

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-13(4)C
Corporation Tax
March 4, 2013

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z120203B

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether its activities may be exempted from corporate franchise tax under the fulfillment clause and whether it should be paying franchise tax to New York State.

We conclude that Petitioner is subject to corporate franchise tax in New York.

Facts

Petitioner is a Virginia corporation with headquarters in Pennsylvania. Petitioner files as a foreign C Corporation for New York State. Petitioner utilizes a sales force of approximately 16 independent contractors located in New York State. Petitioner ships inventory via common carrier from its manufacturing facility in Pennsylvania to the independent contractors in New York who store Petitioner's product in the contractors' own storage facilities. The independent contractors are fully responsible for the stock of consigned inventory, although the Petitioner retains ownership of the goods until sold. The independent contractors make sales visits and sell Petitioner's products to New York customers (the end users) at the customers' locations.

Once the independent contractors sell and deliver the products, they write up sales slips (which indicate the product sold, purchase price, and customer information) and send them to Petitioner. Petitioner then bills the customers and pays commissions to the independent contractors. Petitioner carries the accounts receivable on all sales to the customers. Petitioner must approve the customers' credit before the independent contractors make sales since Petitioner is selling on credit to the customers.

Petitioner has no "bricks & mortar" locations (i.e., physical sales locations) in New York State, owns no facilities in New York and pays no rent for the storage of its goods in New York. The average value of inventory on hand in New York State is approximately \$200,000 for the last three years. In addition to sales and deliveries made from the contractors' locations in New York State, there are also significant sales shipped directly from Pennsylvania to New York customers, although Petitioner provided no facts on how these sales were solicited. Petitioner has been filing New York franchise tax returns to date.

Analysis

Under section 209.1 of the Tax Law, the business corporation franchise tax is imposed annually on a domestic or foreign corporation for the privilege of exercising its corporate franchise, doing business, employing capital, owning or leasing property in New York State, or maintaining an office in New York. Petitioner utilizes a sales force of approximately 16 independent contractors located in New York State to sell and deliver Petitioner's products to the customers. Petitioner consigns its inventory to the independent contractors, so they can deliver the product after the sales are made. After the independent contractors make the sales and deliver the products, they write up the sales slips which detail the products that were sold, the purchase prices, and the customers' information. Those receipts are forwarded to Petitioner. Upon receiving the sales slips, Petitioner bills the customers from its corporate offices located outside of New York State. Petitioner retains title to the products until they are sold to the customers. As further detailed in 20 NYCRR section 1-3.2(d), owning or leasing property in New York State includes consigning property to New York State if the consignor retains title to the consigned property. Petitioner has nexus with New York under section 209.1 of the Tax Law because it owns the products that it consigns to its independent contractors until they are sold to the customer. These products are property owned by the Petitioner in New York State.

Under section 209.2(f) of the Tax Law, a foreign corporation will not be deemed to be doing business, employing capital, owning or leasing property, or maintaining an office in New York because it uses the fulfillment services of a person that is not an affiliated person and it has inventory stored on that person's premises in conjunction with the fulfillment services. "Fulfillment services" is defined in section 208.19 of the Tax Law as any of the following services performed by an entity on its premises on behalf of a purchaser: (a) the acceptance of orders electronically or by mail, telephone, telefax or internet; (b) responses to consumer correspondence or inquiries electronically or by mail, telephone, telefax or internet; (c) billing and collection activities; or (d) the shipment of orders from an inventory of products offered for sale by the purchaser. We conclude that the fulfillment services exemption does not apply to Petitioner. The actions of the independent contractors here do not fall under the definition of fulfillment services because the independent contractors do more than just accept or just ship orders in New York State. The independent contractors located in New York State make sales visits to customers and deliver Petitioner's products to the customers from their consigned inventories located within New York State.

Lastly, under 20 NYCRR section 1-3.4(b)(9), corporations that are not subject to tax are those which are exempt pursuant to the provisions of Public Law 86-272 (15 U.S.C.A. §§ 381-384). The regulation provides that, under Public Law 86-272, "a corporation will not be considered to have engaged in taxable activities in New York State during the taxable year merely by reason of sales in New York State or the solicitation of orders for sales in New York State, of tangible personal property on behalf of the corporation by one or more independent contractors." Public Law 86-272 does not apply here because the independent contractors are doing more than just soliciting orders for sales in New York State. The independent contractors

deliver the products from their consigned inventories located within New York State to the customers upon making the sales.

Accordingly, because Petitioner's independent contractors make sales and deliver Petitioner's products in New York and Petitioner retains title to the products stored in New York until the products are sold, Petitioner's activities go beyond those allowed under Public Law 86-272 and the fulfillment services exemption. Therefore, Petitioner is subject to corporate franchise tax in New York State.

DATED: March 4, 2013

/S/

DEBORAH R. LIEBMAN
Deputy Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.