

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

TSB-A-05(3)C
Corporation Tax
March 10, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C030904C

On September 4, 2003, a Petition for Advisory Opinion was received from Masters RMC, Inc., P.O. Box 25, Main Street, Kingsley, Pennsylvania 18826-0025. Petitioner, Masters RMC, Inc., submitted additional information pertaining to the Petition on November 2, 2004.

The issue raised by Petitioner is whether its activities in New York State are protected by Public Law 86-272, and Petitioner is exempt from franchise tax under Article 9-A of the Tax Law.

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

Petitioner was incorporated in Pennsylvania on January 1, 1998, and engages in sales of ready mix concrete. The sales of Petitioner to New York customers for taxable years 1998 through 2002 were between 15% and 22% of total sales per year.

Petitioner has a telephone listing in the local Hancock and Deposit, New York telephone directories. The telephone listing is the telephone number and address of Petitioner's facilities in Pennsylvania. Petitioner has a telephone listing in the New York directories because these directories cover the areas adjoining Pennsylvania where Petitioner conducts its business. The closest Pennsylvania local telephone directory would be Honesdale, Pennsylvania which is out of Petitioner's business area.

The telephone orders for ready mix concrete are called into Petitioner's office in Pennsylvania. No purchase order is issued. Petitioner states that the ready mix concrete is completely mixed at its facilities in Pennsylvania before it is transported to the customer's location. The concrete is transported and delivered to customers via Petitioner's own concrete mixer trucks and drivers. During the transportation, the mixer drum rotates at a minimum rate to keep the concrete from setting before delivery. However, Petitioner states that the concrete is not transit mixed during transportation and delivery. At the delivery site, the driver unloads the ready mix concrete and does not perform any other services.

Other than the delivery of orders to New York customers, Petitioner has no other contact with New York State. Petitioner does not have any offices, warehouses, showrooms or other business locations in New York State, and it does not conduct any other business in New York. Other than the delivery of concrete to New York customers, Petitioner does not own, lease or rent real or tangible personal property in New York State. It does not obtain or execute contracts in New York State.

Applicable law and regulations

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

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 1-3.2 of the Business Corporation Franchise Tax Regulations (“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.

However, section 1-3.4(b)(9) of the 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....

(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....

Opinion

Pursuant to section 1-3.4(b)(9) of the 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 (15 USCA §§381-384). 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 in New York State by employees or representatives 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 this case, Petitioner solicits sales of its ready mix concrete in New York State through a telephone listing for its Pennsylvania office in two New York telephone directories. When Petitioner's customers call the telephone number listed in the New York directories, the telephone is answered at Petitioner's office in Pennsylvania by Petitioner's employees who take the sales orders. The ready mix concrete is transported and delivered to a customer's location in New York State by Petitioner's own vehicles and drivers. At the delivery site, the driver unloads the concrete but does not perform any other services.

One method of producing ready mix concrete is called *transit mixed*. Under this method, the raw materials for making the concrete are loaded into a concrete truck mixer, and the concrete is produced by the rotation of the truck mixer at a medium or fast speed while in transit to the delivery location. At the time of delivery, the concrete is completely mixed. See the National Ready Mix Concrete Association Web site (www.nrmca.org/aboutconcrete/howproduced.asp). Truck mixers that *transit mix* concrete are considered to be used in the production of the ready mix concrete. See *B.R. DeWitt, Inc.*, Tax App Trib, September 19, 1991, No. 806601; *B. R. DeWitt, Inc.*, Dec St Tax Commn, May 23, 1980, TSB-H-80(14)C; *Matter of DeWitt Concrete Corp.*, Dec St Tax Commn, November 16, 1977.

If the production of the concrete occurs at a facility prior to loading into the truck mixer, the process is called *central mixed*. With *central mixed* concrete, the truck mixer is used as an agitating haul unit that rotates at a very low speed to keep the concrete from hardening during transportation and delivery. See the National Ready Mix Concrete Association Web site

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(www.nrmca.org/aboutconcrete/howproduced.asp). In this case, the rotation of the truck mixer is not used in the production process, but rather keeps the concrete that was produced at the plant in a fluid condition while transporting for delivery.

In this case, Petitioner states that the ready mix concrete it produces is completely mixed at its facilities in Pennsylvania, i.e., central mixed, before being transported and delivered to a customer's location in New York State by Petitioner's own vehicles and drivers. During transportation, the truck mixer rotates the concrete at a very slow speed to keep the concrete in a usable fluid condition for delivery. However, such mixer rotation to agitate the concrete to keep from hardening during transportation to the delivery site is a separate and distinct activity from the concrete production process. The present case, therefore, may be distinguished from the *B.R. DeWitt* decisions cited above, and from *DeWitt Concrete, supra*, since those cases involved transit mix concrete that was produced by the truck mixer in transit to the delivery location.

In the present case, Petitioner's activities in New York State consist of having a telephone listing in a New York telephone directory and the delivery of the concrete produced at Petitioner's Pennsylvania facility. Such activities do not exceed the solicitation of orders for purposes of Public Law 86-272 and section 1-3.4(b)(9) of the Regulations. Therefore, Petitioner's activities are protected under the provisions of Public Law 86-272 and section 1-3.4(b)(9) of the Regulations, and Petitioner is not subject to tax pursuant to section 209.1 of the Tax Law.

However, if Petitioner's vehicles that deliver the ready mix concrete to New York customers are truck mixers that *transit mix* the concrete during transportation in New York or at a delivery site in New York, following *B.R. DeWitt, Inc., supra*, Petitioner's activities in New York State would include the production of goods in New York. The production of goods in New York constitutes *doing business* in New York under section 209.1 of the Tax Law and section 1-3.2(b) of the Regulations. Under these circumstances, Petitioner's production of goods in New York would exceed the mere solicitation of orders under section 1-3.4(b)(9) of the Regulations, and would not be considered to be *de minimis* under such section. In such case, Petitioner's activities would not be protected under the provisions of Public Law 86-272 and section 1-3.4(b)(9) of the Regulations, and Petitioner would be subject to tax pursuant to section 209.1 of the Tax Law.

DATED: March 10, 2005

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