

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-01(3)S
Sales Tax
TSB-A-01(14)C
Corporation Tax
January 11, 2001

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z000502B

On May 2, 2000, a Petition for Advisory Opinion was received from Ernst & Young LLP, 1400 Key Tower, 50 Fountain Plaza, Buffalo, New York 14202-2297.

The issues raised by Petitioner, Ernst & Young LLP, are:

- (1) Whether Company A is subject to the Article 9-A corporate franchise tax.
- (2) Whether Company A is a vendor required to register for purposes of the Article 28 sales and compensating use tax.

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

Company A manufactures industrial blowers outside of New York State. Most of the blowers are sold without further modification and shipped directly to customers located throughout the United States. However, occasionally, customers request that various electrical components (e.g., motor and pulley) be attached to the blower prior to shipment. Since Company A does not supply the motors or pulleys, an arrangement has been entered into with Company B as follows. Once the manufacturing process is complete, Company A ships a supply of blowers to Company B's facility located in New York State. When a customer wants to purchase one of the modified blowers, it contacts Company A. Company A receives the order for a modified blower and relays the order with specifications to Company B. Company B then adds additional parts (motors and pulleys) to the blower according to the customer's specifications. Once completed, Company B then ships the modified blower directly to the customer and bills Company A for the modifications and shipping. Company A then bills the customer for the full price of the modified blower.

The machine, as originally shipped to Company B, accounts for approximately two-thirds of the finished product cost. The additional motors and pulleys added by Company B account for the remaining one-third of the finished product cost. However, the process to attach the motor and pulley is not time consuming since the blowers are manufactured so that the motor and pulley can be easily attached.

Company B is not a public warehouse, but rather a distributor of electrical motors itself. There is no affiliation between Company A and Company B, and Petitioner contends that Company A has no employees or other nexus creating activity in New York State. In order to timely respond to customer orders for the modified blowers, Company A maintains a constant supply of

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blowers at Company B's facility in New York State. On average, the value of this inventory that is owned by Company A is approximately \$35,000.

Company A does not distribute advertising materials of its products in New York. Any advertising is done through industry trade journals and through Company A's Web site. Company A has one sales representative that makes approximately two trips to New York each year to visit customers and solicit sales.

Discussion

Issue 1 - Article 9-A Franchise Tax

With respect to the franchise tax imposed under Article 9-A of the Tax Law, Section 209.1 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 1-3.2(b) of the Business Corporation Franchise Tax Regulations ("Article 9-A Regulations") provides that:

(1) The term doing business is used in a comprehensive sense and includes all activities which occupy the time or labor of people for profit. Regardless of the nature of its activities, every corporation organized for profit and carrying out any of the purposes of its organization is deemed to be doing business for the purposes of the tax. In determining whether a corporation is doing business, it is immaterial whether its activities actually result in a profit or a loss.

(2) Whether a corporation is doing business in New York State is determined by the facts in each case. Consideration is given to such factors as:

(i) the nature, continuity, frequency, and regularity of the activities of the corporation in New York State;

(ii) the purposes for which the corporation was organized;

(iii) the location of its offices and other places of business;

(iv) the employment in New York State of agents, officers and employees; and

and

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(v) the location of the actual seat of management or control of the corporation.

Section 1-3.2(c) of the Article 9-A Regulations provides that:

[t]he term employing capital is used in a comprehensive sense. Any of a large variety of uses, which may overlap other activities, may give rise to taxable status. In general, the use of assets in maintaining or aiding the corporate enterprise or activity in New York State will make the corporation subject to tax. Employing capital includes such activities as:

- (1) maintaining stockpiles of raw materials or inventories; or
- (2) owning materials and equipment assembled for construction.

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. Also, consigning property to New York State may create taxable status if the consignor retains title to the consigned property.

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 a person other than an affiliated person and the ownership of property stored on the premises of such person in conjunction with such services". For purposes of such Section 209.2(f), an affiliated person is an entity that either owns or controls a majority interest in the foreign corporation, either directly or indirectly, or an entity the majority interest in which is owned and controlled by the foreign corporation, either directly or indirectly.

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:

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(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.

In this case, Company A maintains a constant supply of its blowers in New York State at the facilities of Company B, in order to facilitate the modification to the blowers and the shipment of the blowers to its customers. Pursuant to Section 209.1 of the Tax Law and section 1-3.2(c) and (d) of the Article 9-A Regulations, Company A is employing capital and owning personal property in New York State on a regular basis.

Company B's activities of adding motors and pulleys to Company A's industrial blowers, per the customer's specifications, before shipping the blowers to Company A's customers exceeds "the use of fulfillment services" as provided in Section 208.19 of the Tax Law. Therefore, Company A is subject to the Article 9-A franchise tax and the exemption from the Article 9-A franchise tax provided for in Section 209.2(f) of the Tax Law does not apply.

Issue 2 - Article 28 Sales and Compensating Use Taxes

Section 1101(b) of the Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(8) Vendor. (i) The term "vendor" includes:

(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article;

* * *

(C) A person who solicits business either:

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(I) by employees, independent contractors, agents or other representatives;
or

(II) by distribution of catalogs or other advertising matter, without regard to whether such distribution is the result of regular or systematic solicitation, if such person has some additional connection with the state which satisfies the nexus requirement of the United States constitution;

and by reason thereof makes sales to persons within the state of tangible personal property or services, the use of which is taxed by this article. . . .

* * *

(v) Notwithstanding any other provision of law, the term vendor shall not include:

(A) a person who is not otherwise a vendor who purchases fulfillment services carried on in New York by a person other than an affiliated person; or

(B) a person who is not otherwise a vendor who owns tangible personal property located on the premises of an unaffiliated person performing fulfillment services for such person. . . .

* * *

(18) Fulfillment services. Any of the following services performed by an entity on its premises on behalf of a purchaser: (i) the acceptance of orders electronically or by mail, telephone, telefax or internet; (ii) responses to consumer correspondence and inquiries electronically or by mail, telephone, telefax or internet; (iii) billing and collection activities; or (iv) the shipment of orders from an inventory of products offered for sale by the purchaser.

Section 1131(1) of the Tax Law provides, in part:

"Persons required to collect tax" or "person required to collect any tax imposed by this article" shall include: every vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. . . .

Section 1134(a)(1) of the Tax Law provides, in part:

(i) Every person required to collect any tax imposed by this article . . . commencing business or opening a new place of business, (ii) every person purchasing or selling tangible personal property for resale commencing business or opening a new place of business . . . shall file with the commissioner a certificate of registration, in a form prescribed by the commissioner, at least twenty days prior to commencing business or opening a new place of business

Section 526.10(a) of the New York State Sales and Use Tax Regulations provides, in part:

Persons included. (1) (i) A person making sales of tangible personal property the receipts from which are subject to tax is a vendor.

* * *

(3) A person who solicits business by employees, independent contractors, agents or other representatives and by reason thereof makes sales to persons within the State of tangible personal property or services, the use of which is subject to tax, is a vendor.

Example 5: A California based company uses independent manufacturers' representatives, who are residents of New York State, to sell its product in New York. The California company is a vendor.

(4)(i) A person who solicits business by the distribution of catalogs or other advertising matter, without regard to whether such distribution is the result of regular or systematic solicitation, if such person has some additional connection with the State which satisfies the nexus requirement of the United States Constitution and by reason thereof makes sales to persons within the State of tangible personal property or services the use of which is subject to tax, is a vendor.

(ii) For purposes of subparagraph (i) of this paragraph, the additional connection with the State a person may have in order to qualify as a vendor shall include, but not be limited to:

- (a) the operation of retail stores in the State;
- (b) the presence of traveling sales representatives in the State;
- (c) the presence of employees, independent contractors or agents in the State;
- (d) the presence of service representatives in the State;

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(e) the maintenance of a post office box in the State for receiving responses to such person's solicitations; or

(f) the maintenance of an office in the State, even if such office performs no activities related to the sales solicited by such person.

Company A has an employee that makes approximately two trips to New York each year to visit customers and solicit sales, and Company A maintains a constant supply of its blowers in New York State at the facilities of Company B to facilitate the modification to the blowers and the shipment of the blowers to Company A's customers. These activities, as described in this Advisory Opinion, are sufficient to make Company A a vendor for purposes of Article 28 of the Tax Law.

Company B's activities of adding motors and pulleys to Company A's industrial blowers, per the customer's specifications, before shipping the blowers to Company A's customers exceeds the definition of fulfillment services in Section 1101(b)(18) of the Tax Law. Accordingly, in their entirety the activities performed by Company B in New York do not qualify as a fulfillment service.

Therefore, Company A is required to register as a vendor pursuant to Section 1134 of the Tax Law and is required to collect sales and use tax imposed on its sales of industrial blowers to customers in New York. Company A is not required to collect tax on a sale to a customer in New York if Company A receives in good faith from the customer a properly completed exemption certificate within ninety days of the date of the sale. See Section 1132(c) of the Tax Law and Section 532.4 of the Sales and Use Tax Regulations.

DATED: January 11, 2001

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