

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

TSB-A-98(26)C
Corporation Tax
December 2, 1998

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C980814A

On August 14, 1998, a Petition for Advisory Opinion was received from Deloitte & Touche LLP, 2 World Financial Center, 8th Floor, New York, New York 10281-1414.

The issues raised by Petitioner, Deloitte & Touche LLP, are:

1. Whether a foreign corporation's use of public warehouses in New York for the purpose of storing goods to be sold to customers in New York and throughout the country is the use of a fulfillment service under section 209.2(f) of the Tax Law.
2. Whether the foreign corporation is exempt from the tax imposed under Article 9-A of the Tax Law pursuant to Public Law 86-272 when the foreign corporation's only activities beyond the solicitation of orders is the foreign corporation's use of fulfillment services in New York and employees traveling into New York State to examine the warehouses in which its goods are stored and to meet customers?

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

The Company is a foreign corporation that processes food products outside New York. Its inventory of food products is stored in unaffiliated public warehouses throughout the country, including three warehouses located in New York (the "New York Warehouses"). The Company ships the food products from its processing facilities outside New York to the warehouses by common carrier. Unrelated third-party brokers take orders for the sale of food products in New York. The individuals who perform these services are independent contractors and are not employees of the Company. The Company's corporate offices in another state approve the orders taken by the independent contractors and arrange for the shipping from the warehouses directly to customers by common carrier.

The Company does not have an office, employees, or property other than the food products, located in New York. In addition to storing its inventory in the New York Warehouses, the Company has two sales managers, based in offices located outside New York State, who travel to New York once or twice a year for one-week periods to meet customers and inspect the New York Warehouses.

Applicable Law

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.

However, 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.

(ii) For purposes of this exemption, a corporation will not be considered to have engaged in taxable activities in New York State during the taxable year merely by reason of sales in New York State or the solicitation of orders for sales in New York State, of tangible personal property on behalf of the corporation by one or more independent contractors. A corporation will not be considered to have engaged in taxable activities in New York State by reason of maintaining an office in New York State by one or more independent contractors whose activities on behalf of the corporation in New York State consist solely of making sales, or soliciting orders for sales, of tangible personal property.

(iii) The term *independent contractor* means a commission agent, broker, or other independent contractor who is engaged in selling, or in soliciting orders for the sale of tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities. The term *representative* does not include an independent contractor.

(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, shop, warehouse or stock of goods in New York State will make a corporation taxable....

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.

Pursuant to section 1-3.4(b)(9)(vi) of the Article 9-A Regulations, the storage of inventory in New York is an activity that exceeds the solicitation of orders and the activity will make a corporation taxable under Article 9-A.

Further, 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....

However, section 208.19 of the Tax Law, effective September 1, 1997, provides:

The term "fulfillment services" shall mean any of the following services performed by an entity on its premises on behalf of a purchaser:

(a) the acceptance of orders electronically or by mail, telephone, telefax or internet;

(b) responses to consumer correspondence or inquiries electronically or by mail, telephone, telefax or internet;

(c) billing and collection activities; or

(d) the shipment of orders from an inventory of products offered for sale by the purchaser.

Section 209.2(f) of the Tax Law, effective September 1, 1997, provides that a foreign corporation shall not be deemed to be doing business, employing capital, owning or leasing property, or maintaining an office in New York State, for purposes of Article 9-A of the Tax Law, by reason of "the use of fulfillment services of an entity other than an affiliated entity and the ownership of property stored on the premises of such entity in conjunction with such services". Note that, with respect to fulfillment services, the definition of an "affiliated person" was amended by Chapter 75 of the Laws of 1998, enacted on June 2, 1998, and applicable to taxable years beginning on or after August 1, 1998 for purposes of Article 9-A of the Tax Law.

Discussion

Company has unrelated third-party brokers, who are independent contractors not employees of Company, that take orders for the sale of Company's food products in New York. The Company's corporate offices in another state approve the orders and arrange for the shipping from the New York Warehouses directly to customers by common carrier. Once or twice a year for one-week periods, Company's two sales managers, based outside of New York, come into New York to meet with customers and to inspect the New York Warehouses. The New York Warehouses are unaffiliated public warehouses. Petitioner does not have an office in New York.

In Wisconsin Dept of Revenue v Wrigley, 505 US 214, the United States Supreme Court interpreted the term "solicitation" for purposes of PL 86-272. The Court stated that "[a]ctivities that take place after a sale will ordinarily not be entirely ancillary in the sense we have described ... but we are not prepared to say that will invariably be true. Moreover, the pre-sale/post-sale distinction is hopelessly unworkable. Even if one disregards the confusion that may exist concerning when a sale takes place ... manufacturers and distributors ordinarily have ongoing relationships that involve continuous sales, making it often impossible to determine whether a particular incidental activity was related to the sale that preceded it or the sale that followed it."

Accordingly, if Company's two sales managers' activities in New York State to meet with customers constitutes the solicitation of orders pursuant to PL 86-272 and section 1-3.4(b)(9) of the Article 9-A Regulations, these activities will not make Company subject to the tax imposed under Article 9-A of the Tax Law.

Pursuant to section 1-3.4(b)(9)(vi) and section 1-3.2(d) of the Article 9-A Regulations, the storage of Company's product at public warehouses in New York State before it is delivered to the customer is an activity that would make Company subject to tax under Article 9-A of the Tax Law. However, pursuant to section 209.2(f) of the Tax Law, effective September 1, 1997, Company would not be subject to tax under Article 9-A of the Tax Law because of the storage of inventory in New York Warehouses if such storage is in conjunction with the use of the fulfillment services of those New York Warehouses to ship the orders from the inventory of products offered for sale by Company pursuant to section 208.19(d) of the Tax Law. It appears from the facts presented that the New York Warehouses are providing fulfillment services for Company and the storage of Company's product in New York is in conjunction with the use of such services. (See, Distribution Unlimited, Inc, Adv Op Comm T&F, February 19, 1998, TSB-A-98(2)C.)

With respect to Company's two sales managers activities in New York State to inspect the New York Warehouses, these are activities that are not protected under PL 86-272 and section 1-3.4(b)(9). However, these activities are conducted in connection with the use of the fulfillment services of the New York Warehouses, and as such, would not cause Company to be deemed to be doing business, employing capital, owning or leasing property or maintaining an office in New York State. (See, Distribution Unlimited, Inc, Adv Comm Op T&F, September 16, 1998, TSB-A-98(18)C.)

In addition, if the sales managers' activities in New York when meeting with customers constitute the solicitation of orders pursuant to PL 86-272 and section 1-3.4(b)(9) of the Article 9-A Regulations, these activities in New York State would not cause Company to be taxable under Article 9-A of the Tax Law. Otherwise, Company would be subject to tax under Article 9-A. However, there are not enough facts presented to determine whether the sales managers' activities in New York are sufficient to subject Company to tax under Article 9-A.

DATED: December 2, 1998

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

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