TSB-A-11(6)C Corporation Tax March 11, 2011

STATE OF NEW YORK COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C101229B

A petition received by the Department requests an advisory opinion as to whether the sale of assets by **Example**, ("Petitioner") should be treated as business receipts and included in the denominator of the receipts factor of Petitioner's business allocation percentage ("BAP") under Tax Law Article 9-A. We conclude that Petitioner's receipts from the sale of the assets are not business receipts and therefore are not included in its BAP.

Facts

Petitioner, a Rhode Island S Corporation, was a family-owned industrial service company in the business of distributing sealing and filtration products and pumps from its warehouse in Rhode Island. Petitioner did not manufacture any products but merely purchased products in large quantities and resold them at wholesale to third-party customers. Petitioner's shareholders were all residents of Rhode Island. On January 7, 2007, pursuant to an asset purchase agreement, Petitioner sold all its assets, including its entire inventory, to an unrelated private equity group, After the sale, Petitioner no longer actively operated its business.

Petitioner, a New York taxpayer, filed its final CT-3-S, New York State S Corporation franchise tax return, and treated the amounts from the sale of inventory as business income. Petitioner also included those amounts in the denominator of its business receipts factor for purposes of calculating its New York State BAP. The shareholders of Petitioner filed non-resident individual income tax returns and used the BAP calculated by Petitioner to determine their New York source income attributable to the S corporation.

Analysis

In determining the New York source income of a nonresident shareholder of a New York S corporation, only the portion derived from or connected with New York sources of such shareholder's pro rata share of items of S corporation income, loss, and deduction entering into his or her federal adjusted gross income is included. Tax Law § 632(a)(2). The determination of the source of S corporation items is made at the corporation level using the allocation methods that apply to the S corporation under Article 9-A or Article 32 of the Tax Law. *New York Tax Treatment of S Corporations and Their Shareholders*, Publication 35 (3/00) at 24-25.

In determining a taxpayer's entire net income under Tax Law Article 9-A, business income is sourced to New York State using a BAP. In general, the BAP consists entirely of the receipts factor, Tax Law 210.3(a)(10)(A)(ii). The portion of the business income sourced to

New York is determined by dividing a taxpayer's New York business receipts by its total business receipts within and without New York. Tax Law § 210.3(a)(2).

The term "business receipts" means gross income received in the regular course of the taxpayer's business, provided such receipts are includable in the computation of the taxpayer's entire net income for the taxable year. 20 NYCRR § 4-4.1(a). The issue in this case is whether the receipts from the sale of petitioner's inventory are "business receipts," that is, income that was received in the regular course of the taxpayer's business. A prior advisory opinion and Tax Appeals Tribunal decision addressing whether income is received in the "regular course of business" do not involve, as this case does, the sale of a taxpayer's entire inventory to a third party as part of an asset purchase agreement that included the sale of the taxpayer's business.¹ Moreover, after the sale, the present petitioner did not actively engage in business, except for activities necessary to wind down its business affairs and make distributions to its shareholders before ending its business operations. Accordingly, the receipts from petitioner's asle of inventory in this matter are not considered "business receipts" because they were not sold in the regular course of business operations. Therefore, the receipts from Petitioner's sale of inventory should not be included in its BAP.

DATED: March 11, 2011

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DANIEL SMIRLOCK Deputy Commissioner and Counsel

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.

¹ See *International Nickel, Inc. and Inco Alloys International, Inc.*, Tax Appeals Tribunal, Oct. 19, 1995, income received by affiliated corporations from a pension plan reversion was not includable in business receipts because it was not received in the ordinary course of business, and *CaComm, Inc.*, Adv Op Comm T&F, October 16, 2008, TSB-A-08(5)C, partnership's one-time sale of a Federal Communications Commission ("FCC") broadcast license that occurred once in a twenty year period is not in the "regular course of business".