

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-A-08(7)C
Corporation Tax
TSB-A-08(4)I
Income Tax
December 15, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z080520A

On May 20, 2008, a Petition for Advisory Opinion was received from Chaim Kofinas, c/o SAX Macy Fromm & Co., PC, 855 Valley Road, Clifton, New Jersey 07013.

The issues raised by Petitioner, Chaim Kofinas, are:

1. Whether Public Law 86-272 (P.L. 86-272) applies to S Corporations and their shareholders for New York State personal income tax purposes.
2. Whether P.L. 86-272 applies to an LLC, treated as a partnership, and its members for New York State corporate franchise and personal income tax purposes.

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

In 1959, Congress enacted P.L. 86-272 (15 U.S.C.A. §§ 381 to 384), which restricts a state from imposing a net income tax on the income of an entity whose only business activities within the state consist of no more than the solicitation of orders for sales of tangible personal property provided that the orders are sent outside the state for approval and the goods are delivered from outside the state.

Applicable law and regulations

Section 209.1 of Article 9-A of the Tax Law imposes an annual franchise tax as follows, in part:

For the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity, or of maintaining an office in this state, for all or any part of each of its fiscal or calendar years, every domestic or foreign corporation, except corporations specified in subdivision four of this section, shall annually pay a franchise tax, upon the basis of its 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 hereinafter provided, for such fiscal or calendar year or part thereof

Section 612(a) of the Tax Law provides:

General. The New York adjusted gross income of a resident individual means his federal adjusted gross income as defined in the laws of the United States for the taxable year, with the modifications specified in this section.

Section 631 of the Tax Law provides, in part:

(a) General. The New York source 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-two, and

(B) his pro rata share of New York S corporation income, loss and deduction, increased by reductions for taxes described in paragraphs two and three of subsection (f) of section thirteen hundred sixty-six of the internal revenue code, determined under section six hundred thirty-two, and

* * *

(2) The portion of the modifications described in subsections (b) and (c) of section six hundred twelve which relate to income derived from New York sources....

(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:

(A) the ownership of any interest in real or tangible personal property in this state;
or

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

(C) in the case of a shareholder of an S corporation where the election provided for in subsection (a) of section six hundred sixty of this article is in effect, the ownership of shares issued by such corporation, to the extent determined under section six hundred thirty-two of this article; ...

(2) Income from intangible personal property, including annuities, dividends, interest, and gains from the disposition of intangible personal property, shall constitute income derived from New York sources only to the extent that such income is from property employed in a business, trade, profession, or occupation carried on in this state.

...

Section 632(a) of the Tax Law provides, in part:

(1) In determining New York source 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-one.

(2) In determining New York source income of a nonresident shareholder of an S corporation where the election provided for in subsection (a) of section six hundred sixty of this article is in effect, there shall be included only the portion derived from or connected with New York sources of such shareholder's pro rata share of items of S corporation income, loss and deduction entering into his federal adjusted gross income, increased by reductions for taxes described in paragraphs two and three of subsection (f) of section thirteen hundred sixty-six of the internal revenue code, as such portion shall be determined under regulations of the commissioner consistent with the applicable methods and rules for allocation under article nine-A or thirty-two of this chapter.

Section 658(c) of the Tax Law provides, in part:

Partnerships, limited liability companies and S corporations. (1) Partnerships. Every partnership having a resident partner or having any income derived from New York sources, determined in accordance with the applicable rules of section six hundred thirty-one as in the case of a nonresident individual, shall make a return for the taxable year setting forth all items of income, gain, loss and deduction and such other pertinent information as the commissioner may by regulations and instructions prescribe. Such return shall be filed on or before the fifteenth day of the fourth month following the close of each taxable year except that the due date for the return of a partnership consisting entirely of nonresident aliens shall be the date prescribed for the filing of its federal partnership return for the taxable year. For purposes of this paragraph, "taxable year" means a year or a period which would be a taxable year of the partnership if it were subject to tax under this article.

(2) S corporations. Every S corporation for which the election provided for in subsection (a) of section six hundred sixty is in effect shall make a return for the taxable year setting forth all items of income, loss and deduction and such other pertinent information as the commissioner of taxation and finance may by regulations and instructions prescribe. Such return shall be filed on or before the fifteenth day of the third month following the close of each taxable year.

(3) Filing fees. Every subchapter K limited liability company, and every limited liability partnership under article eight-B of the partnership law and every foreign limited

liability partnership, which has any income derived from New York sources, determined in accordance with the applicable rules of section six hundred thirty-one as in the case of a nonresident individual, shall, within thirty days after the last day of the taxable year, make a payment of a filing fee. . . .

Section 660(a) of the Tax Law provides:

Election. If a corporation is an eligible S corporation, the shareholders of the corporation may elect in the manner set forth in subsection (b) of this section to take into account, to the extent provided for in this article (or in article thirteen of this chapter, in the case of a shareholder which is a taxpayer under such article), the S corporation items of income, loss, deduction and reductions for taxes described in paragraphs two and three of subsection (f) of section thirteen hundred sixty-six of the internal revenue code which are taken into account for federal income tax purposes for the taxable year. No election under this subsection shall be effective unless all shareholders of the corporation have so elected. An eligible S corporation is (i) an S corporation which is subject to tax under article nine-A or thirty-two of this chapter, (ii) an S corporation which is the parent of a qualified subchapter S subsidiary subject to tax under article nine-A, where the shareholders of such parent corporation are entitled to make the election under this subsection by reason of subparagraph three of paragraph (k) of subdivision nine of section two hundred eight of this chapter; or (iii) an S corporation which is the parent of a qualified subchapter S corporation subject to tax under article thirty-two, where the shareholders of such parent are entitled to make the election under this subsection by reason of paragraph three of subsection (o) of section fourteen hundred fifty-three of this chapter.

Section 1-3.2 of the Business Corporation Franchise Tax Regulations (“Article 9-A Regulations”) provides, in part:

(b) *Foreign corporation – doing business.* (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
- (v) the location of the actual seat of management or control of the corporation.

(c) *Foreign corporation – employing capital.* The 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.

(d) *Foreign corporation – owning or leasing property.* The 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.

(e) *Foreign corporation – maintaining an office.* A foreign corporation which maintains an office in New York State is engaged in an activity which makes it subject to tax. An office is any area, enclosure or facility which is used in the regular course of the corporate business. A salesperson's home, a hotel room, or a trailer used on a construction job site may constitute an office.

Section 1-3.4(b) of the Article 9-A Regulations lists corporations that are exempt from taxation under Article 9-A, including:

- (9) corporations which are exempt pursuant to the provisions of Public Law 86-272 (15 U.S.C.A. §§ 381-384)

(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....;

(i) participating in a trade show or shows, provided that participation is for not more than 14 days, or part thereof, in the aggregate during the corporation's taxable year for Federal income tax purposes....

(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 State 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....

Section 132.4(a)(2) of the Personal Income Tax Regulations ("Article 22 Regulations") provides:

A "business", "trade", "profession" or "occupation" (as distinguished from personal services as an employee) is carried on within New York State by a nonresident when such nonresident occupies, has, maintains or operates desk space, an office, a shop, a store, a warehouse, a factory, an agency or other place where such nonresident's affairs are systematically and regularly carried on, notwithstanding the occasional consummation of isolated transactions without New York State. This definition is not exclusive. Business is carried on within New York State if activities within New York State in connection with the business are conducted in New York State with a fair measure of permanency and continuity. A taxpayer may enter into transactions for profit within New York State and yet not be engaged in a trade or business within New York State. If a taxpayer pursues an undertaking continuously as one relying on the profit therefrom for such taxpayer's income or part thereof, such taxpayer is carrying on a business or occupation. However, see section 132.10 of this Part with regard to the effect of the purchase and sale of property by a nonresident for such nonresident's own account.

Section 137.1 of the Article 22 Regulations provides:

The New York source income of a nonresident partner includes the partner's distributive share of all items of partnership income, gain, loss and deduction entering into such partner's Federal adjusted gross income to the extent such items are derived from or connected with New York State sources, i.e., attributable to the ownership by the partnership of any interest in real or tangible personal property in New York State or to a business, trade, profession or occupation carried on in New York State by the partnership, as determined under sections 132.3, 132.4(a), 132.6, 132.9, 132.12-132.16, 132.21 and 132.22 of this Article and 137.2 of this Part.

New York Tax Treatment of S Corporations And Their Shareholders, Publication 35 (3/00), at 31, provides, in part:

Nonresident shareholders of S corporations that are ineligible S corporations are not subject to tax on any items of income, gain, loss or deduction from the corporation, unless the stock of the corporation is employed in another trade or business carried on by the shareholder in New York (See Appendix B). However, while the nonresident

shareholder is not subject to tax on the S corporation income, the S corporation pass-through items are included in the shareholder's federal adjusted gross income. Accordingly, if, for some other reason, the shareholder is required to file a New York nonresident return, the S corporation items are dealt with as follows:

- In the resident part of the nonresident tax calculation, the S corporation pass-through items are in federal adjusted gross income, and are included in New York adjusted gross income with any of the New York section 612 modifications attributable to such items. The nonresident shareholder is not entitled to make the New York C corporation modifications which would reverse out the S corporation pass-through items. Tax is calculated as for a resident, on this base which includes the S corporation pass-through items.

This is the same treatment that is described above for resident shareholders of ineligible corporations, in the Resident shareholders section on this page.

- As to nonresidents, however, the S corporation pass-through items included in the base are not New York source income. Accordingly, while their inclusion in New York adjusted gross income requires their inclusion in the base and the denominator of the income percentage, they are excluded from the numerator. This treatment effectively factors out the pass-through items from the New York nonresident tax.

If, on the other hand, the stock of the S corporation is employed in another trade or business carried on by the shareholder in New York, the S corporation pass-through items, with the applicable section 612 modifications, are New York source income and accordingly they are included in the numerator of the income percentage.

Opinion

Issue 1

Public Law 86-272 restricts a state from imposing a net income tax on income derived within its borders from interstate commerce if the only business activity of the entity within the state consists of the solicitation of orders for sales of tangible personal property, which orders are to be sent outside the state for acceptance or rejection, and, if accepted, are filled by shipment or delivery from a point outside the state. The provisions of P. L. 86-272 do not apply to a tax imposed by any state on a corporation that is incorporated under the laws of that state or an individual who is a domiciliary or a resident of that state.

Pursuant to section 209.1 of the Tax Law, every domestic or foreign corporation is required to pay an annual franchise tax for the privilege of exercising its corporate franchise,

doing business, employing capital, owning or leasing property in New York in a corporate or organized capacity, or maintaining an office in the State.

Section 1-3.4(b)(9) of the Article 9-A Regulations provides that a foreign corporation is not subject to the franchise tax on general business corporations if it is exempt pursuant to the provisions of P.L. 86-272. To be exempt pursuant to P.L. 86-272, a foreign 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. The orders must be sent outside New York State for approval or rejection and, if approved, must be filled by shipment or delivery from a point outside New York State. Solicitation includes ancillary activities other than maintaining an office that serve no independent business function apart from their connection to the solicitation of orders. In addition, activities beyond the solicitation of orders will not subject a corporation to tax if the activities are de minimis. For purposes of this exemption, a foreign corporation will not be considered to have engaged in taxable activities in New York State during the taxable year merely by reason of 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 the maintenance of 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.

For New York State personal income tax purposes, the New York source income of a nonresident individual includes his or her pro-rata share of New York S corporation income, loss, and deduction derived from or connected to New York sources entering into his or her federal adjusted gross income. See sections 631(a)(1)(B) and 632(a)(2) of the Tax Law. The taxation of shareholders of an S corporation depends upon whether the corporation is a New York S corporation. A New York S corporation is a federal S corporation subject to tax under Article 9-A or Article 32 of the Tax Law that has made the New York S election under section 660(a) of Article 22 of the Tax Law. Pursuant to section 660(a), the shareholders of an S corporation may make the election to treat the corporation as a New York S corporation only if it is an eligible S corporation. An eligible S corporation is a federal S corporation subject to tax under Article 9-A or Article 32 of the Tax Law; or a federal S corporation that is a parent of a qualified subchapter S subsidiary subject to tax under Article 9-A or Article 32, where the shareholders of the parent corporation are entitled to make the New York S election. All of the corporation's shareholders must agree to make the New York S election.

Since section 1-3.4(b)(9) of the Article 9-A Regulations exempts corporations from tax under Article 9-A or Article 32 of the Tax Law pursuant to P.L. 86-272, an S corporation that is exempt by virtue of P.L. 86-272 is ineligible to make the New York S election under section 660(a) of Article 22 of the Tax Law. Nonresident shareholders of an ineligible S corporation are not subject to New York personal income tax on their pro-rata share of income, gain, loss, and deduction entering into his or her federal adjusted gross income, unless the stock of the

corporation is employed in another trade or business carried on by the shareholder in New York. (See *New York Tax Treatment of S Corporations And Their Shareholders*, Publication 35 [3/00], at 31.)

In the case of the S corporation's resident shareholders, since residents of New York are subject to personal income tax on income earned from all sources, pursuant to section 612(a) of the Tax Law, the resident shareholders must include in New York adjusted gross income the same S corporation pass-through items of income, gain, loss and deduction that are included in federal adjusted gross income.

For purposes of whether the S corporation is required to file a tax return, section 658(c)(2) of the Tax Law provides that every corporation that has made the New York election under section 660 of the Tax Law must file a tax return. If the S corporation is ineligible to make the New York S election, a tax return is not required under section 658(c)(2) of the Tax Law.

If the corporation is exempt under Article 9-A of the Tax Law, it is not required to file a tax return as a C corporation in New York. However, foreign corporations that are authorized to do business in New York that are disclaiming tax liability are required to file form CT-245 (*Maintenance Fee and Activities Return For a Foreign Corporation Disclaiming Tax Liability*), and pay an annual maintenance fee. See section 181.2 of the Tax Law.

Issue 2

A partnership is a conduit for tax purposes. Conduit treatment for partnerships means that any partnership items of income, gain, loss, deduction, and credit pass through to the partner and are reported on the partner's tax return. The primary issue here is whether members of an LLC treated as a partnership are subject to New York State corporate franchise or personal income tax if the LLC's only business activities within New York consist of no more than the solicitation of orders for sales of tangible personal property and the orders are sent outside the State for approval and the goods are delivered from outside the State.

Limited liability companies (LLCs) treated as partnerships for federal income tax purposes are treated as partnerships for New York State tax purposes and are not subject to corporate franchise or personal income tax. See Technical Services Bureau Memorandum entitled *Important Notice: New York Tax Status of Limited Liability Companies and Partnerships*, October 25, 1994, TSB-M-94(8)C, (6)I. Accordingly, references to "partner(s)" and "partnership(s)" will also mean "member(s)" and "LLC(s)" if the LLC is treated as a partnership.

Public Law 86-272 restricts a state from imposing a net income tax on income derived from interstate commerce if the only business activity of the entity within the state consists of the solicitation of orders for sales of tangible personal property, and the orders are sent outside the

state for acceptance or rejection, and, if accepted, are filled by shipment or delivery from a point outside the state. However, P.L. 86-272 specifically excludes domestic corporations and individuals who are residents or domiciliaries of a state from its exemption provisions. Accordingly, the exemption provisions of P.L. 86-272 do not apply to members of LLCs that are New York domestic corporations or who are residents or domiciliaries of New York.

Partners who are resident individuals are subject to personal income tax on income earned from all sources, pursuant to section 612(a) of the Tax Law. Accordingly, the resident partners must include in New York adjusted gross income the same distributive share of items of partnership income, gain, loss, and deduction entering into their federal adjusted gross income.

With respect to partners who are nonresident individuals, section 631(a)(1)(A) of the Tax Law provides that the New York source income of a nonresident individual includes his or her distributive share of all items of partnership income, gain, loss, and deduction entering into such partner's federal adjusted gross income to the extent such items are derived from or connected with New York sources. Section 137.1 of the Article 22 Regulations provides that items attributable to the ownership by the partnership of any interest in real or tangible personal property in New York State or to a business, trade, profession or occupation carried on in New York State by the partnership are items derived from or connected with New York sources.

Pursuant to section 132.4(a)(2) of the Article 22 Regulations, a partnership is carrying on a business, trade, profession, or occupation in New York State when it occupies, has, maintains or operates desk space, an office, a shop, a store, a warehouse, a factory, an agency, or other place where the taxpayer's affairs are systematically and regularly carried on, and it performs with regularity a series of transactions for profit, as distinguished from isolated or incidental transactions. A partnership is also considered to be engaged in a business, trade, profession, or occupation carried on in New York State if it performs a series of acts or transactions in the State with regularity and continuity for livelihood or profit, as distinguished from isolated or incidental transactions.

With respect to partners who are nonresident individuals, if the partnership's only business activities within New York consist of no more than the solicitation of orders for sales of tangible personal property that are sent outside the State for approval and the goods are delivered from outside the State, the partnership is not considered to be engaged in a business, trade, profession, or occupation carried on in New York as contemplated under section 132.4(a)(2) of the Article 22 Regulations. Any distributive share of partnership income, gain, loss, or deduction entering into a nonresident individual partner's federal adjusted gross income from such partnership is not subject to New York State personal income tax.

With respect to partners that are foreign corporations, if the corporation is not otherwise subject to tax as described by section 1-3.2 of the Article 9-A Regulations and the corporation's activities in New York are limited to the activities of the partnership whose only business

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activities in New York are protected activities under P.L. 86-272, the corporation would not be subject to tax pursuant to Article 9-A. However, if the foreign corporation was subject to tax under section 209 of the Tax Law because it was engaged in an activity described in section 1-3.2 of the Article 9-A Regulations, the corporation's share of partnership items attributable to its interest in such partnership would be included in the calculation of the corporate franchise tax.

Partnerships are not subject to New York tax, but may be required to file a tax return. Section 658(c)(1) of the Tax Law provides that every partnership having either (1) at least one partner who is an individual, estate, or trust that is a resident of New York State; or (2) any income, gain, loss, or deduction from New York sources, must file a tax return, Form IT-204, *Partnership Return*. As stated above, if the partnership's only business activity within the state consists of the solicitation of orders of tangible personal property by or on behalf of a business by its employees or representatives, any partnership income, gain, loss, or deduction is not considered to be from New York sources. Therefore, unless the partnership had partners who were residents of New York, if the partnership's only business activity in the State consisted of the solicitation of orders of tangible personal property by or on behalf of a business by its employees or representatives, it would not be required to file a New York State partnership return.

In addition, pursuant to section 658(c)(3) of the Tax Law, every foreign limited liability company that has any income derived from New York sources determined under the rules of section 631 of the Tax Law is required to file Form IT-204-LL, *Limited Liability Company/Limited Liability Partnership Filing Fee Payment Form*. An LLC treated as a partnership for tax purposes that meets the conditions for exemption under P.L. 86-272 would not be subject to the filing fee.

DATED: December 15, 2008

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Taxpayer Guidance Division

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.