

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

TSB-A-95 (19) C
Corporation Tax
November 13, 1995

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C950626A

On June 26, 1995, a Petition for Advisory Opinion was received from International Coffee Corporation, 300 Magazine Street, New Orleans, Louisiana 70130.

The issue raised by Petitioner, International Coffee Corporation, is whether Petitioner's activities within New York State are sufficient to subject it to tax under Article 9-A of the Tax Law for taxable year ending September 30, 1993.

Petitioner is an S corporation incorporated in Louisiana, where Petitioner's only office is located in New Orleans. Petitioner does not maintain an office in New York State, nor does it have any employees working or residing in New York State.

Petitioner's business activities concern commodities trading, specifically, green coffee beans. Petitioner's activities within New York are limited to the solicitation of orders by its representatives. All orders are sent outside New York for approval or rejection in New Orleans. Orders accepted by Petitioner represent the sale of green coffee beans. Coffee is not grown within the United States and, consequently, all coffee originates from points outside the country. These shipments are sold as raw coffee beans with no value added by Petitioner from the point of origin.

Petitioner does not own or lease any real property within New York State. Petitioner states that, generally, it does not maintain a physical inventory or other personal property in New York State.

While Petitioner's primary business is the purchase and sale of the physical commodity, Petitioner states that it also trades in commodity futures through independent brokers on the floor of the commodities exchange. Generally, these futures contracts are closed out with an offsetting contract. However, occasionally when market conditions make delivery prudent, Petitioner will take title to the commodity. When the commodity is tendered by the exchange, Petitioner cannot choose where to take delivery, but instead, must accept the goods where they are located. In such cases, the physical commodity could then be held by Petitioner in a public warehouse located in New York. The length of time the physical commodity is held, is dependent on market conditions.

Petitioner states that the inventory balance for taxable year ending September 30, 1993 was \$26,119 in New York State and \$2,598,747 everywhere resulting in 1.0051% of its inventory in New York State. Also for taxable year ending September 30, 1993, Petitioner states that the total bag equivalent of futures contracts bought is 217,750 and the bag equivalent of futures contracts bought with delivery within New York State is 1,749, resulting in .8032% delivery within New York State.

Petitioner states that where delivery is taken when closing out a futures contract, the bags of coffee beans are held until they are either sold back through the exchange or sold to customers.

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 1-3.2(b) of the Business Corporation Franchise Tax Regulations ("Article 9-A Regulations") provides that:

(1) [t]he term doing business is used in a comprehensive sense and includes all activities which occupy the time or labor of people for profit. Regardless of the nature of its activities, every corporation organized for profit and carrying out any of the purposes of its organization is deemed to be doing business for the purposes of the tax. In determining whether a corporation is doing business, it is immaterial whether its activities actually result in a profit or loss.

(2) Whether a corporation is doing business in New York State is determined by the facts in each case. Consideration is given to such factors as:

(i) the nature, continuity, frequency, and regularity of the activities of the corporation in New York State;

(ii) the purposes for which the corporation was organized;

(iii) the location of its offices and other places of business;

(iv) the employment in New York State of agents, officers and employees; and

(v) the location of the actual seat of management or control of the corporation.

Section 1-3.2(c) of the Article 9-A Regulations provides that:

[t]he 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 provides 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. 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

Pursuant to section 1-3.2(d) of the Article 9-A Regulations, the ownership of real or tangible personal property located in New York State is sufficient to make a corporation subject to the franchise tax imposed under Article 9-A of the Tax Law even though the corporation is not deemed to be doing business in New York State.

However, there are situations where the ownership of property in New York is not sufficient in magnitude to subject a foreign corporation to tax. For example, section 1-3.4(b)(9) of the Article 9-A Regulations provides that a foreign corporation whose income is derived from interstate commerce is not subject to tax if its New York activities do not exceed those prescribed by Public Law 86-272, even where the corporation has samples or automobiles in New York, used exclusively for solicitation.

Similarly, it has been held that a foreign corporation which ships raw materials or partially finished goods to an unrelated contractor in this state, by whom the goods are processed or finished, is not taxable solely because of the ownership of such property in New York, assuming that the contractor returns the goods to the foreign corporation or ships them to another contractor outside the state. American Association of Advertising Agencies, Inc., Adv Op St Tax Comm, November 7, 1980, TSB-H-80(32)C.

Also, a foreign corporation manufacturing aluminum, is not subject to tax because it only has minimal ownership of property in New York when it ships its by-product, dross, to a processor in New York who reclaims some aluminum from the dross and then ships the reclaimed metal back to the foreign corporation and disposes of the waste product. Aluminum Company of Canada, Ltd., Adv Op St Tax Comm, August 12, 1983, TSB-A-83(9)C.

In Cargill Financial Services Corporation, Adv Op Comm T & F, September 26, 1990, TSB-A-90(20)C, the petitioner was engaged in the business of trading in stocks, bonds, currencies, commodities and other financial instruments on various exchanges in New York City. The transactions were executed by independent brokers. The opinion held that such activity by itself was not sufficient to deem the petitioner to be doing business in New York State. The petitioner proposed to also trade in commodity futures contracts in precious metals on the floor of the Commodity Exchange, Inc. in New York City. Because of market conditions, it may be prudent for the petitioner to occasionally take title to the precious metal for a short period of time. The physical commodities would be held in warehouses or vaults in New York City. The opinion also held that when the petitioner occasionally takes title to the precious metal for short periods of time, such ownership of property in New York State is minimal, and if the petitioner is not otherwise doing business in New York, the petitioner would not be taxable under

Article 9-A of the Tax Law. However, the actual determination of whether the petitioner was subject to tax was a factual matter dependent on the totality of the corporation's circumstances and not susceptible of determination in an Advisory Opinion.

Herein, Petitioner is in the business of buying and selling coffee beans. As part of its business, Petitioner also trades in coffee bean futures through independent brokers on the floor of the commodities exchange. When trading commodity futures, occasionally the market conditions make it prudent to take delivery, and Petitioner takes title to the physical commodity, coffee beans. When the commodity is tendered by the exchange, Petitioner must take delivery wherever the goods are located. Therefore, Petitioner's inventory in New York includes the occasional taking of title to coffee beans through the commodities exchange which Petitioner holds until it either sells the beans back through the exchange or sells the beans to its customers. In addition, Petitioner occasionally has other inventory located in New York State that is held for sale to its customers.

Petitioner's activities in New York State exceed those in Cargill, supra. Where Cargill was engaged in the business of trading financial instruments, Petitioner's primary business is the purchase and sale of coffee beans. Also, where Cargill occasionally took delivery, for short periods of time, of precious metals when closing out futures contracts, such precious metals were sold back through the exchange. Herein, when Petitioner takes delivery of coffee beans in New York State when closing out futures contracts, such coffee beans are sometimes sold to Petitioner's customers rather than sold back through the exchange. In addition, Petitioner occasionally acquires inventory held in New York State that is sold to its customers.

Petitioner's activities in New York State exceed those prescribed by Public Law 86-272. Therefore, Petitioner is not exempt from taxation pursuant to section 1-3.4(b)(9) of the Article 9-A Regulations. Because Petitioner does maintain inventory in New York State for sale to customers, albeit not continuously, Petitioner's activities in New York State exceeds the minimal ownership of property as contemplated in American Association of Advertising Agencies, supra, Aluminum Company of Canada, supra, and Cargill, supra.

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Accordingly, Petitioner is subject to tax under Article 9-A of the Tax Law, pursuant to section 209.1 of the Tax Law and section 1-3.2(d) of the Article 9-A Regulations, for taxable year ending September 30, 1993.

DATED: November 13, 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.