

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

TSB-A-95 (11) C
Corporation Tax
July 26, 1995

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C950301A

On March 1, 1995, a Petition for Advisory Opinion was received from Christopher L. Doyle, Esq., c/o Hodgson, Russ, Andrews, Woods & Goodyear, LLP, 1800 One M&T Plaza, Buffalo, New York 14203.

The issue raised by Petitioner, Christopher L. Doyle, Esq., is whether certain receipts of the corporation described herein are sourced in New York State for purposes of the receipts factor of the business allocation percentage under Article 9-A of the Tax Law.

The Taxpayer is a corporation subject to tax in New York State under Article 9-A of the Tax Law. The Taxpayer's only office is located in New Hampshire. The Taxpayer provides diversified marketing services to its clients.

The diversified marketing services the Taxpayer provides are performed in two stages: the development stage and the execution stage. Typically, a potential client will approach the Taxpayer with a marketing idea it would like executed in a particular market or markets. The marketing plan might include something as simple as setting up point of sale displays in a supermarket chain in a particular region. Or the marketing plan may be more complicated and include design and distribution of brochures or other collateral information pieces about a product or company. Some plans also include packaging and distribution of free samples of products manufactured by one or several manufacturers.

Once the Taxpayer has received a marketing plan from a client, it reviews the plan and develops a program to facilitate realization of the plan. As part of program development, the Taxpayer maps out a strategy for the execution stage, identifies the independent contractors (the "subcontractors") that will physically perform the tasks required during the execution stage and develop a program price based on the budgeted costs for the execution stage. The Taxpayer assimilates the program strategy and budget into a document (similar to a "bid") submitted to the client, who then accepts or rejects the Taxpayer's program bid.

If the client accepts the program bid, the Taxpayer enters the execution stage during which the program strategy discussed above is implemented by the subcontractors. For instance, the Taxpayer will contract with a graphic art designer to design brochures if brochure design is part of the program. If brochure distribution is part of the program, the Taxpayer will contract with subcontractors to prepare packets of brochures for mailing; or, if hand distribution has been specified in the program, the Taxpayer will contract with subcontractors to distribute the brochures by hand.

The Taxpayer oversees and schedules the various tasks required to be accomplished during the execution stage. However, all such tasks are performed by subcontractors, and none of the tasks are performed by the Taxpayer. The Taxpayer reviews all invoices received from the subcontractors actually completing the tasks required during the execution phase and pays all of the subcontractors for the work performed. Once a Program has been executed the Taxpayer invoices its clients. The client pays the one price specified in the bid which covers both program development and execution.

Program development occurs predominantly in the Taxpayer's office in New Hampshire although certain aspects of program development may require visits by the Taxpayer's planning personnel to a client's office located in some other state or country.

Likewise, the Taxpayer's oversight of program execution is accomplished mainly in its New Hampshire office, even though most of the subcontractors which actually perform the tasks required in the execution stage of the program are located in the region, country or market which is the target of the program.

In a hypothetical tax year, the Taxpayer might receive 20 marketing plans with requests for program bids. The Taxpayer's personnel in its New Hampshire office will prepare program strategies and budgets and submit a bid in connection with each of the 20 marketing plans received. Perhaps four of the bids will be accepted by Taxpayer's clients. Of the four bids received, one will require some execution in New York State.

As part of the execution stage, the Taxpayer will contract with subcontractors located in the targeted markets to perform the execution stage tasks including: creative services, mailing, hand distribution, display erection, sample packaging and distribution, etc. If the execution stage requires multiple steps, the Taxpayer's New Hampshire personnel will oversee the steps and schedule the subcontractors to provide for the most expeditious completion of the execution stage of the program. After each phase of the execution stage is completed, the subcontractors will submit invoices to the Taxpayer. If the invoices are proper, the Taxpayer pays the subcontractors. When the execution stage is completed, the Taxpayer submits one detailed bill to each client.

The one program requiring New York execution during the hypothetical year involves in-store displays to be placed in stores located in New York State and the distribution of free samples at such displays. The Taxpayer pays a Massachusetts subcontractor \$20,000 to design the displays, \$30,000 to a Connecticut subcontractor to fabricate the displays in easy-to-ship pieces, and \$150,000 to a New York subcontractor to erect the displays in the New York stores and to distribute the samples at the displays. The displays are owned by the Taxpayer's customer at all times after they are manufactured⁴ The Taxpayer never owns the displays. The Taxpayer bills its client \$300,000 for its services. The \$100,000 the Taxpayer received in excess of its subcontractor expenses covers the Taxpayer's program development and program management expense and the Taxpayer's profit. The Taxpayer's program development and management expenses for this program were \$50,000, including salary expense, office overhead, etc. The Taxpayer's total receipts for the year are \$1,200,000.

Section 210.3(a)(2) of the Tax Law provides that the receipts factor of the business allocation percentage is determined by (1) ascertaining the taxpayer's receipts within New York State during the period covered by the report and (2) dividing the sum of such receipts by the taxpayer's total receipts within and without New York State during such period.

Section 4-4.1(b) of the Business Corporation Franchise Tax Regulations ("Article 9-A Regulations") provide that 100 percent of receipts from services performed in New York State are allocable to New York State.

Section 4-4.3 of the Article 9-A Regulations provides that:

(a) The receipts from services performed in New York State are allocable to New York State. All receipts from such services are allocated to New York State, whether the services were performed by employees, agents or subcontractors of the taxpayer, or by any other persons. It is immaterial where such receipts are payable or where they are actually received.

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(f)(1) Where a lump sum is received by the taxpayer in payment of services performed within and without New York State, the portion of the sum attributable to services performed within New York State is determined on the basis of the relative values of, or amounts of time spent in performance of such services within and without New York State, or by some other reasonable method. Full details must be submitted with the taxpayer's report.

Herein, the Taxpayer's receipts from its diversified marketing services are receipts for services performed for its clients. Pursuant to section 4-4.3(a) of the Article 9-A Regulations, when computing the receipts factor of the business allocation percentage, the Taxpayer includes, in the numerator of such factor, the receipts for services performed in New York State by its employees and by the subcontractors the Taxpayer contracts with to perform services for it.

Pursuant to section 4-4.3(f)(1) of the Article 9-A Regulations, the Taxpayer determines the portion of the lump sum payment received from a client that is attributable to services performed within New York State on the basis of the relative values of or amounts of time spent in the performance of such services within and without New York State. The Taxpayer may use some other method if it is determined to be reasonable. Such section 4-4.3(f)(1) requires that regardless of the method used, the full details, with respect to the method used, must be submitted with the Taxpayer's report.

Accordingly, the Taxpayer must submit, with its report, the full details with respect to the method used in computing the portion of a lump sum receipt that is attributable to the performance of services within New York State for purposes of the numerator of the receipts factor of the business allocation percentage. The determination of whether the Taxpayer's method is reasonable is a question of fact that, pursuant to section 4-4.3(f)(1) of the Article 9-A Regulations, must be answered on a case by case basis based upon a careful review of the relevant facts

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and circumstances of each case. Inasmuch as any such review of the relevant facts and circumstances must be conducted in the context of an audit performed by the Audit Division, such determination is not within the scope of 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: July 26, 1995

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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