

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-13(6)C
Corporation Tax
April 11, 2013

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C120126A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (“Petitioner X”) and [REDACTED] (“Petitioner Y”), [REDACTED]. Petitioners ask whether Petitioner X is “doing business” in New York and therefore is subject to the franchise tax imposed by Article 9-A of the Tax Law for the tax years during the period January 1, 2009 through September 19, 2011, when Petitioner X was acquired by Petitioner Y (“years at issue”). Based on the facts provided, we conclude that Petitioner X was not doing business in New York during the years at issue and therefore was not subject to tax under Article 9-A for those years.

Facts

Petitioner X is a [REDACTED] corporation with its headquarters and principal place of business in [REDACTED]. Petitioner X sells women’s apparel, accessories and footwear to customers nationwide by catalog or via its Internet website. Petitioner X does not currently own or operate retail stores in any state and has not operated any in New York since at least 2002. Since at least January 1, 2009 Petitioner X has conducted its business exclusively through interstate commerce and has had no place of business outside [REDACTED].

Petitioner X’s Catalog and Internet Operations

Petitioner conducted its business as described below during the years at issue.

Petitioner X is a traditional remote seller. Petitioner X solicited sales by sending catalogs, e-mails and other direct solicitations to prospective customers nationwide, including customers in New York. Petitioner X also advertised in national media, but none of these advertisements was targeted specifically to New York residents. Customers ordered merchandise from Petitioner X by calling the company’s “800” number or, in some limited cases, by mail or fax. Petitioner X accepted all orders in [REDACTED]. Petitioner X fulfilled all orders from points outside New York. Petitioner X shipped all merchandise to customers by common carrier or the United States Postal Service.

Petitioner X also sold merchandise online through its Internet website. The website was maintained in [REDACTED], from where all website design, maintenance, and customer service is provided. All Internet orders were placed online and received, accepted and processed in [REDACTED]. Petitioner X fulfilled all orders from inventory located outside

New York. Petitioner X shipped all merchandise to customers by common carrier or the United States Postal Service.

Petitioner X has an online web affiliate linking program, under which various unrelated third parties place a link to Petitioner X's website on their own internet website and are paid a commission for any resulting "click through" sales. By May 31, 2008, Petitioner X terminated all contracts with New York-based web affiliates. Since then Petitioner X has not paid any commissions or fees to any New York resident in exchange for website links or referrals.

Petitioner X conducted all of its sales activities from outside New York. Petitioner X had no stores, offices, or property in New York, and Petitioner X conducted no business operations in New York. Petitioner X maintained no inventory in New York, and Petitioner X did not rent or lease tangible personal property to customers in New York. Petitioner X did not deliver goods in New York in company-owned vehicles, via private carrier, or by any means other than through the mail or common carrier. Petitioner X did not have any in-state service facilities, nor did Petitioner X use any third party in New York to perform any activities or provide any customer service on its behalf. Petitioner X provided all customer service by phone or online from outside New York, and Petitioner X's customers made merchandise returns to Petitioner X's [REDACTED] facility via mail or other interstate means.

Petitioner X did not have any sales representatives, agents, independent contractors, or other third parties soliciting sales on its behalf in New York, nor did Petitioner X have any employees in New York (either permanently or on a temporary basis) promoting or soliciting sales in the state. In fact, Petitioner had no employees in New York, except that, from time to time, Petitioner X's employees came to New York on a temporary basis to meet with potential merchandise vendors as well as to engage in "inspirational shopping" trips to gather information on fashion trends. In addition, Petitioner X's employees came to New York from time to time to attend trade shows (as attendees and not as participants/exhibitors). Petitioner X's employees did not meet with customers in New York and none of the visits related to soliciting sales or distributing products in New York.

Typically, six to eight Petitioner X employees (generally merchandise buyers and/or creative marketing personnel) traveled to New York for these visits. Each visit lasted approximately two to three days, and was solely for the purposes previously described. There were approximately nine to ten such visits annually in each of 2010 and 2011. None of Petitioner X's in-state visits involved sales promotion, or any selling activities.

Petitioner X's Corporate History

During the years at issue, Petitioner X did not have any subsidiaries or affiliates whatsoever. After Petitioner Y acquired Petitioner X in September, 2011, Petitioner X became a wholly-owned subsidiary of Petitioner Y.

Analysis

The Petition asks whether Petitioner X was doing business in the State during the years at issue. That issue is a highly factual one that requires careful review of all the pertinent facts, something that is best done on audit. The analysis below assumes the accuracy of the facts in the Petition as set forth herein. Moreover, that analysis also assumes that there are no other relevant facts.

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 Business Corporation Franchise 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 this case, it appears that Petitioner X did not employ capital in New York, own or lease property in New York, or maintain an office in the State. Therefore, in determining whether Petitioner X is subject to tax under Article 9-A of the Tax Law, the pertinent question is whether Petitioner X is doing business in New York State.

Section 1-3.2 of the Business Corporation Franchise Tax Regulations (“Article 9-A 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.

In this case, for the years at issue, on nine or ten occasions annually, six to eight of Petitioner X’s employees would come into New York and stay for two to three days at a time to

do “inspirational shopping,” attend, but not participate in, trade shows, and meet with merchandise vendors. While it is a close question, given the limited purposes and duration of Petitioner’s employees’ trips into the State, those trips do not rise to the level of “doing business” in the State for purposes of Tax Law § 209.1 (*see* Article 9-A Regulations § 1-3.2[b]; TSB-M-96[3]C). Thus, for the years at issue, Petitioner X is not a taxpayer for Article 9-A purposes. This conclusion assumes that Petitioner had no employees or representatives in the State soliciting sales on its behalf during the years at issue. Such solicitation activity, by itself, can fall within the activity protected by Public Law 86-272 (15 U.S.C.A. §§ 381 to 384), which precludes a State from subjecting a foreign corporation to its net income tax if the corporation’s activities are limited to solicitation of orders for the sale of tangible personal property by its employees, representatives, or independent contractors, where the orders are accepted, and delivery is made from, outside the State. If Petitioner X, however, is engaged in the solicitation activity described by Public Law 86-272, along with the activity described in the facts herein, Petitioner X would fall outside the protection of that Public Law and would be considered to be doing business in New York for purposes of the Article 9-A tax (Article 9-A Regulations § 1-3.4[b][9][v]).

If there are other facts relevant to whether Petitioner X is doing business in New York apart from those set forth above, or if any of the facts set forth are inaccurate, the result of the “doing business” analysis herein might be different and this Advisory Opinion should not be relied on for guidance.

DATED: April 11, 2013

/S/

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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.