

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

TSB-A-95 (18) C
Corporation Tax
November 14, 1995

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C950629B

On June 29, 1995, a Petition for Advisory Opinion was received from Alston & Bird, 1201 West Peachtree Street, Atlanta, Georgia 30309-3424.

The issue raised by Petitioner, Alston & Bird, relates to the allocation of receipts from sales of tangible personal property under section 4-4.2 of the Business Corporation Franchise Tax Regulations ("Article 9-A Regulations"). Specifically, Petitioner asks whether receipts from sales of tangible personal property are allocated to New York State when a seller, located outside New York State, sells goods to a New York customer under the following fact scenarios.

Scenario 1. Corporation X is an out-of-state corporation which sells tangible personal property to a New York customer. The goods are shipped from Corporation X's out-of-state location into New York by common carrier. The customer arranges and pays for shipment by the common carrier. The goods are shipped FOB shipping point and the customer bears the risk of loss or damage in transit.

Scenario 2. Corporation X is an out-of-state corporation which sells tangible personal property to a New York customer. The goods are shipped from Corporation X's out-of-state location into New York by common carrier. The customer arranges and pays for shipment by the common carrier. The goods are shipped FOB shipping point, but Corporation X bears the risk of loss or damage in transit.

Scenario 3. Corporation X is an out-of-state corporation which sells tangible personal property to a New York customer. The goods are shipped from Corporation X's out-of-state location into New York by common carrier. The New York customer directs Corporation X to arrange for shipment by common carrier on behalf of the customer. The common carrier bills the customer directly for the shipment and the customer is responsible for payment. The goods are shipped FOB shipping point and the customer bears the risk of loss or damage in transit.

Scenario 4. Corporation X is an out-of-state corporation which sells tangible personal property to a New York customer. The goods are shipped from Corporation X's out-of-state location into New York by common carrier. The New York customer directs Corporation X to arrange for shipment by common carrier on behalf of the customer. The common carrier bills the customer directly for the shipment and the customer is responsible for payment. The goods are shipped FOB shipping point, but Corporation X bears all risk of loss or damage in transit.

Scenario 5. Corporation X is an out-of-state corporation which sells tangible personal property to a New York customer. The goods are shipped from Corporation X's out-of-state location into New York by common carrier. The New York customer arranges for shipment by the common carrier. However, Corporation X is responsible

for payment to the common carrier. The goods are shipped FOB shipping point, but Corporation X bears all risk of loss or damage in transit. The price of the goods excludes transportation costs but the customer is billed separately by Corporation X for the cost of the transportation.

Scenario 6. Corporation X is an out-of-state corporation which sells tangible personal property to a New York customer. The goods are shipped from Corporation X's out-of-state location into New York by common carrier. The New York customer arranges for shipment by the common carrier. However, Corporation X is responsible for payment to the common carrier. The goods are shipped FOB shipping point and the customer bears all risk of loss or damage in transit. The price of the goods excludes transportation costs but the customer is billed separately by Corporation X for the cost of the transportation.

Scenario 7. Corporation X is an out-of-state corporation which sells tangible personal property to a New York customer. The goods are shipped from Corporation X's out-of-state location into New York by common carrier. The New York customer directs Corporation X to arrange for shipment by common carrier on behalf of the customer. Corporation X is also responsible for payment to the common carrier. The goods are shipped FOB shipping point and the customer bears all risk of loss or damage in transit. The price of the goods excludes transportation costs but the customer is billed separately by Corporation X for the cost of transportation.

Scenario 8. Corporation X is an out-of-state corporation which sells tangible personal property to a New York customer. The goods are shipped from Corporation X's out-of-state location into New York by common carrier. The New York customer directs Corporation X to arrange for shipment by common carrier on behalf of the customer. Corporation X is also responsible for payment to the common carrier. The goods are shipped FOB shipping point, but Corporation X bears all risk of loss or damage in transit. The price of the goods excludes transportation costs but the customer is billed separately by Corporation X for the cost of transportation.

Section 210.3(a)(2)(A) of the Tax Law provides that, for purposes of computing the receipts factor of the business allocation percentage, receipts from sales of tangible personal property are allocated to New York State where shipments are made to points within New York State.

Section 4-4.2 of the Article 9-A Regulations states that:

Receipts from sales of tangible personal property are allocable 100 percent to New York State where shipments are made to points in this State. Tangible personal property is considered to be shipped to a point in New York State if:

(a) the property is shipped via common carrier or via taxpayer's truck to a point in New York State designated on the bill of lading or other shipping document, regardless of the FOB point; or

(b) the property is delivered to a purchaser at a point in New York State.

Example: A taxpayer has its factory in New York State. A customer located in New Jersey comes into New York State in its own truck or one rented by it and picks up its purchase at the taxpayer's factory. The receipts from such sale must be allocated to New York State.

In the Matter of F. & M. Schaefer Brewing Co. v Gerosa, 4 NY2d 423, (1958), the Court of Appeals held that the City of New York could, under its General Business and Financial Tax Law, tax receipts from sales by petitioner, a domestic corporation, made to out-of-state distributors. The customer's truck would be loaded at petitioner's brewery in Brooklyn and, after the load had been checked by the driver and one of petitioner's employees, the truck would be "sealed" and driven to the distributor's place of business. Some distributors own their own trucks or lease them while others use contract motor carriers or motor vehicle common carriers. The trucker taking delivery of the beer was selected by the distributor and had no connection with the brewery. No employee or representative of petitioner handled the beer or accompanied it once it left the brewery and it assumed no responsibility for the beer from that time on. Since the customer took delivery in Brooklyn, it was a local transaction and the receipts from such sales are taxable. See also, Matter of F. & M. Schaefer Brewing Co. v Gerosa, (1964) 14 NY2d 25.

In W. A. Krueger Company, Adv Op St Tax Comm, May 29, 1987, TSB-A-87(13)C, it was held that where books, magazines and catalogs are shipped by the petitioner to its customers located in New York State or to designees of its customers located in New York State, in bulk, via common carrier or through the mails, the receipts from such sales are properly allocated to New York State and must be included in the numerator of the petitioner's receipts factor.

In Swanknit Inc., Adv Op Comm T & F, October 18, 1993, TSB-A-93(18)C, it was held that where the petitioner manufactured clothing that it shipped via common carrier to its customers or its customers' designees throughout the United States, the receipts from the sales where such shipments are to points within New York State must be included in the numerator of the petitioner's receipts factor.

In Flexovit USA, Inc., Adv Op Comm T & F, December 27, 1994, TSB-A-94(18)C, it was held that where it is petitioner's customer that contracts with a common carrier for the pickup of material at the petitioner's factory in New York State and exercises complete control over the common carrier by providing the place, date and time the shipment must be at the destination outside New York and makes payment for such shipment, it is the customer that is shipping the material, not the petitioner. Where the customer is shipping the material from the petitioner's factory in New York State, the customer is taking delivery of the material at the factory in New York State and the receipts from such sale are allocated to New York State pursuant to section 4-4.2 of the Article 9-A Regulations.

Herein, the facts under Scenario 1 are similar to Flexovit, supra. The goods are delivered to a purchaser at a point outside New York State, and it is the purchaser that is shipping the goods into New York State. The receipts of Corporation X from the sales of such tangible personal property are receipts from sales outside New York State and are not included in the numerator of the receipts factor.

Based on section 210.3(a)(2)(A) of the Tax Law, section 4-4.2 of the Article 9-A Regulations, and the above court cases and advisory opinions, the facts in Scenarios 2 through 8 indicate that Corporation X, the seller, has some connection with the shipping of the goods into New York State and therefore, the delivery of the goods to the purchaser does not take place outside New York State. Specifically, in Scenario 2, Corporation X bears the risk of loss or damage in transit. In Scenario 3, Corporation X arranges for the shipment by common carrier. In Scenario 4, Corporation X arranges for the shipment by common carrier and bears all risk or loss or damage in transit. In Scenario 5, Corporation X is responsible for payment to the common carrier and bears all risk of loss or damage in transit. In Scenario 6, Corporation X is responsible for payment to the common carrier. In Scenario 7, Corporation X arranges for shipment by common carrier and is responsible for payment to the common carrier. In Scenario 8, Corporation X arranges for shipment by common carrier, is responsible for payment to the common carrier and bears all risk of loss or damage in transit.

Note that in all Scenarios, the FOB point and method of billing the purchaser for transportation costs is irrelevant.

Accordingly, the receipts from the sale of the goods in Scenarios 2 through 8 must be included in the numerator of Corporation X's receipts factor where the goods are shipped to points in New York State.

DATED: November 14, 1995

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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