

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

TSB-A-02(2)C
Corporation Tax
April 8, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C010117A

On January 17, 2001, a Petition for Advisory Opinion was received from Corporation X, c/o John M. Allan, PricewaterhouseCoopers, 50 Hurt Plaza Suite 1700, Atlanta, Georgia 30303.

The issue raised by Petitioner, Corporation X, is whether Corporation X's royalties from the licenses described below are sourced to the state in which the licensees manufacture products under the licenses for purposes of computing the numerator of the receipts factor of the business allocation percentage under Article 9-A of the Tax Law.

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

Corporation X is a corporation organized and commercially domiciled outside of New York. It has substantial operations outside of New York, and holds a 91 percent interest in several manufacturing facilities located outside of New York.

In addition to other sources of income, Corporation X has royalty income from licensing product and process patents, trade secrets and other similar types of intellectual property to affiliated and non-affiliated corporations ("Licensees") engaged in the manufacture and sale of tangible personal property. While many of the licenses are limited to the grant of rights under a single patent, others grant access to patented and non-patented inventions, drawings, designs, technical information, and know-how related to the design and production of entire products. The royalty calculations are generally based on a percentage of the Licensee's/manufacture's wholesale revenue.

Discussion

Section 210.3(a)(2) of the Tax Law provides that, for purposes of computing the receipts factor of the business allocation percentage, receipts allocable to New York State include:

(A) sales of tangible personal property where shipments are made to points within New York;

(B) services performed within New York;

(C) rentals from property situated, and royalties from the use of patents or copyrights, within New York, and receipts from sales of rights for closed-circuit and cable television transmissions of an event taking place within the state;

(D) all other business receipts earned within New York.

Section 4-4.4(c) of the Business Corporation Franchise Tax Regulations (“Article 9-A Regulations”) provides that:

Receipts of royalties from the use in New York State of patents and copyrights are allocated to New York State. Royalties include all amounts received by the taxpayer for the use of patents or copyrights, whether or not such patents or copyrights were issued to or are owned by the taxpayer. A patent or copyright is used in New York State to the extent that the activities thereunder are carried on in New York State.

In this case, Corporation X has receipts of royalty income from licensing product and process patents to Licensees engaged in the manufacture and sale of tangible personal property. Pursuant to section 210.3(a)(2)(C) of the Tax Law and section 4-4.4(c) of the Article 9-A Regulations, such royalty receipts from the use of such patents are allocated to New York State, and included in the numerator of the receipts factor, when the Licensee uses the licensed product and process patents in New York State.

Corporation X also has receipts from licensing trade secrets and other similar types of intellectual property to such Licensees. Such receipts are not from any of the sources enumerated in section 210.3(a)(2) of the Tax Law. Therefore, such receipts constitute “other business receipts.” Pursuant to section 210.3(a)(2)(D) of the Tax Law, the receipts from licensing trade secrets and other similar types of intellectual property are earned in New York State, and included in the numerator of the receipts factor, when the Licensee uses the licensed trade secrets and other similar types of intellectual property in New York State.

Section 210.3(a)(2)(C) and (D) of the Tax Law and sections 4-4.4(c) and 4-4.6 of the Article 9-A Regulations do not provide for a method to determine when a Licensee uses licensed product and process patents, trade secrets and other intellectual property in New York State. However, a reasonable method to make such determination is to look to where the Licensee’s manufacturing facility that makes a product using one or more of Corporation X’s licenses is located. When the Licensee’s manufacturing facility that makes a product using one or more of Corporation X’s licenses is located in New York State, Corporation X’s product and process patents, trade secrets and other intellectual property attributable to such product are considered to be used in New York. If the Licensee’s manufacturing facility that makes a product using one or more of Corporation X’s licenses is located outside of New York State, Corporation X’s product and process patents, trade secrets and other intellectual property attributable to such product are considered to be used outside of New York.

TSB-A-02(2)C
Corporation Tax
April 8, 2002

Where a Licensee makes a product using one or more of Corporation X's licenses at manufacturing facilities that are located within and without New York State, the portion of the licensed product and process patents, trade secrets and other intellectual property that are used in New York State may be determined by multiplying all of Corporation X's receipts for the taxable year from each such licensing, by a fraction. The numerator of the fraction is the number of products manufactured by the Licensee in New York State during the taxable year using each such license, and the denominator of the fraction is the number of products manufactured by the Licensee everywhere during the taxable year using each such license.

Note that some other reasonable method to determine when a Licensee uses licensed product and process patents, trade secrets and other intellectual property in New York State may be used, in which case Corporation X must submit full details with its return.

DATED: April 8, 2002

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

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