

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

TSB-A-87 (7) C
Corporation Tax
April 7, 1987

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. C861230A

On December 30, 1986, a Petition for Advisory Opinion was received from Hugo Bosca Company, Inc., 1905 W. Jefferson St., P.O. Box 777, Springfield, Ohio 45501.

The issue raised is whether Petitioner's activities in New York State are sufficient to make Petitioner subject to tax under Article 9-A of the Tax Law for taxable year 1986.

Petitioner is a manufacturer of small leather goods. Its headquarters, manufacturing plant and sole place of business are located in Springfield, Ohio. Petitioner's products are sold by freelance salesmen throughout the United States. These salesmen, who are not employees of Petitioner, work on a commission basis, earning fees by representing Petitioner and other manufacturers. The salesmen purchase samples of Petitioner's product lines, take them to the retail stores in their assigned geographical area and obtain purchase orders. The orders are then sent, by either the salesmen or the retailer, to Petitioner in Springfield where Petitioner's employees accept or reject them. If the order is accepted by Petitioner, it is filled by sending the goods from Springfield to the retailer at an address specified by the retailer in the purchase order. If there is a defect in the product or the goods are not accepted, all repairs and returns are made directly to Petitioner in Springfield.

There are two independent salesmen who are responsible for showing Petitioner's products to retailers located in New York State. As a convenience to these salesmen Petitioner rented a showroom at the Empire State Building until February 14, 1986 at which time it assigned its lease for this space. Petitioner understands that the independent sales representatives used the showroom until February 14, 1986 on the average once every two weeks except during market week when it was used every day. There are three market weeks a year when the showroom is so used. Since February 14, 1986, Petitioner has ceased renting space in New York State.

It is Petitioner's position that it is at most only liable for taxes from January 1, 1986 to February 14, 1986 and that if it was ever doing business in New York State, it stopped when it assigned its lease on February 14, 1986.

Section 209.1 of the Tax Law, contained in Article 9-A thereof, imposes the Franchise Tax on Business Corporations, 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, . . . shall annually pay a franchise tax. . . ."

Section 1-3.2(a)(1) of the Business Corporation Franchise Tax Regulations provides, in pertinent part, that "[t]he tax is imposed on every foreign corporation . . . whose activities include one or more of the following:

. . .

(iii) owning or leasing property in New York State in a corporate or organized capacity or in a corporate form" 20 NYCRR 1-3.2(a)(1).

Section 1-3.2(d) of such Regulations provides, in pertinent part, that, "[t]he 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." 20 NYCRR 1-3.2(d).

Petitioner states that it rented a showroom in New York City until February 14, 1986 for use by Petitioner's independent sales representatives. Even though Petitioner has since ceased to rent space in New York State, the rental of property in New York for a portion of the year constitutes "leasing property in this state" within the meaning of section 209.1 of the Tax Law.

P.L. 86-272 (15 USC 381) limits the power of a state to impose a net income tax on "interstate income". Income derived from the interstate business activities of a corporation incorporated outside a state may not be taxed by that state if the activities carried on with the state are limited to:

"(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1)."

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While Petitioner's activities in soliciting, approving and filling orders, as described earlier, are activities of a type described in the foregoing federal statutory provision, the leasing of property within this state extends the sum of Petitioner's activities in New York beyond the protected zone established by P.L. 86-272.

Accordingly, Petitioner is subject to New York's Franchise Tax on Business Corporations, imposed under Article 9-A of the Tax Law, for all of taxable year 1986, pursuant to section 209.1, which imposes the tax on foreign corporations "owning or leasing property in this state in a corporate or organized capacity, for all or any part of each of its fiscal or calendar years. . . ." (emphasis added).

DATED: April 7, 1987

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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