

**New York State Department of Taxation and Finance**  
**Office of Tax Policy Analysis**  
**Taxpayer Guidance Division**

TSB-A-07(5)C  
Corporation Tax  
November 13, 2007

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C070705A

On July 5, 2007, a Petition for Advisory Opinion was received from KPMG, LLP, 4100 Yonge Street, Suite 200, Toronto, Ontario M2P 2H3.

The issue raised by Petitioner, KPMG, LLP, is whether the term “premises” as used in section 209.2(f) of Article 9-A of the Tax Law includes a warehouse leased to a fulfillment-services provider as described below.

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

Taxpayer is an alien corporation (a corporation organized under the laws of a country other than the United States), engaged in the manufacture, distribution, and sale of nutritional supplements. Taxpayer sells its products worldwide but predominantly to retail stores located throughout the United States.

USCo, a corporation affiliated with Taxpayer pursuant to section 209.2 of Article 9-A of the Tax Law, owns a warehouse located in New York State. USCo is not a member of a U.S. consolidated group that includes Taxpayer.

USCo proposes to lease the warehouse to an unrelated third party, 3PCo, pursuant to arm's length lease terms. Taxpayer and other corporations affiliated with Taxpayer propose to enter into an arm's length agreement with 3PCo whereby 3PCo will provide fulfillment services in the warehouse to Taxpayer or its affiliates.

3PCo's fulfillment services will be limited to (1) acceptance of orders electronically or by mail, telephone, telefax, or Internet; (2) responses to consumer correspondence or inquiries electronically or by mail, telephone, telefax, or Internet; (3) billing and collection activities; and (4) the shipment of orders from the inventory of products offered for sale by Taxpayer or its affiliates.

Taxpayer or its affiliates will own the inventory stored in the warehouse leased by 3PCo. Taxpayer or its affiliates will own no other property in New York State except the inventory stored in the warehouse leased by 3PCo and the warehouse leased to 3PCo that is owned by USCo. Taxpayer and its affiliates will have no other physical presence in New York State except it may occasionally have employees or representatives in New York State to solicit sales of tangible personal property.

### **Applicable law and regulations**

Section 208.19 of the Tax Law provides:

The term "fulfillment services" shall mean any of the following services performed by an entity on its premises on behalf of a purchaser:

- (a) the acceptance of orders electronically or by mail, telephone, telefax or internet;
- (b) responses to consumer correspondence or inquiries electronically or by mail, telephone, telefax or internet;
- (c) billing and collection activities; or
- (d) the shipment of orders from an inventory of products offered for sale by the purchaser.

Section 209 of the Tax Law contains the imposition of the franchise tax under Article 9-A of the Tax Law, and provides, in part:

1. 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,...

2. A foreign corporation shall not be deemed to be doing business, employing capital, owning or leasing property, or maintaining an office in this state, for the purposes of this article, by reason of (a) the maintenance of cash balances with banks or trust companies in this state, or (b) the ownership of shares of stock or securities kept in this state, if kept in a safe deposit box, safe, vault or other receptacle rented for the purpose, or if pledged as collateral security, or if deposited with one or more banks or trust companies, or brokers who are members of a recognized security exchange, in safekeeping or custody accounts, or (c) the taking of any action by any such bank or trust company or broker, which is incidental to the rendering of safekeeping or custodian service to such corporation, or (d) the maintenance of an office in this state by one or more officers or directors of the corporation who are not employees of the corporation if the corporation otherwise is not doing business in this state, and does not employ capital or own or lease property in this state, or (e) the keeping of books or records of a corporation in this state if such books or records are not kept by employees of such

corporation and such corporation does not otherwise do business, employ capital, own or lease property or maintain an office in this state, or (f) the use of fulfillment services of a person other than an affiliated person and the ownership of property stored on the premises of such person in conjunction with such services, or (g) any combination of the foregoing activities. For purposes of this subdivision, persons are affiliated persons with respect to each other where one of such persons has an ownership interest of more than five percent, whether direct or indirect, in the other, or where an ownership interest of more than five percent, whether direct or indirect, is held in each of such persons by another person or by a group of other persons which are affiliated persons with respect to each other. The term "person" in the preceding sentence and in paragraph (f) of this subdivision shall have the meaning ascribed thereto by subdivision (a) of section eleven hundred one of this chapter.

Section 1-2.5(a) of the Business Corporation Franchise Tax Regulations ("Regulations") provides, in part:

\* \* \*

(1) The term *domestic corporation* means a corporation incorporated by or under the laws of the State or colony of New York State.

(2) The term *foreign corporation* means a corporation which is not a domestic corporation.

Section 4-3.1(a) of the Regulations, with regard to the computation of the property factor of the business allocation percentage, provides, in part:

The percentage of the taxpayer's real property and tangible personal property, whether owned or rented to it, within New York State is determined by dividing the average value of such property within New York State (without deduction of any encumbrances) by the average value of all such property within and without New York State (without deduction of any encumbrances)....

Section 4-3.2 of the Regulations provides, in part:

(a) In computing the property factor, real and tangible personal property rented to the taxpayer must be included. In order to avoid unnecessary hardship on taxpayers and for ease of administration, the value of real and tangible personal property, both within and without New York State, which is rented to the taxpayer is determined by multiplying the gross rents payable during the period covered by the report by eight.

(b) The term *gross rents* as used in this section means the actual sum of money or other consideration payable, directly or indirectly, by the taxpayer or for its benefit for the use or possession of the property and includes:

(1) Any amount payable for the use or possession of real and tangible personal property, or any part thereof, whether designated as a fixed sum of money or as a percentage of sales, profits or otherwise.

## **Opinion**

Under section 209.1 of Article 9-A of the Tax Law, the business corporation franchise tax is imposed annually on a domestic or foreign corporation for the privilege of exercising its corporate franchise, or of doing business, employing capital, or owning or leasing property in New York State, or maintaining an office in New York. The exemptions under section 209.2 of the Tax Law apply only to foreign corporations, not to domestic corporations.

Under section 209.2(f) of Article 9-A of the Tax Law, a foreign corporation will not be deemed to be doing business, employing capital, owning or leasing property, or maintaining an office in New York because it uses the fulfillment services of a person that is not an affiliated person and it has inventory stored on that person's premises in conjunction with the fulfillment services.

For purposes of the imposition of the franchise tax under section 209.1 of Article 9-A of the Tax Law and the computation of the property factor under section 4-3.1 and section 4-3.2 of the Regulations, property leased to a taxpayer (the lessee) for its use or possession that is under its control is treated as the taxpayer's property. (See *Peter Pan Bus Lines, Inc.*, Dec Tax App Trib, July 28, 2005, DTA Nos. 819131 and 819132 with respect to the property factor; and *Matter of Allied Thermal Corporation*, Dec St Tax Comm, February 1, 1983, TSB-H-83(3)C with respect to imposition of the franchise tax.)

Accordingly, the warehouse leased from USCo to an unrelated third party, 3PCo, pursuant to arm's length lease terms is considered 3PCo's premises for purposes of sections 209.2(f) and 208.19 of Article 9-A of the Tax Law.

It is noted that even though USCo leases the warehouse to 3PCo, it is the owner of the warehouse. If USCo is a domestic corporation it is subject to the franchise tax imposed by section 209.1 of Article 9-A of the Tax Law for the privilege of exercising its corporate franchise since the exemptions under section 209.2 of the Tax Law apply only to foreign corporations. If

USCo is a foreign corporation it is not exempt from tax, since it otherwise owns property located in New York State and none of the exemptions from tax apply.

DATED: November 13, 2007

/s/  
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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.