

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-89(13)C
Corporation Tax
November 6, 1989

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C890712A

On July 12, 1989, a Petition for Advisory Opinion was received from Project Technology, Inc., 2560 Ninth Street #214, Berkeley, California 94710.

The issue raised is whether Petitioner, Project Technology, Inc., is subject to franchise tax, under Article 9-A of the Tax Law, because it conducted four five-day courses in New York State.

Petitioner is a California corporation that conducted four five-day courses in New York State in 1988. The classes were taught by employees of Petitioner who do not reside in New York State. Petitioner does not own or rent property in New York State. Petitioner also provided consulting services for client projects. The gross revenue in question was \$50,000.00 and Petitioner's before-tax profit margins were approximately 4%.

Petitioner states that California uses the three-factor formula (sales, property and payroll) to determine the percentage of business income to be taxed in California and under such formula, California will tax the income from the activities at issue, if the income-producing activity, based on the costs of performance, is performed in California. Petitioner provides that "costs of performance" are the direct costs in the income producing activity. For Petitioner, the direct costs of the activities at issue include the instructor's salary, course site expenses, travel expenses and the production costs of the course materials. Because a greater share of the costs of performance of the activities at issue were incurred in California, the income is taxed in California. Therefore, Petitioner contends that it is not subject to tax in New York State.

Section 209.1 of Article 9-A of the Tax Law imposes the business corporation franchise tax on every foreign corporation, unless specifically exempt, for the privilege of doing business, or of employing capital, or of owning or leasing property in New York State in a corporate or organized capacity, or of maintaining an office in New York State.

Section 1-3.2(b) of the Business Corporation Franchise Tax Regulations (hereinafter "Article 9-A Regulations") provides that:

(1) [t]he term doing business is used in a comprehensive sense and includes all activities which occupy the time or labor of men 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, compared with the nature, continuity, frequency, and regularity of its activities elsewhere;

(ii) the purposes for which the corporation was organized, compared with its activities in New York State;

(iii) the location of its offices and other places of business;

(iv) the income of the corporation and the portion thereof derived from activities in New York State;

(v) the employment in New York State of agents, officers and employees; and

(vi) the location of the actual seat of management or control of the corporation. 20 NYCRR 1-3.2(b)

Section 1-3.2(c) of the Article 9-A Regulations provides that:

[t]he 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. 20 NYCRR 1-3.2(c)

Section 1-3.2(d) of the Article 9-A Regulations provides that:

[t]he 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. 20 NYCRR 1-3.2(d)

Petitioner is not employing capital in New York, does not own or lease property in New York and does not maintain an office in New York. Therefore, the pertinent question in determining whether Petitioner is subject to tax under Article 9-A is whether Petitioner is "doing business" in New York State.

During 1988, Petitioner's employees taught software development seminars in four five-day courses that were conducted in New York State. In addition, during 1988, its employees provided "consulting services for client projects," but it is not clear, whether such services were conducted by employees in New York State.

The fact that Petitioner's employees were in New York State conducting the software development seminars for compensation is sufficient presence in New York State to constitute "doing business" in New York State. Further, where the consulting services are performed by Petitioner's employees in New York State, such activity would also constitute "doing business" in New York State.

When a corporation is doing business in New York State pursuant to section 209.1 of the Tax Law, such corporation is subject to tax under Article 9-A of the Tax Law.

Accordingly, pursuant to section 209.1 of the Tax Law and section 1-3.2(b) of the Article 9-A Regulations, Petitioner is subject to the franchise tax imposed under Article 9-A of the Tax Law for taxable year 1988 and for all subsequent taxable years Petitioner is doing business in New York State. Petitioner must compute its tax under Article 9-A pursuant to section 210 of the Tax Law. It should be noted that for New York State franchise tax purposes, it is immaterial whether California taxes the income from the activities conducted in New York State.

DATED: November 6, 1989

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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