

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

TSB-A-07(3)C
Corporation Tax
May 16, 2007

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C070313B

On March 13, 2007, a Petition for Advisory Opinion was received from Northeast Tent Productions, Inc., c/o Keith W. Wofsey, EA, 48 Union Street, Suite 1C, Stamford CT 09606. Petitioner, Northeast Tent Productions, Inc., provided additional information pertaining to the Petition on March 15, 2007.

The issue raised by Petitioner is whether it is subject to the franchise tax imposed by Article 9-A of the Tax Law.

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

Petitioner is an S corporation for federal income tax purposes organized under the laws of the state of Connecticut and located in Stamford, Connecticut. Petitioner is engaged in the business of selling party equipment, including tents, dance floors, and lighting equipment.

Petitioner was not incorporated under the laws of New York State. It does not employ capital, own or lease property, or maintain an office within New York State. The majority of Petitioner's business and sales occur within Connecticut. However, Petitioner does sell equipment to customers within New York State.

Typically, a New York-based customer will hear of Petitioner through either a referral or a yellow pages advertisement. Petitioner does not have a New York telephone number; Petitioner only has a Connecticut telephone number. Petitioner does not employ salespeople in New York State. Once a telephone call is made to Petitioner's home office in Stamford and a sale is made, Petitioner ships the equipment from its Connecticut warehouse generally using a common carrier delivery service. On some occasions, Petitioner's truck will leave its Connecticut warehouse and enter New York State to deliver equipment sold to a customer. Petitioner's only activity in New York State is the delivery of equipment to its customers.

Final payment for the equipment is sent to Petitioner's Connecticut office on the date the equipment is delivered. Petitioner collects and remits New York State sales and use tax, when applicable, for any sale within New York State. Petitioner also pays all applicable New York State highway use taxes.

Applicable law and regulations

Section 209.1 of Article 9-A of the Tax Law imposes an annual franchise tax and provides, in part, 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 (“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.

Opinion

Pursuant to section 209.1 of the Tax Law and sections 1-3.2(b), (c), (d), and (e) of the Article 9-A Regulations, a corporation organized outside of New York State is subject to the tax imposed under Article 9-A of the Tax Law if the corporation is doing business, employing capital, owning or leasing property in a corporate or organized capacity, or maintaining an office in New York State.

Petitioner states that its principal place of business is in Stamford, Connecticut. Petitioner also states that it does not employ capital, own or lease property, or maintain an office within New York State and does not employ salespeople in New York State. Petitioner does not have a New York telephone number, only a Connecticut telephone number. Once a telephone call is made to Petitioner's office in Stamford and a sale is made, Petitioner ships the equipment from its Connecticut warehouse generally using a common carrier delivery service. On some occasions, Petitioner's truck will leave its Connecticut warehouse and enter New York State to deliver equipment sold to a customer. Petitioner's only activity in New York State is the delivery of equipment to its customer.

Based on Petitioner's activities described in this Opinion, Petitioner is not doing business, employing capital, owning or leasing property, or maintaining an office in New York State pursuant to section 209.1 of the Tax Law and as described in sections 1-3.2(b), (c), (d), and (e) of

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the Article 9-A Regulations. Accordingly, Petitioner is not subject to the franchise tax imposed by Article 9-A of the Tax Law.

DATED: May 16, 2007

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