

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

TSB-A-97(6)C
Corporation Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C960425A

On April 25, 1996, a Petition for Advisory Opinion was received from Ernst & Young LLP, 787 Seventh Avenue, New York, New York 10019.

The issue raised by Petitioner, Ernst & Young LLP, is whether a foreign corporation that displays goods at trade shows in New York State is doing business pursuant to section 1-3.2 of the Business Corporation Franchise Tax Regulations ("Article 9-A Regulations").

Petitioner submits the following facts as the basis for this Advisory Opinion.

ABC is a foreign corporation that comes into New York for the limited purpose of participating in trade shows to display its goods. Typically, ABC comes into New York for two five-day trade shows a year. ABC does not take orders nor sell its goods at the trade shows. ABC does not otherwise "do business" within New York State.

Section 209.1 of Article 9-A of the Tax Law imposes an annual franchise tax on domestic or foreign corporations for the privilege of exercising a corporate franchise, doing business, employing capital, owning or leasing property in a corporate or organized capacity, or maintaining an office in New York State for all or any part of each of its fiscal or calendar years.

However, section 1-3.4(b)(9) of the Article 9-A Regulations provides for an exemption from taxation under Article 9-A for corporations which are exempt pursuant to the provisions of Public Law 86-272 (15 USCA §§ 381-384) and states as follows:

(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 from a point outside New York State; and

(b) the solicitation of orders 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.

(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 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.

Pursuant to section 1-3.4(b)(9) of the Article 9-A Regulations, a corporation is not subject to tax in New York State if it is exempt pursuant to the provisions of Public Law 86-272. To be exempt pursuant to Public Law 86-272, a corporation's activities in New York State must be limited to 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. Activities that exceed the solicitation of orders will subject a corporation to tax in New York State, unless they are *de minimis*. Activities are not *de minimis* if they establish a nontrivial additional connection with New York.

In this case, ABC is a foreign corporation that comes into New York State for the limited purpose of participating in two five-day trade shows to display its goods. Petitioner states that ABC does not take orders or sell its goods at the trade shows nor does it otherwise do business in New York State.

Where ABC comes into New York State for 10 days during the taxable year to participate in the two five-day trade shows, the activity for the limited purpose of displaying its goods at the trade shows constitutes a trivial connection with New York that is deemed to be a *de minimis* activity in excess of solicitation. Where ABC does not otherwise do business, employ capital, own or lease property or maintain an office in New York State, this *de minimis* activity, pursuant to Public Law 86-272 and section 1-3.4(b)(9) of the Article 9-A Regulations, is not sufficient to subject ABC to tax under Article 9-A of the Tax Law.

DATED: March 24, 1997

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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