

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

TSB-A-97(14)C  
Corporation Tax

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C970306A

On March 6, 1997, a Petition for Advisory Opinion was received from PWG Vintners USA, Inc., c/o Southcorp USA, Inc., 100 Galleria Parkway, Suite 900, Atlanta, Georgia 30339.

The issue raised by Petitioner, PWG Vintners USA, Inc., is whether it is exempt from the franchise tax imposed by Article 9-A of the Tax Law as a corporation protected under the provisions of Public Law 86-272 (15 USCA §§381-384).

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner is a corporation organized outside New York State that is principally engaged in the business of selling wines owned by its Australian affiliates ("Southcorp Wines") to customers located throughout the United States. All of Petitioner's sales are made on a wholesale basis to local distributors. With respect to its New York activities, Petitioner supplies wine to four New York wholesale distributors. All wines sold by Petitioner to its New York customers are shipped by common carrier from inventories maintained by Southcorp Wines in Australia and California, or from inventory that Petitioner owns in New Jersey.

To service the accounts of its New York customers, Petitioner retains an area sales manager, who resides within New York State. It is the New York area sales manager's responsibility to generate sales of Petitioner's products by motivating and educating the sales staff of its customers with regard to Petitioner's products, and communicating the objectives and priorities of Petitioner to its customers to ensure that its customers' efforts are consistent with Petitioner's goals. The sales manager is also charged with the responsibility of working with Petitioner's New York customers' sales force in order to generate incremental sales and distribution of Petitioner's products.

To stimulate interest in Petitioner's products, the New York area sales manager will perform certain activities to assist distributors in marketing Petitioner's wines. Specifically, the sales manager will accompany a distributor's salesperson on visits to the distributor's direct customers. During these visits the sales manager may assist in setting up a display, answering questions about Petitioner's wines, or, in the case of restaurant customers, conducting Petitioner wine demonstrations to the customer's waitstaff. To perform these demonstrations, the sales manager maintains a nominal inventory of Petitioner's wines to use as samples. These samples are never sold by the sales manager; neither are they used to replace wines which may have previously been sold by the distributor. The sales manager will also periodically meet with a distributor's salespeople to educate them about Petitioner's products and preferred methods for marketing them (i.e., promotions.)

The New York area sales manager will periodically inspect a distributor's inventory for purposes of verifying that the distributor is maintaining an adequate supply of Petitioner's products in stock. This inventory inspection also serves the purpose of confirming that distributors are keeping pace with sales goals established by Petitioner. If damaged merchandise is identified by the sales manager in the course of her inspections, it is likely the sales manager will bring this to the attention of the distributor. The sales manager will not, however, remove or replace the damaged merchandise.

To aid the New York area sales manager in accomplishing her duties, Petitioner provides her with a laptop computer, a fax machine, a leased motor vehicle, and a nominal inventory of sample products and point of sale advertising materials. With the exception of these items, no other property is owned or leased by Petitioner in New York.

The New York area sales manager's principal responsibility is to solicit orders from customers for the wines sold by Petitioner. Because the sales manager is without authority to accept or reject customer order requests, orders are forwarded directly by Petitioner's New York customers to a Petitioner office located in California. Neither Southcorp Wines nor Petitioner maintains any inventory in New York. Southcorp Wines retains title to its wines until a customer order has been shipped. Once an order is shipped, title to the Southcorp Wines wine vests momentarily with Petitioner and then immediately with the purchasing distributor. The four distributors located in New York who make purchases from Petitioner acquire title to the wines at the point of shipment in California or New Jersey, and, in the case of shipments from Australia, outside the territorial waters of the United States.

Neither the New York area sales manager nor Petitioner maintains an office in New York; rather, the sales manager works solely out of her home. Petitioner does not reimburse the sales manager for the business use of her home. Petitioner does not list, or hold out to the public, the sales manager's home telephone or address as a Petitioner business number or address. At various times, however, the New York area sales manager has prepared stationery that advises Petitioner's customers of her home telephone number and address. The sales manager does not meet with customers at her home or in any similar way use her home to complete her employment duties. As noted above, all orders are sent directly to Petitioner's California office by its customers, consequently the New York area sales manager never receives orders at her home. The New York area sales manager's use of space at her home, and advice to Petitioner's four New York customers that she may be contacted at such location, is solely for her own convenience.

Petitioner's New York accounts are also routinely serviced by the company's northeast area sales manager. The northeast area sales manager resides in Connecticut and performs many of his employment duties at a Petitioner office maintained in that state. Periodically the northeast area sales manager will travel into New York to perform duties identical to those of the New York area sales manager. The northeast area sales manager is also without authority to accept or reject the order requests of Petitioner's New York customers.

Petitioner personnel other than the New York area and northeast area sales managers have in the past come to New York for the purpose of briefly meeting with Petitioner customers. These visits are infrequent, often no more than one a year, and involve no one other than Petitioner's president, east region sales manager, and marketing director. These sales-related visits serve no independent business function apart from their connection to the solicitation of orders of Petitioner's products. Such visits are prompted by the desire of each person to obtain direct, first-hand information on Petitioner's current New York customers.

Section 209.1 of Article 9-A of the Tax Law imposes an annual franchise tax on domestic or foreign corporations for the privilege of exercising a corporate franchise, doing business, employing capital, owning or leasing property in a corporate or organized capacity, or maintaining an office in New York State for all or any part of each of its fiscal or calendar years.

However, section 1-3.4(b)(9) of the Business Corporation Franchise Tax Regulations ("Article 9-A Regulations") provides for 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) and states as follows:

(i) A foreign corporation whose income is derived from interstate commerce is not subject to tax under article 9-A of the Tax Law 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 for sales of tangible personal property 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.

...

(iv) In order to be exempt by virtue of Public Law 86-272, the activities in New York State of employees or representatives must be limited to the solicitation of orders. The solicitation of orders includes offering tangible personal property for sale or pursuing offers for the purchase of tangible personal property and those ancillary activities, other than maintaining an office, that serve no independent business function apart from their connection to the solicitation of orders. Examples of activities performed by such employees or representatives in New York State that are entirely ancillary to the solicitation of orders include:

(a) the use of free samples and other promotional materials in connection with the solicitation of orders;

(b) passing product inquiries and complaints to the corporation's home office;

(c) using autos furnished by the corporation;

(d) advising customers on the display of the corporation's products and furnishing and setting up display racks;

(e) recruitment, training and evaluation of sales representatives;

(f) use of hotels and homes for sales-related meetings;

(g) intervention in credit disputes;

(h) use of space at the salesperson's home solely for the salesperson's convenience. (However, see subparagraph [vi] of this paragraph as to loss of immunity for maintaining an office.)

(v) Activities in New York State beyond the solicitation of orders will subject a corporation to tax in New York State unless such activities are *de minimis*. Activities will not be considered *de minimis* if such activities establish a nontrivial additional connection with New York State. Solicitation activities do not include those activities that the corporation would have reason to engage in apart from the solicitation of orders but chooses to allocate to its New York sales force. In determining whether a corporation's activities exceed the solicitation of orders, all of the corporation's activities in New York State will be considered. Examples of activities which go beyond the solicitation of orders 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) replacing the corporation's stale or damaged products;

(f) giving technical advice on the use of the corporation's products after the products have been delivered to the customer.

(vi) Maintaining an office, shop, warehouse or stock of goods in New York State will make a corporation taxable. However, a corporation will not be made taxable solely by maintaining a supply of goods in New York State if such goods are used only as free samples in connection with the solicitation of orders. A corporation will be considered to be maintaining an office in New York State if the space is held out to the public as an office or place of business of the taxpayer. For example, a salesperson uses his or her house for business. A telephone, listed in the corporation's name, is maintained at the salesperson's house. The salesperson makes telephone contacts from the house or receives calls and orders at the house. The residence will be treated as an office of the corporation, and the corporation will be taxable;

Pursuant to section 1-3.4(b)(9) of the Article 9-A Regulations, a corporation is not subject to tax in New York State if it is exempt pursuant to the provisions of Public Law 86-272. To be exempt pursuant to Public Law 86-272, a corporation's activities in New York State must be limited to 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. Activities that exceed the solicitation of orders will subject a corporation to tax in New York State, unless they are *de minimis*. Activities are not *de minimis* if they establish a nontrivial additional connection with New York.

The United States Supreme Court has established a standard for interpreting the term "solicitation" in Wisconsin Dept of Revenue v William Wrigley Jr. Co., 505 US 214 (1992). The Court established a "bright line" test to determine when solicitation ends. That is, the "clear line ... between those activities that are entirely ancillary to requests for purchases -- those that serve no independent business function apart from their connection to the soliciting of orders -- and those activities that the company would have reason to engage in anyway but chooses to allocate to its in-state sales force." In that case, Wrigley had personnel in Wisconsin, but did not provide offices for them. The representatives would store gum, furnish display racks and fill retailers' stock, if necessary, from the stock of gum they carried in their cars (the retailer would be billed for the gum) and replace stale gum without charge. The company had no facilities, telephone listing or bank account in Wisconsin, but did print and broadcast advertising in Wisconsin. Orders, credit and collection activities were all handled by the Chicago office. The Court held that the activities of replacing stale gum, filling stock from a salesman's supply, and storage of gum were not ancillary to solicitation as they did not facilitate the process of obtaining sales; and were not *de minimis* when taken together. Therefore, Wrigley's activities in Wisconsin were sufficient to support the imposition of a franchise tax.

In this case, the New York area sales manager will periodically inspect a distributor's inventory for purposes of verifying that the distributor is maintaining an adequate supply of Petitioner's products in stock and confirming that distributors are keeping pace with sales goals established by Petitioner. Petitioner states that the sole purpose behind the New York area sales manager's

inspection of a distributor's inventory is to provide the sales manager with a basis to request future purchases. No benefit is afforded the distributor (i.e., to verify a customer's records). Making sure that one's products are available serves no independent business function apart from the solicitation of orders. Therefore, this activity is considered ancillary to soliciting an order pursuant to Wrigley, supra, and is not "taking inventory of the corporation's products for customers" as contemplated under section 1-3.4(b)(9)(v)(d) of the Article 9-A Regulations.

In performing other activities in New York, the New York area sales manager will accompany distributors' salespersons on customer visits, meet with distributors' salespersons to discuss products and marketing techniques, use space at the home of the New York area sales manager, use Petitioner's vehicle, fax machine and laptop computer; and maintain an inventory of sample products and point of sale advertising materials. All of these activities performed by the New York area sales manager, as described by Petitioner, appear to be ancillary to soliciting an order and do not appear to have an independent business function that Petitioner would engage in whether or not it had an in-state sales force.

Accordingly, pursuant to Wrigley, supra, and section 1-3.4(b)(9)(iv) of the Article 9-A Regulations, Petitioner's activities in New York State do not go beyond the solicitation of orders. Therefore, Petitioner is exempt from franchise tax under Article 9-A of the Tax Law because its activities are protected under the provisions of Public Law 86-272.

DATED: June 26, 1997

/s/  
John W. Bartlett  
Deputy Director  
Technical Services Bureau

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