

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

TSB-A-86 (15) I
Income Tax
October 24, 1986

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. I860311C

On March 11, 1986, a Petition for Advisory Opinion was received from Hallin Equipment Company, 20 Grist Mill Lane, Manhasset, New York 11030.

The issue raised is whether Petitioner carries on business both within and without New York State so as to permit Petitioner to allocate its net income or loss to New York and non-New York sources.

Petitioner, Hallin Equipment Company, is a limited partnership with two general partners. The partnership was organized to acquire and lease railroad equipment to Penn Central Company, subsequently Conrail.

Penn Central Company, as lessee, is the sole customer of Petitioner. Lessee has its headquarters in Philadelphia, Pennsylvania.

All activities of the Partnership, except for the few the customer has assumed, are overseen by one of the general partners and a management company, both of whom are located in New York State. The general partner and management company arrange for the financing, purchasing and leasing of the railroad cars. They maintain the equipment in good working order and in compliance with all safety requirements. Also, all books of account, ledgers, files and other records, comprising the core of the business are also located in New York. Upon termination of the lease the Petitioner decides whether to re-lease or sell the equipment. Helm Financial Corporation of California arranges for the re-lease or sale.

Petitioner appointed Penn-Central Company, its attorney and its agent-in-fact for the duration of the lease. Penn Central performs the following functions: assert and enforce, in the name of the Petitioner, claims against the seller of the railroad cars; inspect and either accept or reject delivery of the railroad cars ordered by Petitioner. Delivery takes place in Erie, Pennsylvania or Indian Point, Indiana. Also, once a year Penn Central furnishes the Petitioner with an inventory of the equipment and a report on its condition. It is the responsibility of both Petitioner and lessee to maintain the equipment in good working order and in compliance with all rules and regulations. Upon termination of the lease, lessee stores and/or transports the equipment, depending upon the Petitioner's wishes.

Section 637 (subd [a], par [1]) of the Tax Law provides: "In determining New York adjusted gross income of a nonresident partner of any partnership, there shall be included only the portion derived from or connected with New York sources of such partner's distributive share of items of partnership income, gain, loss and deduction entering into his federal adjusted gross income, as such portion shall be determined under regulations of the tax commission consistent with the applicable rules of section six hundred thirty-two."

Section 632 provides in pertinent part:

"(a) General. The New York adjusted gross income of a nonresident individual shall be the sum of the following:

"(1) The net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources, including:

"(A) his distributive share of partnership income, gain, loss and deduction, determined under section six hundred thirty-seven,

* * *

"(b) Income and deductions from New York sources.

"(1) Items of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to:

* * *

"(B) a business, trade, profession or occupation carried on in this state."

These statutory provisions are supplemented by the provisions of regulation sections 131.4[a] and 131.14 which provide:

131.4 Business, trade, profession or occupation carried on in this State (Tax Law, §632[b][1][B]). The New York adjusted gross income of a nonresident individual includes items of income, gain, loss and deduction entering into his Federal adjusted gross income which are attributable to a business, trade, profession or occupation carried on in this State.

"(a) A business, trade, profession or occupation (as distinguished from personal services as an employee) is carried on within the State by a nonresident when he occupies, has, maintains or operates desk room, an office, a shop, a store, a warehouse, a factory, an agency or other place where his affairs are systematically and regularly carried on, notwithstanding the occasional consummation of isolated transactions without the State. This definition is not exclusive. Business is carried on within the State if activities within the State in connection with the business are conducted in this State with a fair measure of permanency and continuity. A taxpayer may enter into transactions for profit within the State and yet not be engaged in a trade or business within the State. If a taxpayer pursues an undertaking continuously as one relying on the profit therefrom for his income or part thereof, he is carrying on a business or occupation. 20 NYCRR 131.4.

131.14 Business carried on partly within and partly without New York State. A business, trade, profession or occupation (as distinguished from personal services an

employee) is carried on partly within and partly without New York State when one or more of the activities described in subdivision (a) of section 131.4 of this Part is systematically and regularly carried on within New York State and one or more of such activities is systematically and regularly carried on outside New York State, or when one or more of such activities is systematically and regularly carried on both within and without New York State. 20 NYCRR 131.14.

Petitioner maintains that it is engaged in business both within and without the State of New York, citing the activities of its lessee/agent as its business activities outside of New York State.

Petitioner concedes that it maintains a regular place of business in New York State, thereby making its income taxable by New York State. However, Petitioner wishes to allocate a portion of its income to sources outside New York. In order to do this Petitioner must either maintain a regular place of business outside of New York or carry on business activities outside of New York with a fair measure of permanency and continuity.

Neither the lessee nor the rental agency would qualify as a regular place of business maintained by the Petitioner. Office space not owned or rented by the taxpayer is not recognized as a regular place of business maintained by the taxpayer outside New York State for allocation purposes. See Frank H. Burgmeiger, Jr. State Tax Commission Decision, September 19, 1980, TSB-H-80-(421)-I.

Petitioner proposes that Penn Central, Petitioner's appointed agent, carried on business activities outside of New York State with a fair measure of permanency and continuity, and that those activities were carried on behalf of the Petitioner, by virtue of Penn Central being its agent, thereby allowing Petitioner to allocate its income to both New York and non-New York sources.

However, based upon the facts described herein, it must be concluded that Penn Central is not conducting Petitioner's business as Petitioner's agent but is, instead, only conducting its own business.

An agent is not only employed by the principal, but represents him as well. He is the business representative of the principal and acts not only for the principal but in the place and instead of the principal. 2 NY Jur 2d, Agency §3. However, the facts in each case must be considered in determining whether or not it is understood that the primary obligation of one party is to act for the benefit of the other. The names which the parties give to the relationship are not determinative. Restatement, Agency, §13, Comment C.

While Petitioner has appointed Penn Central its agent, there is little evidence of the existence of a true agency relationship. Petitioner does not exercise control over Penn Central's activities relating to Petitioner as it would if Penn Central were truly its agent.

However, even if Penn Central is Petitioner's agent, the activities conducted by Penn Central cannot be said to be the conduct of the business of Petitioner. Rather, Penn Central's activities are nothing more than the activities of a lessee and customer of Petitioner. The mere naming of a customer as an agent does not transform the activities of the customer such that the customer's activities become the business activities of the Petitioner.

Accordingly, since Petitioner is not carrying on its business outside of New York State and since Penn Central is not carrying on Petitioner's business outside of New York State, Petitioner is doing business only in New York State and may not allocate its income, gain, loss or deductions out of the state.

Petitioner also requests that no penalties be assessed against Petitioner's partners relating to income of the Partnership determined to be attributable to New York due to the resolution of the above issue.

Section 685(a)(3) of the Tax Law provides for the assessment of penalties for failure to pay any tax required to be shown on a return "unless it is shown that such failure is due to reasonable cause and not due to willful neglect . . ."

Personal income tax regulation section 102.8(b) sets forth the grounds for establishing reasonable cause. The finding of reasonable cause is always a factual question based upon the particular circumstances of each taxpayer. As such, this question is not susceptible to resolution within the context of an advisory opinion.

DATED: October 24, 1986

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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