

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

TSB-A-91 (20) C
Corporation Tax
October 22, 1991

STATE OF NEW YORK
COMMISSIONER OF TAXATION

ADVISORY OPINION

PETITION NO. C910711B

On July 11, 1991, a Petition for Advisory Opinion was received from Himont USA, Inc., 2801 Centerville Rd, P.O. Box 15439, Wilmington, Delaware 19850-5439.

The issues raised by Petitioner, Himont USA, Inc., are:

- 1) Whether for taxable years ending after October 31, 1987, "compensation of employees within New York" as used in section 4-5.1(a) of the Business Corporation Franchise Tax Regulations (hereinafter "Article 9-A Regulations") includes employees of a taxpayer that does not have an office or place of business within New York.
- 2) If the answer to question "1" is yes, whether New York State would require the attribution of some amount, albeit small, of payroll to New York if such employees spend only insubstantial amounts of time within New York.

Petitioner is incorporated and headquartered in the state of Delaware. Petitioner does not have an office or other business location in New York State, nor are any of Petitioner's employees residents of New York State. Petitioner has generally held a small amount of property (inventory) in New York and it does have a small amount of sales destined for New York. As an example, the average sales (single weighted) factor for taxable years ended 10/31/85, 10/31/86 and 10/31/87 was 1.8276% and the average property factor for those periods was .1742%.

Petitioner is a taxpayer under Article 9-A of the Tax Law and when computing its business allocation percentage it includes amounts in the numerator of the property and receipts factors, but treats the numerator of the payroll factor as zero. Petitioner estimates that the amount of time spent by its employees "within New York" is only about 30 - 35 man days per year. This would represent only about .015% of all of Petitioner's payroll.

Section 4-5.1 of the Article 9-A Regulations provides that:

(a) The percentage of the taxpayer's payroll allocated to New York State is determined by dividing the wages, salaries and other personal service compensation of the taxpayer's employees, except general executive officers, within New York State during the period covered by the report, by the total amount of compensation of all the taxpayer's employees, except general executive officers, during the period covered by the report.

* * *

(d) Employees within New York State include all employees regularly connected with or working out of an office or place of business of the taxpayer within New York State, irrespective of where the services of such employees were performed. However, if the taxpayer establishes to the satisfaction of the [Commissioner of Taxation and Finance] that (1) a substantial part of its payroll was paid to employees attached to an office in New York State who performed a substantial part of their services outside New York State and (2) establishes that the computation of the payroll factor according to the general rule stated above would not properly reflect the amount of the taxpayer's business done within New York State by its employees, then the [Commissioner of Taxation and Finance] may permit the payroll factor to be computed on the basis of the amount of compensation paid for services performed within New York State.

Herein, none of Petitioner's employees are regularly connected with or working out of an office or place of business of Petitioner within New York State. Petitioner does not have an office or other business location in New York State and Petitioner's employees spend an insubstantial amount of time in New York State.

Therefore, in accordance with Section 4-5.1 of the Article 9-A Regulations, for taxable years ending after October 31, 1987, the numerator of Petitioner's payroll factor, for purposes of the business allocation percentage, is zero for those taxable years where Petitioner's circumstances are the same as the facts presented herein.

DATED: October 22, 1991

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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