

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

TSB-A-91(8)C
Corporation Tax
March 22, 1991

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C901211A

On December 11, 1990, a Petition for Advisory Opinion was received from ROP Color, Inc., 501 Bergen Street, Harrison, New Jersey 07029.

The issue raised by Petitioner, ROP Color, Inc., is whether its activities in New York State in connection with its computerized typesetting and color separation business make it subject to the franchise tax imposed on business corporations under Article 9-A of the Tax Law.

Petitioner conducts a computerized typesetting and color separation business. It conducts its manufacturing operations outside New York State and its seat of management and commercial domicile are outside New York State. Petitioner does not maintain an office, own or lease property or employ capital in New York State.

Petitioner's activities in New York consist of: (1) soliciting orders, (2) picking up mechanicals for delivery to its manufacturing plant outside New York, and (3) delivering completed negatives to customers in New York.

Petitioner has customers in several states. However, the majority of its sales are to New York customers. Customers in New York place orders by mail, by telephone, or through salesmen employed by Petitioner. These salesmen solicit sales in New York on a regular and continuous basis. All purchase orders are sent outside New York State for approval, and if approved, are filled by shipment or delivery from a point outside New York State. All credit is approved outside New York State.

The customer's manuscripts, mechanicals or photographs are delivered to Petitioner's plant located outside New York by the customer, salesmen, Petitioner's van, messenger, or common carrier. There the mechanicals are typeset, photographed and color separated for color reproductions. The resulting negatives are delivered to the customer by the salesmen, Petitioner's own vans, messengers, or common carriers. Salesmen when delivering merchandise may deal with customer complaints and arrange for the repair of defective goods in order to encourage future sales.

Petitioner salesmen's duties consist of the following:

1. The salesmen take orders from customers which they send to the New Jersey office for credit check and approval.
2. The salesmen attempt to maintain goodwill and continuous customer relations.

3. The salesmen, in order to facilitate "1" and "2" above, on occasion, deliver merchandise to a customer. A very small percentage of merchandise is delivered by salesmen.
4. If a customer is dissatisfied with the product, and the salesman is present or made aware of the problem, he will try to soothe the customer. He may on occasion arrange for the products return to the New Jersey plant for inspection by Petitioner's plant supervisors. No repairs are made, or can be made outside the plant. The salesmen are not technically proficient. Credit for defective merchandise is granted by technicians in the New Jersey plant.
5. Salesmen neither collect delinquent accounts, nor do they collect customer deposits.

Section 209.1 of Article 9-A of the Tax Law imposes the business corporation franchise tax on every foreign corporation, unless specifically exempt, for the privilege of doing business, or of employing capital, or of owning or leasing property in New York State in a corporate or organized capacity, or of maintaining an office in New York State.

Section 1-3.4(b)(9)(i) of the Article 9-A Regulations provides an exemption from taxation under Article 9-A for corporations which are exempt pursuant to the provisions of Public Law 86-272 (15 USCA §§ 381-384). Such section provides that:

[a] A foreign corporation whose income is derived from interstate commerce is not subject to tax under article 9-A if the activities of the corporation in New York State are limited to either, or both of the following:

(a) the solicitation of orders by employees or representatives in New York State for sales of tangible personal property and the orders are sent outside New York State for approval or rejection; and, if approved, are filled by shipment or delivery from a point outside New York State, and

(b) the solicitation of orders by employees or representatives in New York State in the name of or for the benefit of a prospective customer of such corporation if the customer's orders to the corporation are sent outside the State for approval or rejection; and, if approved, are filled by shipment or delivery from a point outside New York State.

Section 1-3.4(b)(9)(v) of the Article 9-A regulations provides that:

[a]ctivities beyond mere solicitation will subject a corporation to tax in New York State. In general, activities of employees in New York State which are intended or designed to promote or encourage the marketing of the corporation's products in New

York State or intended or designed to maintain a market already established in New York State are beyond mere solicitation and will make a corporation taxable. In determining whether a corporation's activities exceed mere solicitation, all of the corporation's activities in New York State will be considered. Examples of activities which go beyond mere solicitation include:

- (a) making repairs to or installing the corporation's products;
- (b) making credit investigations;
- (c) collecting delinquent accounts;
- (d) taking inventory of the corporation's products for customers or prospective customers;
- (e) setting up displays of the corporation's products for customers;
- (f) giving technical advise on the use of the corporation's products.

Herein, Petitioner's manufacturing operations and seat of management are located outside New York State. Petitioner does not maintain an office in New York State, does not own or lease property or employ capital in New York State. Petitioner's sole activities in New York are the soliciting of orders, picking up manuscripts, mechanicals or photographs for delivery to the plant outside New York and the delivery of the completed negatives from outside to New York to customers in New York. Petitioner's salesmen may forward customers complaints to offices outside New York and return defective goods to be repaired. All decision making regarding these activities are conducted outside New York State.

Consequently, Petitioner's activities in New York State do not go beyond the mere solicitation of orders and Petitioner is exempt from the franchise tax imposed by Section 209.1 of Article 9-A of the Tax Law by virtue of Public Law 86-272 and section 1-3.4(b)(9) of the Article 9-A Regulations.

DATED: March 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.