

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

TSB-A-99(14)C
Corporation Tax
March 1, 1999

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C980330B

On March 30, 1998, a Petition for Advisory Opinion was received from Company A, c/o Ernst & Young LLP, 99 Wood Ave. S., PO Box 751, Iselin New Jersey 08830-0471.

The issue raised by Petitioner, Company A, is whether its activities in New York are enough to subject it to tax under Article 9-A of the Tax Law, and if yes, must it compute tax under the entire net income base.

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

Company A is a manufacturer and distributor of wholesale paper products used in a specialized industry. Company A's products are manufactured outside New York State (the "State") and are then sold to retailers and/or other distributors located both inside and outside the State. Company A never directly sells its products to the ultimate consumer.

The activities of Company A within the boundaries of the State are limited to those conducted by only two employees. Both employees are sales representatives responsible for the solicitation of sales from within and without the State. The first sales representative ("Rep 1") resides in or around Buffalo, New York while the second sales representative ("Rep 2") resides in the State of New Jersey. The sales territory of Rep 1 is inclusive of western Pennsylvania and all the counties of upstate New York. The sales territory of Rep 2 is inclusive of New York City, Long Island, Westchester County, New Jersey and eastern Pennsylvania. Both representatives are permitted to and do carry product samples. These product samples are used for display purposes in the solicitation of sales. At no time may these samples be sold to any individual or company.

Company A does not own or lease any real property in the State. Personal property owned by Company A within the State is limited to that of a company vehicle and general office equipment (i.e., fax machine, computer, etc.) needed by Rep 1 in performing his everyday duties. Office supplies (i.e., paper, pens, etc.) needed by Rep 1 are obtained through a local office supply store. Office supplies and other general expenses (i.e., phone bill, travel expenses, etc.) are reimbursed to Rep 1 through a periodic expense report. Note, Company A does not provide any other remuneration to Rep 1 with regards to his home office expenses (i.e., rental reimbursement).

Petitioner states that Company A does not represent itself as having an existence within New York State, either by the efforts of Rep 1 or through the company's own efforts. Any documentation (i.e., business cards, letterhead, etc.) that is provided by Rep 1 to customers references only the out-

of-state corporate office address and phone number of Company A. Any correspondence sent to Rep 1 by customers is sent to the out-of-state corporate office address of Company A and then forwarded to Rep 1 by Company A. Rep 1 has a voice-mailbox at the out-of-state corporate office where Rep 1 can retrieve voice-mails.

In addition to the above mentioned facts, it can be assumed for purposes of this advisory opinion that Company A is properly complying with the payroll withholding and unemployment compensation tax laws of the State.

The following is a listing of the job responsibilities of both Rep 1 and Rep 2:

- Fulfill assigned sales quotas for all company distributed products.
- Responsible to visit territorially designated customers for purposes of solicitation of sales orders.
- Confer with immediate supervisor (located outside the State) on all matters affecting the assigned sales territory.
- Implement localized sales plan in order to meet annual sales quotas.
- Provide feedback to Company A regarding its sales programs (i.e., summary of sales by product) in order to better align itself for solicitation of future sales.
- Advise Company A of trends and competitive activity within their assigned sales territories.
- Remit customer purchase requests to Company A (located outside the State) for credit check, order processing, shipping and billing.
- Attend nationwide trade show conventions when and as directed by the Vice President of Sales. (Note: conventions are not held in the State.)

Discussion

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. The tax is imposed on the basis of the corporation's entire net income base, or upon such other basis (capital base, minimum taxable income bases or the fixed dollar minimum), as may be applicable, as determined under section 210 of the Tax Law.

However, section 1-3.4(b)(9) of the Article 9-A Regulations ("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. (However, see subparagraph (vi) of this paragraph as to loss of immunity for maintaining an office.)

(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.

Pursuant to section 1-3.4(b)(9) of the Regulations, a corporation is not subject to franchise 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. The solicitation of orders includes ancillary activities such as the use of space at the salesperson's home solely for the salesperson's convenience, as opposed to the salesperson maintaining an office for the corporation.

Pursuant to section 1-3.4(b)(9)(vi) of the Regulations, a corporation's activities in New York will exceed the immunity provisions of Public Law 86-272 if it is considered to be maintaining an office in New York, and the corporation will be taxable under Article 9-A of the Tax Law. A corporation will be considered to be maintaining an office in New York at its salesperson's residence if its salesperson's home office is held out to the public as an office or place of business of the corporation, such as listing a telephone in the corporation's name, and the salesperson makes telephone contacts from the house or receives calls and orders at the house.

In this case, the job responsibilities of Rep 1 and Rep 2, including the use of product samples only for display purposes, and the use of a company vehicle and company general office equipment (i.e. a fax machine, computer, etc.) needed by the Reps in performing everyday duties, fit within the scope of "solicitation of orders" pursuant to the provisions of Public Law 86-272. Company A states that it does not own or lease any real property in New York. It also states that it reimburses Rep 1 for office supplies and other general expenses, but does not provide any other remuneration to Rep 1 with regards to his home office expenses. Company A does not represent itself as having an office at Rep 1's home office address. Rep 1's business cards and letterhead use the out-of-state corporate office address and phone number. Rep 1 receives voice-mail from the voice-mailbox at the out-of-state office, and written correspondence to Rep 1 is sent to the out-of-state office and forwarded to Rep 1. Therefore, it is determined that Company A would not be considered to be maintaining an office in New York at Rep 1's residence pursuant to section 1-3.4(b)(9)(vi) of the Regulations.

Since Company A would not be maintaining an office in New York at Rep 1's residence pursuant to section 1-3.4(b)(9)(vi) of the Regulations, Company A's activities in New York would constitute the solicitation of orders pursuant to the provisions of Public Law 86-272, and pursuant to section 1-3.4(b)(9) of the Regulations, Company A would be exempt from the franchise tax imposed under Article 9-A of the Tax Law. However, Company A would be required to annually

TSB-A-99(14)C
Corporation Tax
March 1, 1999

file an activities report on form CT-245 - **Maintenance Fee and Activities Return For a Foreign Corporation Disclaiming Tax Liability**, but it would not be liable for the maintenance fee.

DATED: March 1, 1999

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

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