

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

TSB-A-03(13)C  
Corporation Tax  
December 24, 2003

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C030613A

On June 13, 2003, a Petition for Advisory Opinion was received from TFS & Sons, Inc., 25 Dundaff Street, Carbondale, Pennsylvania 18407-1820. Petitioner, TFS & Sons, Inc., submitted additional information pertaining to the Petition on August 26, 2003.

The issue raised by Petitioner is whether it is subject to tax under Article 9-A of the Tax Law for taxable years 1994 through 2002.

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

Petitioner is a food service distributor selling refrigerated, frozen or dry food and grocery products to all types of establishments. Petitioner does not own, rent, lease, or maintain any real property in New York. Petitioner has employees who are not based in New York but serve New York customers. Salespeople solicit orders from a territory consisting of Pennsylvania and New York. Orders are taken back to the Pennsylvania office for approval. As of 2003, Petitioner has 14 customers in New York. Four of these customers are seasonal with sales only occurring during a four month period per year.

Goods are shipped from Pennsylvania warehouses via company owned trucks. There is one delivery per week into New York. Goods are delivered in boxes with no visible damage. If the customer later claims the goods were received damaged, and informs Petitioner about the hidden damage, the items are usually replaced. To replace damaged items, customers either contact their salesperson, who then contacts the main office, or the customer contacts the main office directly, in Carbondale, Pennsylvania. The office issues a pick-up ticket and includes it with the delivery person's orders, authorizing him or her to pick up the damaged items. Pick-up tickets average one per week. When the damaged items are received in Carbondale, they are reviewed and the damage claim is either approved or denied. If approved, a credit memo is issued to the customer.

Delivery personnel normally do not collect amounts due. However, at times delivery personnel may pick up checks for the amount due from the previous delivery when delivering current shipments for active customers. Petitioner states that this is done as a convenience to the customer who normally remits payment by mail. Delivery personnel do not perform collections for delinquent accounts.

It is assumed for purposes of this Advisory Opinion that these facts applied to the taxable years 1994 through 2002.

### **Applicable law and regulations**

Section 209.1 of the Tax Law provides, 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 ... shall annually pay a franchise tax, upon the basis of its entire net income base, or upon such other basis as may be applicable as hereinafter provided....

However, section 1-3.4(b)(9) of the Business Corporation Franchise Tax Regulations (Article 9-A 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 provides, in part:

(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 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....

## Opinion

Pursuant to section 1-3.4(b)(9) of the Article 9-A 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 either (a) limited to the solicitation of orders by employees or representatives in New York State for sales of tangible personal property, or be entirely ancillary to such solicitation of orders, or (b) if the activities exceed the solicitation of orders, the activities must be considered to be *de minimis*. In addition, 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.

In *KPMG Peat Marwick LLP*, Adv Op Comm T&F, March 27, 1997, TSB-A-97(8)C, a manufacturing company employed a sales staff that solicited orders from customers in New York State. The orders were approved at the company headquarters in Indiana, and the company delivered the products from its facility in Indiana to its New York customers via its own commercial vehicles. In addition, the company also did *backhauling*. That is, it used the vehicles that delivered its products to customers in New York to pick up products in New York that did not meet customer specifications and returned them to the company's facility in Indiana. The customer either received a replacement product or got a credit for the cost of the product. The company also transported the trim and scrap of its New York customers back to Indiana, for which each customer received a credit against the price of future products. The opinion held that the backhauling activities were post delivery activities in New York that went beyond the solicitation of orders and the company would be subject to tax under Article 9-A of the Tax Law pursuant to section 1-3.4(b)(9)(v) of the Article 9-A Regulations, unless such activities were deemed to be *de minimis*.

In this case, Petitioner has salespersons who solicit orders from customers in New York State. The orders are taken back to the Pennsylvania office for approval. Once a week, Petitioner delivers the products from its warehouses in Pennsylvania to its New York customers via company owned trucks. Pursuant to section 1-3.4(b)(9)(i)(a) of the Article 9-A Regulations, these activities would not make Petitioner subject to tax under Article 9-A of the Tax Law.

However, in addition to these activities, Petitioner's delivery personnel pick up damaged products from customers in New York that do not meet customer specifications and return them to its Carbondale, Pennsylvania facility. These delivery personnel also pick up checks for the amount due from the previous delivery when delivering current shipments. These activities are similar to the post delivery examples contained in section 1-3.4(b)(9)(v) of the Article 9-A Regulations;

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particularly, *collecting delinquent accounts and replacing the corporation's stale or damaged products*. These post delivery activities by Petitioner for New York customers are activities that go beyond the solicitation of orders as contemplated by Public Law 86-272, and will subject Petitioner to franchise tax under Article 9-A unless they are deemed to be *de minimis*.

When viewed in a comprehensive sense and giving due consideration to section 1-3.4(b)(9)(v) of the Article 9-A Regulations, Petitioner's post delivery activities in New York State of picking up damaged products from customers on an average of once per week, and sometimes collecting from customers amounts due from the previous delivery are not considered to be *de minimis*, and they establish more than a nontrivial additional connection with New York State as contemplated in section 1-3.4(b)(9)(v) of the Article 9-A Regulations.

Accordingly, Petitioner's activities in New York State are not exempt pursuant to the provisions of Public Law 86-272. Petitioner is doing business, employing capital, or owning or leasing property in a corporate or organized capacity in New York State pursuant to section 209.1 of the Tax Law, and is subject to tax under Article 9-A of the Tax Law for the taxable years at issue, 1994 through 2002.

DATED: December 24, 2003

/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.