

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

TSB-A-93 (8) C
Corporation Tax
February 26, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C920814B

On August 14, 1992, a Petition for Advisory Opinion was received from Construction Forms, Inc., W60 N151 Cardinal Avenue, Cedarburg, Wisconsin 53012.

The issues raised by Petitioner, Construction Forms, Inc., are (1) whether it is doing business in New York State pursuant to section 1-3.2(b) of the Business Corporation Franchise Tax Regulations (hereinafter "Article 9-A Regulations") and (2) whether its activities constitute solicitation and if so, go beyond mere solicitation as defined in section 1-3.4(b)(9)(v) of the Article 9-A Regulations.

Petitioner manufactures concrete pumping system components and accessories for the concrete pumping industry. Petitioner's products are used throughout the United States and the world by contractors and others to pump concrete for the construction of office buildings, dams, bridges, etc. Petitioner is a major supplier in the industry. Petitioner estimates that it controls 50% of the domestic market. Petitioner's world wide annual sales are approximately \$10,000,000. Petitioner's sales to New York customers totaled \$467,000 in fiscal year 1989-1990.

Petitioner does not have any offices, factories or distribution centers in New York. Petitioner does not have any traveling sales personnel or other employees or agents who reside in New York or even visit New York to solicit sales for its product.

Petitioner's products are marketed directly from its home offices in Cedarburg, Wisconsin. Advertising is primarily limited to trade magazines. There are some promotional materials used by Petitioner. However, these are mailed from Petitioner's home office. A customer can order Petitioner's product directly from the factory or through a limited number of distributors who are authorized to resell Petitioner's products or through one of Petitioner's branch warehouses. Petitioner's closest facility to New York is a branch warehouse located in Piscataway, New Jersey. Petitioner collects New Jersey sales tax where applicable. A distributor authorized to resell Petitioner's products takes title to the products, is billed by Petitioner, pays Petitioner and then resells the products to the ultimate user. Distributors are often also contractors, using Petitioner's products for their own projects. Approximately one-half of Petitioner's sales in New York are to distributors. Petitioner uses common carriers to ship all orders that are not picked up directly by the customer at the New Jersey warehouse. Petitioner never delivers its products with its own vehicles.

Petitioner employs three regional managers to oversee the U.S. market. Mr. John Ferraris is Petitioner's Eastern Regional Manager. He is responsible for overseeing product distribution and technical services provided to Petitioner's customers in 15 east coast states, including New York.

He does not have an engineering degree or other formal technical training. He does not call on customers to solicit or otherwise obtain orders. In addition, Mr. Ferraris does not call on Petitioner's customers to distribute catalogues or other advertising material. Rather, Mr. Ferraris is a customer service manager and his primary responsibility is to ascertain and arrange to service the needs of the customers, and to act as intermediary between the customer and Petitioner's headquarters in Cedarburg.

The regional manager acts as the eyes and ears of Petitioner. He keeps abreast of various ongoing and proposed projects which may have a use for Petitioner's concrete pumping equipment. He keeps the corporate offices informed so it can make the appropriate marketing effort. The regional manager also keeps in touch with major customers with ongoing projects to keep abreast of their needs and to refer them to Petitioner's engineering department in Cedarburg, Wisconsin for technical advice. The regional manager is responsible for keeping good customer relations with Petitioner's large customers by entertaining and listening to their concerns.

Petitioner's regional managers do provide some limited and basic advice regarding general and routine applications for Petitioner's products. This includes basic advice regarding the safe use of Petitioner's products. However, this is limited and basic advice as to what Petitioner's products are available for general and routine applications. This advice is more along the lines of an assessment of a need and best utilization of Petitioner's products. The primary source of advice for technical applications is from Petitioner's engineering department. For any large or complex job which requires non-routine application of Petitioner's concrete pumping equipment, the regional manager would refer any questions to Petitioner's engineering department. In addition, Petitioner's engineering department holds an annual service school at its home offices on the safety and application of its products.

Mr. Ferraris is paid a straight salary. He is not under any type of commission arrangement. Petitioner's customers are not charged for the services provided by its regional managers. Mr. Ferraris resides in Pennsylvania and services 15 east coast states. He makes approximately 6 to 10 personal visits to New York per year, each trip lasting one to two days. Mr. Ferraris and other Petitioner personnel do not solicit current or prospective customers 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 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 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;
- (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.

A foreign corporation was held to be doing business in New York when its employees taught software development seminars conducted in New York even though the corporation did not employ capital or own or lease property in New York and did not maintain an office in New York. Project Technology, Adv Op Comm T & F, November 6, 1989, TSB-A-89(13)C.

Also, it has been held that where a foreign corporation has no offices or assets located in New York and no employees based in New York, the corporation was doing business in New York when it sent employees into New York to install automated management systems for movie theatres by connecting the hardware, loading the software, testing the system and training the customers to use the system. Theatron Data Systems, Adv Op Comm T & F, April 16, 1990, TSB-A-90(10)C.

In addition, a foreign corporation was held to be doing business in New York when its employees provided clerical and technical services in New York under the supervision of the foreign corporation's clients even though the foreign corporation did not employ capital or own or lease property in New York and did not maintain an office in New York. Quantum Resources Corporation, Adv Op Comm T & F, January 18, 1991, TSB-A-91(2)C.

Herein, 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 east coast regional manager's activities as set forth above, 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 State pursuant to section 209.1 of the Tax Law, such corporation is subject to tax under Article 9-A of the Tax Law unless specifically exempt.

Section 1-3.2(a)(3) of the Article 9-A Regulations provides that:

Pursuant to Public Law 86-272 (15 U.S.C.A. sections 381 - 384), a foreign corporation is not subject to the tax imposed by article 9-A of the Tax Law if its activities are limited to those described in that law. That is, the solicitation of orders by the corporation's employees, representatives or independent contractors for sales of tangible personal property, which orders are sent outside New York State for approval or rejection, and, which if approved, are filled by shipment or delivery from a point outside New York State. For a description of corporations which are exempt from taxation under Article 9-A of the Tax Law pursuant to the provisions of Public Law 86-272, see section 1-3.4(b)(9) of this Subpart.

Section 1-3.4(b)(9) of the Article 9-A regulations as amended January 25, 1993, 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 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 for a point outside New York State; and

(b) the solicitation of order 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.

...

(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.)

(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, shop, warehouse or stock of goods in New York State will make a corporation taxable. However, a corporation will not be made taxable solely by maintaining a supply of goods in New York State if such goods are used only as free samples in connection with the solicitation of orders. 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

If Petitioner does not solicit orders for its products in New York State, the provisions of Public Law 86-272 are not applicable to its activities in New York State and thus Petitioner is not exempt from tax under Article 9-A pursuant to section 1-3.4(b)(9) of the Article 9-A Regulations.

If it is held that Petitioner's activities in New York State do constitute the solicitation of orders pursuant to Public Law 86-272, and the eastern regional manager gives advice on the general application of Petitioner's products and on the safe use of such products, which advice constitutes "technical advice" as contemplated in section 1-3.4(b)(9)(v)(f) of the Article 9-A Regulations, where such advice about Petitioner's products is given before the products are delivered, such advice is ancillary to the solicitation of orders and Petitioner would be exempt from tax under Article 9-A pursuant to section 1-3.2(a)(3) by virtue of Public Law 86-272. However, if the advice is given after the products are delivered, such activity, pursuant to section 1-3.4(b)(9)(v)(f) of the Article 9-A Regulations, goes beyond the solicitation of orders, and Petitioner will not be exempt from tax under Article 9-A pursuant to section 1-3.2(a)(3) of the Article 9-A Regulations.

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The determination of whether Petitioner's activities constitute the solicitation of orders is a question of fact not susceptible of determination in an Advisory Opinion. An Advisory Opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to "a specified set of facts". Tax Law §171. Twenty-fourth, 20 NYCRR 2376.1(a).

DATED: February 26, 1993

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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