

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

TSB-A-97(7)C
Corporation Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C961113B

On November 13, 1996, a Petition for Advisory Opinion was received from Price Waterhouse LLP, 50 Hurt Plaza Building, Suite 1700, Atlanta, Georgia 30303.

The issue raised by Petitioner, Price Waterhouse LLP, is whether a corporation, whose sales representatives' activities in New York State do not exceed the mere solicitation of orders, will lose its protection under Public Law 86-272 and become subject to franchise tax under Article 9-A of the Tax Law as a result of conducting three one-day seminars in New York.

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

The Company is a non-New York corporation engaged in the business of manufacturing medical products, including prosthetic devices and related accessories. Products manufactured by the Company are sold at wholesale to independent retailers located throughout the United States. The Company does not sell directly to the ultimate consumer. During 1994 and 1995, approximately five percent of the Company's sales were made to New York based retailers. None of the Company's New York based customers are directly or indirectly affiliated with the Company.

In order to generate interest in the Company's products, the Company employs a limited number of sales representatives in New York to service accounts in the State. The sales representatives' in-state activities are limited to merely displaying and demonstrating the Company's products to potential and existing customers, as well as answering any questions the customers may have concerning product attributes. The sales representatives do not actually make sales of products to customers; rather, any product orders must be sent directly from the customer to the Company's out-of-state office for approval. Although the sales representatives work out of their homes, their home addresses are not publicly displayed as a Company address.

Apart from product samples, automobiles and home office supplies provided to the sales representatives, the Company maintains no tangible property in New York State.

Periodically, the Company will conduct a small one-day seminar for both existing and prospective customers of the Company's prosthetic products. The primary purpose of these seminars is to train retailers on the proper methods for fitting the prosthetic devices sold by the Company. Upon completion of the course, the participant is presented with a certificate evidencing his/her status as a "certified fitter." Attendance at these seminars is generally limited to 30 or fewer participants. Training is provided by a Company employee who specializes in putting on such seminars. In addition, sales representatives are

generally present at these seminars for purposes of enhancing customer relations. Seminars are generally conducted in private conference centers rented by the Company. Prospective seminar participants are notified of the seminars through direct mailing.

The purpose of the seminars is two-fold. First, by training retailers on the proper methods for fitting prosthetic devices, the Company benefits through the increased sales the retailers are expected to generate. It should be noted that attendance at a training seminar similar to that put on by the Company is not mandatory for prosthetic retailers; rather, it is merely a means of improving the service provided by retailers to their customers. There are no laws or licensing requirements mandating that a retailer become a certified fitter. Accordingly, receipt and display of the Company provided training certificate by independent retailers serves only to increase customer confidence in the retailer's service. It is hoped that this added customer confidence and enhanced retailer service will indirectly generate increased sales for the Company.

The second purpose served by the seminars is to increase both product awareness and goodwill for the Company. Although the training provided by the Company will enhance participants' abilities to fit both Company manufactured and competitor prosthetics, it is hoped that, by providing such seminars, retailer loyalty to the Company will be enhanced. Additionally, because Company brochures and other promotional materials are included in seminar manuals, and Company products are used for purposes of training, it is anticipated that additional retailer interest in Company products will be stimulated.

Seminar participants are required to pay a fee of approximately \$55 - \$60 in order to attend the seminar. This fee covers the cost of seminar facilities, course materials (participants receive a training manual containing Company brochures) and lunch. The amount of the fee is viewed by the Company as negligible and generally set at a level necessary to only cover costs. As a result, profits generated by the seminars are either non-existent or negligible. In fact, were it not for the belief by Company officials that payment of a fee aids to "commit" a retailer to attend a seminar, fees would not even be charged.

It is anticipated that three seminars will be conducted on an annual basis in New York State. Assuming the maximum 30 participants attend each seminar, total New York seminar receipts of between \$4,950 to \$5,400 can be expected. During 1994 and 1995, the New York sales for the Company were approximately \$700,000 and \$1.6 million, respectively. Accordingly, based on 1994 and 1995 figures, seminar receipts would constitute considerably less than one percent of total New York receipts.

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.

Section 1-3.4(b)(9) of the Business Corporation Franchise Tax Regulations ("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.

(vi) Maintaining an office ... in New York State will make a corporation taxable... 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.

In this case, all of the Company's activities in New York State, except the three one-day seminars, constitute the solicitation of orders or are entirely ancillary to the solicitation of orders as described in section 1-3.4(b)(9)(iv) of the Article 9-A Regulations. Under section 1-3.4(b)(9)(v) of the Article 9-A Regulations, the conduct of seminars to train retailers on the proper methods for

fitting the Company's prosthetic devices exceeds activities ancillary to the solicitation of orders because the Company is "giving technical advice on the use of the corporation's products after the products have been delivered to the customer."

However, under the circumstances described in this opinion, the Company's conduct of the three one-day seminars annually to train retailers on the proper methods for fitting the Company's prosthetic devices will constitute *de minimis* activities as contemplated in section 1-3.4(b)(9)(v) of the Article 9-A Regulations. Accordingly, the Company will be exempt from taxation under Article 9-A of the Tax Law pursuant to section 1.3-4(b)(9) of the Article 9-A Regulations.

DATED: March 26, 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.