor located outside of New York State.
- Implementing sales plan for designated territory in order to meet annual sales quotas.
- Submitting customer purchase requests to Company A located outside of New York for credit approval, order processing, shipping and billing.
- Attending nationwide trade show conventions when directed by Company A. It should be noted that the conventions are not held in New York State.

Applicable law and regulations

Section 181.2(a) of the Tax Law imposes an annual maintenance fee and provides, in part:

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

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....

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.

However, section 1-3.4(b)(9) of the Regulations provides for an exemption from taxation under Article 9-A for corporations which are exempt pursuant to the provisions of Public Law 86-272 (15 USCA §§ 381-384) and provides, in part:

(i) A foreign corporation whose income is derived from interstate commerce is not subject to tax under article 9-A of the Tax Law if the activities of the corporation in New York State are limited to either, or both of the following:

(a) the solicitation of orders by employees or representatives in New York State for sales of tangible personal property and the orders are sent outside New York State for approval or rejection; and if approved, are filled by shipment or delivery from a point outside New York State; and

(b) the solicitation of orders for sales of tangible personal property by employees or representatives in New York State in the name of or for the benefit of a prospective customer of such corporation if the customer's orders to the corporation are sent outside the State for approval or rejection; and, if approved, are filled by shipment or delivery from a point outside New York State.

(ii) For purposes of this exemption, a corporation will not be considered to have engaged in taxable activities in New York State during the taxable year merely by reason of sales in New York State or the solicitation of orders for sales in New York State, of tangible personal property on behalf of the corporation by one or more independent contractors. A corporation will not be considered to have engaged in taxable activities in New York State by reason of maintaining an office in New York State by one or more independent contractors whose activities on behalf of the corporation in New York State consist solely of making sales, or soliciting orders for sales, of tangible personal property.

* * *

(iv) In order to be exempt by virtue of Public Law 86-272, the activities in New York State of employees or representatives must be limited to the solicitation of orders. The solicitation of orders includes offering tangible personal property for sale or pursuing offers for the purchase of tangible personal property and those ancillary activities, other than maintaining an office, that serve no independent business function apart from their connection to the solicitation of orders. Examples of activities performed

by such employees or representatives in New York State that are entirely ancillary to the solicitation of orders include:

(a) the use of free samples and other promotional materials in connection with the solicitation of orders;

(b) passing product inquiries and complaints to the corporation's home office;

(c) using autos furnished by the corporation;

(d) advising customers on the display of the corporation's products and furnishing and setting up display racks;

(e) recruitment, training and evaluation of sales representatives;

(f) use of hotels and homes for sales-related meetings;

(g) intervention in credit disputes;

(h) use of space at the salesperson's home solely for the salesperson's convenience...;

(i) participating in a trade show or shows, provided that participation is for not more than 14 days, or part thereof, in the aggregate during the corporation's taxable year for Federal income tax purposes....

(v) Activities in New York State beyond the solicitation of orders will subject a corporation to tax in New York State unless such activities are *de minimis*. Activities will not be considered *de minimis* if such activities establish a nontrivial additional connection with New York State. Solicitation activities do not include those activities that the corporation would have reason to engage in apart from the solicitation of orders but chooses to allocate to its New York State sales force. In determining whether a corporation's activities exceed the solicitation of orders, all of the corporation's activities in New York State will be considered. Examples of activities which go beyond the solicitation of orders include:

(a) making repairs to or installing the corporation's products;

(b) making credit investigations;

(c) collecting delinquent accounts;

(d) taking inventory of the corporation's products for customers or prospective customers;

(e) replacing the corporation's stale or damaged products;

(f) giving technical advice on the use of the corporation's products after the products have been delivered to the customer.

(vi) Maintaining an office ... in New York State will make a corporation taxable... A corporation will be considered to be maintaining an office in New York State if the space is held out to the public as an office or place of business of the taxpayer. For example, a salesperson uses his or her house for business. A telephone, listed in the corporation's name, is maintained at the salesperson's house. The salesperson makes telephone contacts from the house or receives calls and orders at the house. The residence will be treated as an office of the corporation, and the corporation will be taxable;

Opinion

Pursuant to section 1-3.4(b)(9) of the Regulations, a corporation is not subject to the Article 9-A franchise tax in New York State if it is exempt pursuant to the provisions of Public Law 86-272. To be exempt pursuant to Public Law 86-272, a corporation's activities in New York State must be either (a) limited to the solicitation of orders by employees or representatives in New York State for sales of tangible personal property, or be entirely ancillary to such solicitation of orders, or (b) if the activities exceed the solicitation of orders, the activities must be considered to be *de minimis*. In addition, the orders must be sent outside New York State for approval or rejection; and if approved, must be filled by shipment or delivery from a point outside New York.

In this case, the sales representative's job responsibilities as described above fit within the scope of *solicitation of orders* pursuant to the provisions of Public Law 86-272. Company A states that it does not conduct any other activities in New York State, and does not own or lease any real property in New York. The only personal property of Company A in New York consists of a laptop computer for the use of the sales representative in the performance of his job duties. Orders for Company A's products are approved outside New York, and products are shipped from outside New York. Petitioner also states that Company A reimburses the sales representative for office supplies and general expenses, but does not provide any other remuneration to the sales representative with respect to his home office expenses. Company A does not represent itself to the public as having an office at the sales representative's home office address. The sales representative's business cards and letterhead use the out-of-state corporate office address and phone number. The sales representative receives voice mail from the voice mailbox at the out-of-state office. Therefore, it is determined that Company A does not maintain

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an office in New York at the sales representative's residence pursuant to section 1-3.4(b)(9)(vi) of the Regulations.

Since Company A does not maintain an office in New York State at the sales representative's residence pursuant to section 1-3.4(b)(9)(vi) of the Regulations, Company A's activities in New York appear to be limited to the solicitation of orders pursuant to the provisions of Public Law 86-272, and pursuant to section 1-3.4(b)(9) of the Regulations, Company A is exempt from the franchise tax imposed under Article 9-A of the Tax Law. However, since Company A has an employee in New York, Company A is required to annually file an activities report on Form CT-245, *Maintenance Fee and Activities Return For a Foreign Corporation Disclaiming Tax Liability*. In addition, Company A is required to pay a maintenance fee pursuant to section 181.2(a) of the Tax Law, if it is authorized to do business in New York pursuant to Article 13 or Article 15-A of the Business Corporation Law.

DATED: April 4, 2005

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