

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. C821029A

On October 29, 1982 a Petition for Advisory Opinion was received from Touche Ross and Company, 1700 Market Street, Philadelphia, Pa. 19103.

At issue is whether a foreign corporation is subject to the Franchise Tax on Business Corporations imposed under Article 9-A of the Tax Law, under the following circumstances.

The corporation ("Corporation"), which conducts a typesetting operation, has its seat of management and commercial domicile, and conducts its manufacturing operations outside the State. Although Corporation has customers in many states, the majority of its sales are to New York customers. Customers in New York place orders by mail, by telephone, or through salesmen employed by Corporation to solicit sales in New York on a regular and continuous basis. All such orders are sent outside the State for approval or rejection.

The customer's manuscripts are delivered to Corporation's typesetting plant, located outside New York, by salesmen, messengers, or common carriers. There the manuscripts are typeset and photographed. The salesmen, messengers, or common carriers then deliver the negatives either back to the customer in New York or directly to the customer's publisher at some other location.

New York State imposes a franchise tax on foreign corporations that are, among other things, doing business in the State. Tax Law, §209.1. Pursuant to Public Law 86-272, however, no state may impose a net income tax on a foreign corporation where the corporation's only activities in that state are:

"(1) the solicitation of orders by such person, or his representative, in such state for sales of tangible personal property, which orders are sent outside the state for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the state;..."

Act of Sept. 14, 1959, Pub. L. No. 86-272, 1959 U.S. Code Cong. & Ad. News (73 Stat.) 613.

The term "tangible personal property" refers to corporeal personal property. Walker Engraving Corp. v. State Tax Commission, 268 N.Y. 648 (1935). In the present case, customers relinquish manuscripts in return for a typeset negative. The underlying object of the transaction is the purchase of the negative, a form of tangible personal property, thus bringing the business of Corporation within the ambit of concern of P.L. 86-272.

Petitioner's activities in New York are three-fold: (1) soliciting orders, (2) picking up manuscripts for delivery to its typesetting plant outside New York, and (3) delivering typeset negatives to customers in New York.

The activities in New York that constitute pure solicitation may not be made the basis for an assertion of jurisdiction to tax under Article 9-A, by virtue of Public Law 86-272. Although the courts have varied significantly on precisely what activities ancillary to pure solicitation are protected by P.L. 86-272 (See, e.g., Gillette Co. v. State Tax Commission, 56 A.D.2d 475 (3d Dept. 1977), aff'd, 45 N.Y.2d 846 (1978), Hervey v. AMF Beaird, Inc., 250 Ark. 147, 464 S.W.2d 557 (1971)), such issue is not of concern herein.

Next, P.L. 86-272 specifically includes, as part of the protected activities, the sending of orders "outside the State for approval or rejection." In the present case, the delivery of the manuscript to the typesetting location outside New York is in essence the placing of the order. Thus, picking up and delivering the manuscript for the purpose of placing the order is a protected activity. Further, this service is provided for the convenience of the customer. "[W]hen a corporate representative performs [such] an 'act of courtesy' in order to accommodate a customer, he has not ventured beyond the realm of 'solicitation'" Indiana Department of Revenue v. Kimberly - Clark Corp., 416 N.E.2d 1264, 1268 (Ind., 1981). This view is consistent with the relatively liberal construction New York courts have put on the term "solicitation" in the context of P.L. 86-272. Gillette Co. v. State Tax Commission, 56 A.D.2d 475 (3d Dept. 1977), aff'd, 45 N.Y.2d 846 (1978); North American Car Corp. v. State Tax Commission, 94 A.D.2d 880 (3d Dept. 1983).

Finally, delivering the completed typeset negative to customers in New York constitutes "delivery from a point outside the State" as defined in P.L. 86-272, and falls within the scope of activities protected by its provisions. This interpretation is supported by a recent commentary on Public Law 86-272 in which it was noted that "[p]resumably, the protected area includes not only delivery by common carrier or the post office, but also by the vendor's trucks, for the test appears to be the point of origin of the shipment." J. Hellerstein, State Taxation, Vol. I, p.238 (1983). In the present case, therefore, such deliveries are protected regardless of whether they are made by Petitioner's salesmen, messengers, or common carriers.

Based on the foregoing considerations, Corporation's described New York activities fall within the ambit of Public Law 86-272. Therefore, Corporation is exempt from the Franchise Tax on Business Corporations, imposed under Article 9-A of the Tax Law.

DATED: September 11, 1984

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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