

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

TSB-A-06(3)C
Corporation Tax
July 25, 2006

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C051227A

On December 27, 2005, a Petition for Advisory Opinion was received from Lutz & Company, PC, 11837 Miracle Hills Drive, #100, Omaha, NE 68154-4418. Petitioner, Lutz & Company, PC, provided additional information with respect to the Petition on March 20, 2006.

The issue raised by Petitioner is whether Company A's current and planned activities within New York State, as described below, are mere solicitation under Public Law 86-272 and thereby exempt the corporation from the franchise tax imposed under Article 9-A of the Tax Law.

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

Company A is a corporation organized outside New York State that is principally engaged in the manufacture and wholesale distribution of plastic products and PVC fencing to customers throughout the world. All of Company A's sales are made on a wholesale basis to local distributors.

With respect to its New York State activities, all customer orders are approved and filled outside New York State. All orders are shipped by common carrier from inventories maintained outside New York State. Company A does not maintain a place of business in New York State. Currently, Company A's only activity in New York State is the solicitation of orders for sales of tangible personal property by representatives of Company A based outside New York State.

Company A is considering employing a sales representative who will operate out of her New York residence with frequent travel to the Midwestern United States. The sales representative will be responsible for solicitation of sales in the Midwestern United States. The sales representative will not solicit sales from New York State customers and will not have any dealings with New York State customers. However, the sales representative may, in the future, solicit sales from New York State customers.

Company A will not represent itself as having a presence within New York State, either by the efforts of the sales representative or through its own efforts. Company A will not hold out the sales representative's home office space as corporate office space. Company A will not list or hold out to the public the sales representative's home telephone or address as Company A's business number or address. The sales representative will rent a New York post office box to receive all business correspondence. The post office box will not be in the name of Company A and will not be held out as Company A's mailing address. It is likely, however, that the sales representative will prepare stationery that lists the sales representative's post office box address or home or cellular telephone number. It is also likely that the sales representative will place and

receive telephone calls to and from Company A's customers out of the sales representative's home. Any correspondence sent to the sales representative in New York State will be directed to the sales representative's post office box. The sales representative will not meet with customers at the sales representative's home or in any similar way use her home to complete her employment duties. All orders will be sent directly to Company A's corporate office outside New York State for approval and, if approved, will be shipped from outside New York State. The sales representative residing in New York State will never receive orders at her home. The sales representative's use of space at her home in New York State for customer telephone contacts at that location is solely for her own convenience.

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 that 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. (However, see subparagraph (vi) of this paragraph as to loss of immunity for maintaining an office.);

(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;

Section 6-3.1(d) of the Regulations provides, in part:

A foreign corporation which is not a taxpayer, but which has an employee, including any officer, within New York State, is required to file an information report on form CT-245....

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. However, pursuant to section 1-3.4(b)(9) of the Regulations, a corporation is not subject to 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 limited to the solicitation of orders by employees or representatives in New York State for sales of tangible personal property and 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 State.

In this case, the current activities of Company A in New York State and the planned activities of the sales representative Company A plans to hire, as described above, fit within the scope of *solicitation of orders* pursuant to the provisions of Public Law 86-272. Petitioner states that Company A does not and will not conduct any other activities in New York State. Orders for Company A's products are or will be approved outside New York, and the products are or will be shipped from outside New York. With respect to the office in the home of the sales representative Company A plans to hire, Company A will not represent itself to the public as having an office at the sales representative's home address in New York State. Therefore, it is determined that Company A will meet the requirements of section 1-3.4(b)(9)(iv)(h) of the Regulations in that it will not be maintaining an office in New York at such sales representative's residence pursuant to section 1-3.4(b)(9)(vi) of the Regulations.

Since Company A will not be maintaining 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 current and planned activities in New York appear to be limited to the solicitation of orders pursuant to the provisions of Public Law 86-272. Accordingly, with regard to Company A's current and planned activities 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, with respect to Company A's planned hiring of a sales representative in New York State, since Company A will have an employee in New York, Company A will be required to annually file

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an activities report on Form CT-245, *Maintenance Fee and Activities Return For a Foreign Corporation Disclaiming Tax Liability*. See section 6-3.1(d) of the Regulations. In addition, if Company A is authorized to do business in New York pursuant to Articles 13 or 15-A of the Business Corporation Law, it is required to pay a maintenance fee pursuant to section 181.2(a) of the Tax Law.

DATED: July 25, 2006

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