

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-87 (15) C
Corporation Tax
June 12, 1987

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. C861121B

On November 21, 1986, a Petition for Advisory Opinion was received from Moore Brothers Oil Company, Inc., c/o W. W. Griffith Oil Company, Inc., Route 19, Wyoming, New York 14591.

The issues raised are (1) whether Petitioner is required to file a New York corporation tax franchise tax return, pursuant to Article 9-A of the Tax Law, and (2) if Petitioner is not subject to tax, what procedure should be followed to recover taxes paid in previous years.

Petitioner presents the following facts -

Petitioner was incorporated in New Jersey on March 8, 1957 and is a wholly owned subsidiary of W. W. Griffith Oil Company, Inc., a New York corporation (hereinafter "Griffith"). Petitioner files a consolidated federal return with Griffith.

Petitioner is a New York registered fuel distributor that sells petroleum products as a wholesaler and retailer from its facility located in Mahwah, New Jersey. The facility contains a small bulk storage plant and a truck depot. Petitioner buys petroleum from within New York State and takes title to such petroleum within New York State. Upon receipt of the product, some is shipped to its customers in New York State while the remainder is immediately transported to the New Jersey facility. From there, the product is shipped to customers in New Jersey and in New York State. Petitioner purchases some of its inventory from its parent, Griffith, but such inventory is not stored at Griffith's Oil facilities in New York.

All of Petitioner's payroll is located in New Jersey. Petitioner employs five individuals in New Jersey: one administrative person, three drivers and one sales manager. Only the sales manager has the authority to accept orders and approve sales. The sales manager resides in New Jersey and calls on customers in New York State and solicits orders. The orders are approved in New Jersey. The sales manager does not maintain an office in New York State. Petitioner does not rent any property in New York State.

Petitioner accumulates accounting data (sales, payroll, A/P, A/R etc.) in New Jersey and transmits this data to Griffith, which maintains Petitioner's general ledger. On behalf of Petitioner, Griffith pays Petitioner's expenses, including payroll, from Griffith's Wyoming, New York headquarters. These expenses are reimbursed to Griffith by Petitioner. The accounting services provided for Petitioner by Griffith are performed by Griffith's employees.

Griffith sets corporate strategy and goals but Petitioner has its own management team that is responsible for implementing corporate policy. In this regard, Petitioner's management has total operating authority to direct company activities.

A Griffith officer, who resides in New York, is also an officer of Petitioner. However, he is not an employee of Petitioner and is not paid by Petitioner.

Petitioner contends that pursuant to sections 1-3.2 and 1-3.3(d) and (e) of the Business Corporation Franchise Tax Regulations (hereinafter "Article 9-A regulations") it is not required to file a New York franchise tax return, since it does not have a physical presence in New York or engage in any activities in New York which would subject a foreign corporation to the New York State franchise tax.

Section 209.1 of the Tax Law and section 1-3.2 of the Article 9-A regulations provide that the franchise tax is imposed on a foreign corporation whose activities include one or more of the following:

- (i) doing business in New York State in a corporate or organized capacity or in a corporate form; or
- (ii) employing capital in New York State in a corporate or organized capacity or in a corporate form; or
- (iii) owning or leasing property in New York State in a corporate or organized capacity or in a corporate form; or
- (iv) maintaining an office in New York State.

Section 1-3.2(c) of the Article 9-A regulations states that:

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.

Section 1-3.2(d) of the Article 9-A regulations states that:

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.

Section 209.2 of the Tax Law and section 1-3.3(d) of the Article 9-A regulations provides that the maintenance of an office in New York State by one or more officers or directors of the corporation who are not employees of the corporation, does not subject the foreign corporation to tax if the corporation is not otherwise doing business or employing capital in New York State and does not own or lease property in New York State.

Section 209.2 of the Tax Law and section 1-3.3(e) of the Article 9-A regulations provides that the keeping of books or records of a foreign corporation in New York State does not subject the foreign corporation to tax if such books or records are not kept by the employees of such corporation and if such corporation is not otherwise doing business or employing capital in New York State and does not own or lease property in New York State.

Accordingly, the mere keeping of the books and records of Petitioner in New York by Griffith which are maintained by Griffith employees and the maintenance of an office in New York by an officer of Petitioner who is not an employee of Petitioner, is not sufficient activity in New York to subject Petitioner to tax.

However, the facts presented by Petitioner indicate that, pursuant to section 209.1 of the Tax Law and section 1-3.2 of the Article 9-A regulations, Petitioner is employing capital in New York and does own property in New York when it takes title to petroleum in New York State and ships such petroleum to customers within New York State.

Therefore, it is determined that Petitioner's activities in New York are of a nature that renders Petitioner subject to the Franchise Tax on Business Corporations pursuant to Article 9-A of the Tax Law.

Since Petitioner is subject to the franchise tax, the second issue raised is moot.

DATED: June 12, 1987

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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