

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

TSB-A-91(19)C
Corporation Tax
October 24, 1991

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO.C910715B

On July 15, 1991, a Petition ,for Advisory Opinion was received from The American Crane Corporation, 202 Raleigh St., Wilmington, North Carolina 28412.

The issue raised by Petitioner, The American Crane Corporation, is whether it is doing business in New York State and therefore is subject to tax under Article 9-A of the Tax Law.

Petitioner was incorporated in North Carolina in April 1987 and began operations in July 1987. Petitioner manufactures heavy equipment machinery (cranes). Petitioner sells the cranes to dealers throughout the county and has averaged \$40 million in sales since inception. At the present time, Petitioner employs 250 people. All facilities including manufacturing, warehousing and sales are located in Wilmington, North Carolina.

For customer service and convenience, Petitioner has a small service department that repairs cranes out in the field. Only four or five employees travel for this purpose. Petitioner's employees come into New York for a maximum of two weeks a year for such repair services. For instance, during 1990 only one employee spent ten days in New York consisting of two days in July, three days in September and five days in November. Petitioner charges a nominal fee to cover its expenses for this service. The revenue generated from these service trips represent less than one-tenth of one percent of Petitioner's total revenue for 1990. Petitioner does no other business in New York.

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.

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 or construction.

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.

Section 1-3.4(b)(9) of the Article 9-A regulations provides an exemption from taxation under Article 9-A for corporations which are exempt pursuant to the provisions of Public Law 86-272 (15 U.S.C.A. §§ 381-384). Such section provides that:

- (i) [a] foreign corporation whose income is derived from interstate commerce is not subject to tax under article 9-A 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 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.

Section 1-3.4(b)(9)(v) of the Article 9-A Regulations provides that:

[a]ctivities beyond mere solicitation will subject a corporation to tax in New York State. In general, activities of employees in New York State which are intended or designed to promote or encourage the marketing of the corporation's products in New York State or intended or designed to maintain a market already established in New York State are beyond mere solicitation and will make a corporation taxable. In determining whether a corporation's activities exceed mere solicitation, all of the corporation's activities in New York State will be considered. Examples of activities which go beyond mere solicitation 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) setting up displays of the corporation's products for customers;
- (f) giving technical advice on the use of the corporation's products.

Herein, Petitioner's employees come into New York to repair cranes that it sells. Consequently, Petitioner's activities in New York State go beyond the mere solicitation of orders and Petitioner is not exempt from tax by virtue of Public Law 86-272.

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. However, giving due consideration to the factors set forth in section 1-3.2(b)(2) of the Article 9-A Regulations, and viewing Petitioner's activities as set

forth above in a comprehensive sense, such activities in New York State constitute "doing business" within the meaning of section 209.1 of the Tax Law.

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 the 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.

DATED: October 24, 1991

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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