

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

TSB-A-05(6)C
Corporation Tax
March 10, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C041020B

On October 20, 2004, a Petition for Advisory Opinion was received from Ion Technologies, Inc., 131 Wing Haven Circle, Winston-Salem, North Carolina 27106-6250.

The issue raised by Petitioner, Ion Technologies, Inc., is whether it is subject to franchise tax under Article 9-A of the Tax Law.

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

Petitioner is a North Carolina corporation. It received a grant for research with a university in Troy, New York. The grant allowed Petitioner to hire a researcher in the third quarter of 2004. The researcher was hired by Petitioner from the university in Troy, and the individual continues to work at the university performing the same research he worked on before Petitioner hired him.

Petitioner states that other than the research conducted in New York, Petitioner does not perform any services in New York, do business in New York, maintain an office or other place of business in New York, lease any real or personal property in New York, have assets in New York, participate in any partnership, limited liability company, limited liability partnership or joint venture in New York, or have any officers or employees performing any activities in New York.

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, on a report which shall be filed, except as hereinafter provided, on or before the fifteenth day of March next succeeding the close of each such year, or, in the case of a corporation which reports on the basis of a

fiscal year, within two and one-half months after the close of such fiscal year, and shall be paid as hereinafter provided.

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.

Opinion

The Tax Department has determined that where a foreign corporation's only presence in New York was the temporary employees placed by the foreign corporation at a client's facilities, which employees provided clerical and technical services using the client's equipment and supplies under the client's supervision, the foreign corporation was doing business in New York. *Quantum Resources Corporation*, Adv Op Comm T&F, January 18, 1991, TSB-A-91(2)C.

Also, a foreign corporation was determined to be doing business in New York when its employees taught software development seminars conducted in New York even though the corporation did not employ capital or own or lease property in New York and did not maintain an office in New York. *Project Technology, Inc.*, Adv Op Comm T&F, November 6, 1989, TSB-A-89(13)C.

Petitioner states that it has received a grant for research with a university in Troy, New York and has hired an individual from the university to perform the research for Petitioner at the university in Troy, New York. Assuming the individual is Petitioner's employee, this activity by Petitioner's employee in Troy, New York constitutes *doing business* as described in section 1-3.2(b) of the Regulations. See *Quantum Resources*, *supra*, and *Project Technology*, *supra*. Accordingly, pursuant to section 209.1 of the Tax Law, Petitioner is subject to franchise tax under Article 9-A of the Tax Law for the period that its employee is performing research in New York, and Petitioner must file an annual franchise tax report and pay the tax due as determined under such Article 9-A.

It should be noted that if the individual who is performing research for Petitioner is an independent contractor, the research activities of such individual in New York will not constitute *doing business* on the part of Petitioner in New York under section 1-3.2(b) of the Regulations. In that case, Petitioner will not be subject to franchise tax under Article 9-A of the Tax Law.

However, the determination of whether such individual is an employee of Petitioner is not within the scope of this Advisory Opinion.

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.