

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

TSB-A-98(7)C
Corporation Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C971001A

On October 1, 1997, a Petition for Advisory Opinion was received from Citrin Cooperman & Company, LLP, 529 Fifth Avenue, New York, New York 10017.

The issue raised by Petitioner, Citrin Cooperman & Company, LLP, is whether, for purposes of the receipts factor under Article 9-A, a portion of a taxpayer's receipts are allocable outside New York State when it hires subcontractors outside New York State.

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

The Taxpayer is a New York State corporation that provides telemarketing services to regional telephone companies throughout the United States. The Taxpayer receives a commission from a telephone company for each customer of the telephone company that subscribes to the new service being promoted by the telephone company.

Prior to contacting the customers of the telephone company, the Taxpayer performs all planning functions within New York State. These functions include marketing strategy, script writing and other functions in order to prepare the telemarketing campaign.

The Taxpayer then hires an independent telemarketing company, located outside New York State, that will actually call the telephone company's customers and offer the additional telephone services. The number of customers that subscribe to the new telephone service being solicited by the telemarketing company provides the basis for the Taxpayer's commissions. The Taxpayer gets a commission for each customer that subscribes to the new telephone service.

Section 210.3(a)(2) of the Tax Law provides that the receipts factor of the business allocation percentage includes receipts from the performance of services. Section 4-4.1(b)(2) of the Business Corporation Franchise Tax Regulations ("Article 9-A Regulations") provides that 100 percent of receipts from services performed in New York State are included in the numerator of the receipts factor.

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.

(b) Commissions received by a taxpayer are allocated to New York State if the services for which the commissions were paid were performed in New York State. If the services for which the commissions were paid were performed for the taxpayer by salesmen attached to or working out of a New York State office of the taxpayer, the services will be deemed to have been performed in New York State....

In Christopher L. Doyle, Esq., Adv Op Comm T & F, July 26, 1995, TSB-A-95(11)C, a taxpayer provided diversified marketing services to its clients. The services were performed in two stages: the development stage and the execution stage. The taxpayer, located outside of New York State, would receive a marketing plan from a potential client, and would develop a program for it. The development would include mapping out a strategy for the execution stage, identifying the independent contractors (subcontractors) that would physically perform the tasks required during the execution stage and develop a program price based on the budgeted costs for the execution stage. This work would be done outside of New York State. The taxpayer would then submit a program bid to the potential client. If it was not accepted, the taxpayer would receive no compensation for its efforts. If accepted, the taxpayer would execute the program it developed by overseeing and scheduling the various tasks required to be performed by the subcontractors. The oversight and scheduling would be done outside of New York State, but the subcontractors' work would be done in New York State. None of the execution tasks would be performed by the taxpayer. When the program was executed, the taxpayer would pay the subcontractors for the work performed, and, the client would pay the taxpayer the one price specified in the bid that covered both the program development and execution. The opinion held that the taxpayer's receipts from these marketing services are receipts for services performed for its clients, and the taxpayer includes, in the numerator of the receipts factor, the receipts for services performed in New York State by its employees, if any, and by the subcontractors the taxpayer contracts with to perform services for it in executing the program.

In Alan Langer, CPA, Adv Op Comm T & F, May 20, 1992, TSB-A-92(9)C, a taxpayer booked trips and tours. The taxpayer's purchase agents, and administrative personnel were located outside New York State and the "booking agent" or sales agent was located in New York State. The opinion held that the taxpayer's activities through the efforts of the purchasing agents in packaging the tours and arranging pricing with the various vendors; the marketing efforts; the computer operation and the activities of the administrative personnel, all of which were conducted outside New York State, do not generate any income. The generation of income is based on the booking agent's efforts in New York State in selling, to a customer, a trip or tour "packaged" by the purchasing agent. No revenue is generated until a customer buys a ticket or tour package at the booking agent's New York location. It is the booking agent's efforts in making the sale that generates the taxpayer's receipts from services. The opinion concluded that since the booking agents were located in New York State, 100 percent of the receipts from services rendered would be attributable to New York State for purposes of the receipts factor of the business allocation percentage. The efforts of the taxpayer's purchasing agents and its administrative personnel, the marketing efforts and the computer operation all conducted outside of New York State would be reflected in the property and payroll factors.

In this case, the generation of the Taxpayer's income is based on the independent telemarketing company's efforts in soliciting the telephone company's customers to subscribe to the additional telephone services promoted by the telephone company. No revenue is generated until a telephone company customer subscribes to the new service being solicited by the telemarketing company. The Taxpayer's performance of all the planning functions including marketing strategy, script writing and other functions in preparation for the telemarketing campaign does not generate any income.

Accordingly, when computing the receipts factor of the business allocation percentage pursuant to section 4-4.3(a) of the Article 9-A Regulations and Doyle, supra, the Taxpayer's receipts from services performed in New York State are allocable to New York State whether the services are performed by employees, agents or subcontractors of the Taxpayer. Pursuant to section 4-4.3(b) of the Article 9-A Regulations and Langer, supra, the Taxpayer's commissions received from a regional telephone company, for each customer of the telephone company that subscribed to the new service being solicited by the independent telemarketing company hired by the Taxpayer, are allocated to New York State to the extent that the services of the independent telemarketing company are performed or deemed to have been performed within New York State. It is the efforts of the telemarketing company that generate the commissions. The Taxpayer's performance of the planning functions does not generate receipts. These efforts are reflected in the property and payroll factors of the business allocation percentage.

The services performed by the subcontractor will be deemed to have been performed in New York State if it is determined that the subcontractor is "attached to or working out of a New York State office of the [T]axpayer". Such determination is a question of fact that is not susceptible of determination in an advisory opinion. Tax Law, §171.24; 20 NYCRR 2376.1(a).

DATED: June 8, 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.