New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-02(16)C
Corporation Tax
September 18, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C010412A

On April 12, 2001, a Petition for Advisory Opinion was received from Sommer & Maca Industries, Inc., 5501 West Ogden Avenue, Cicero, Illinois 60804. Petitioner, Sommer & Maca Industries, Inc., submitted additional information pertaining to the Petition on October 29, 2001 and May 3, 2002.

The issues raised by Petitioner, Sommer & Maca Industries, Inc., concerning Petitioner's contacts within New York State for the taxable years 1993-1997, are:

1. Whether Petitioner's post-sale activity in New York State of assembling or disassembling portions of large glass machines shipped into New York by common carrier, which the New York purchaser either accepts or rejects, is ancillary to the solicitation of orders and is an exempt activity under section 1-3.4(b)(9) of the Business Corporation Franchise Tax Regulations ("Article 9-A Regulations").

2. Whether warranty service that is not an exempt service under section 1-3.4(b)(9) of the Article 9-A Regulations, which is provided by Petitioner in New York State as described below is *de minimis*, thereby exempting Petitioner from the franchise tax imposed under Article 9-A of the Tax Law.

3. Whether Petitioner would be exempt from filing New York State corporate franchise tax returns and paying tax under Article 9-A of the Tax Law for the taxable years that its activities in New York State do not exceed a *de minimis* standard as determined under Issue 2 above, but would have to file returns and pay New York corporate franchise tax under Article 9-A of the Tax Law for those taxable years that its activities do exceed the *de minimis* standard.

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

Petitioner is incorporated in Illinois. Petitioner sells glass finishing machinery and glazing supplies. Petitioner has three employees who reside in New York State. One employee works solely in Petitioner's New Jersey warehouse. One employee is a sales person in New York State and adjacent states. One employee is a sales person solely in New York State. Petitioner withholds and pays over all New York taxes with respect to its New York resident employees, as well as all applicable sales and use taxes. During the relevant period there was a change of employees; one sales person retired, the other left, and two replacement sales persons joined the company.

All orders and contracts solicited in New York are sent to Illinois for acceptance or rejection. No contracts are made or executed in New York State. Petitioner does not do business, employ

capital or fill orders from inventory within New York State. At no time has Petitioner maintained any office, phone number, warehouse or inventory in New York.

During the five taxable years at issue, pursuant to contracts solicited by the sales persons, Petitioner has had employees in New York State delivering machinery. The machines are very large; for instance a VE 2+2 edger is over 22 feet long, six feet wide and about nine feet tall when fully assembled. Therefore, the machines are transported in three pieces on three skids by a common carrier to the customer's location. After the three machine pieces arrive, Petitioner's employees assemble the machine pieces for final delivery and acceptance or rejection by the customer. Petitioner states that it takes no responsibility for the installation of machines, including the preparation of pads, electrical connections, or water and sewage requirements of the customer. Installation of the machinery may require pouring a special concrete pad, providing an adjacent sewer drain and dropping an electrical hook-up consistent with the machine's power needs.

In 1995, Petitioner sold three VE 2+2 edgers to New York customers. Petitioner's Chicago service employees spent almost 40 hours assembling the machines, including local travel time. All three machines were accepted and installed by the purchasers.

In 1993, Petitioner sold and assembled one VE 2+2 edger in New York State and its Chicago service employees assembled it in 15.5 hours, including local travel time.

In 1994, Petitioner sold and assembled five VE 2+2 edgers to New York customers, and its Chicago service employees spent 80 hours assembling the five machines, including local travel time.

In 1996, Petitioner sold two VE 2+2 edgers and one seven spindle beveller to New York customers. The seven spindle beveller is even larger than the VE 2+2 edger and also was delivered on three skids. Petitioner's Chicago employees spent 60 hours, including local travel time, assembling the three machines in 1996, which machines were installed by the customers. One machine in 1996 was not accepted. When a customer rejects a machine, Petitioner's employees disassemble the machine for transport, on the three skids, by the common carrier back to Petitioner. Also in 1996, Petitioner's service people made three trips into New York to assist customers, which took 49 hours including local travel time. The service people came from Petitioner's factory in Chicago.

In 1997, Petitioner sold four VE 2+2 edgers and one 60 inch Washer (which is also larger than the VE 2+2 edger and delivered on three skids). Petitioner's service people spent 95 hours assembling the five machines including local travel time. In 1997, Petitioner had one service call in New York State taking 12.5 hours.

Petitioner does, on rare occasions, have other employees that enter New York State. During the five taxable years at issue, a total of 30 hours were spent by Petitioner's Machinery Division employees performing repairs in New York State. Some of the repairs were under warranty and some were billed. If all of the repairs made in New York State were billed (including the warranty

work), the receipts from such repairs would have been less than one-quarter of one percent of Petitioner's total receipts. Also, during the taxable years at issue, an additional 30 hours were spent by Petitioner's Machinery Division employees in New York State related to sales solicitation to New York customers. These visits were not to make repairs, but rather to visit other customers in the area where a repair was made to look at their existing machinery and discuss new products and new techniques that are available to encourage new orders. Petitioner states that these visits serve no independent business function apart from the solicitation of orders.

During the five year period, Petitioner had no other contact with customers in New York other than by its sales people.

Discussion

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. The tax is imposed on the basis of the corporation's entire net income base, or upon such other basis (capital base, minimum taxable income bases or the fixed dollar minimum), as may be applicable, as determined under section 210 of the Tax Law.

However, section 1-3.4(b)(9) of the 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 ... in New York State will make a corporation taxable....

In Price Waterhouse LLP, Adv Op Comm T&F, March 26, 1997, TSB-A-97(7)C, the company manufactured and sold medical products, including prosthetic devices. It employed sales representatives to service accounts in New York State. They worked out of their homes, but the home addresses were not publicly displayed as a company address. The sales representatives' New York activities were limited to displaying and demonstrating the company's products to potential and existing customers, and answering questions about the products. Sales orders were sent directly from the customer to the company's out-of-state office for approval. Other than product samples, automobiles and home office supplies provided to the sales representatives, the company did not maintain any tangible property in New York. The company anticipated that three one-day seminars would be conducted in New York for both existing and prospective customers to train retailers on the proper methods for fitting the prosthetic devices sold by the company, which would increase both product awareness and goodwill for the company as well as sales. Attendance at each seminar was limited to 30 people, and the fees charged for the seminars were merely to cover expenses. Such fees would have constituted considerably less than one percent of the total New York receipts based on 1994 and 1995 amounts. The opinion held that all of the company's activities in New York, except for the three one-day seminars, constituted the solicitation of orders or were entirely ancillary to the solicitation of orders. The opinion also held that the conduct of the seminars to train the retailers exceeded activities ancillary to the solicitation of orders because the company was giving technical advice after delivery of the products. However, under the company's circumstances, such conduct constituted *de minimis* activities under section 1-3.4(b)(9)(v) of the Article 9-A Regulations.

In PWG Vintener USA, Inc., Adv Op Comm T&F, June 26, 1997, TSB-A-97(14)C, the petitioner was engaged in the business of selling wines owned by its Australian affiliates to customers located throughout the United States. All sales were made on a wholesale basis to local distributors. To service the New York accounts, petitioner retained an area sales manager to generate sales by motivating and educating the sales staff of its customers with regard to the petitioner's products, and communicating the objectives and priorities of petitioner to its customers to ensure that its customers' efforts were consistent with petitioner's goals. The opinion held that the activities of the area sales manager did not go beyond the solicitation of orders, and the sales

manager's activities, such as accompanying distributors' salespersons on customer visits, and meeting with distributors' salespersons to discuss products and marketing techniques, were ancillary to solicitation and served no independent business function apart from the solicitation of orders. The petitioner's activities in New York were insufficient to subject it to tax under Article 9-A.

In Construction Forms, Inc., Adv Op Comm T&F, February 26, 1993, TSB-A-93(8)C, the petitioner manufactured and sold concrete pumping system components, and sold them throughout the country and the world. The petitioner employed three regional managers to oversee the United States market. One manager is responsible for overseeing product distribution and technical services provided to customers in 15 east coast states, including New York. The manager did not have an engineering degree or other formal technical training, did not call on customers to solicit or otherwise obtain orders or distribute catalogues or other advertising material to them. He was a customer service manager and his primary responsibility was to ascertain and arrange to service the needs of the customers, and acted as an intermediary between the customer and headquarters. The manager did provide some limited and basic advice regarding general and routine applications of products, including the safe use of the products. The manager kept abreast of various ongoing and proposed projects that could have a use for the products, and kept headquarters informed so it could make appropriate marketing efforts. He also kept in touch with major customers with ongoing projects to keep abreast of their needs and to refer them to headquarters for technical advice, and was responsible for keeping good customer relations by entertaining customers and listening to their concerns. The manager made 6 to 10 personal visits to New York per year, each trip lasting one or two days. The opinion held that if the petitioner did not solicit orders for its products in New York, the provisions of Public Law 86-272 would not be applicable to its activities and the petitioner would not be exempt pursuant to section 1-3.4(b)(9) of the Article 9-A Regulations. The opinion also held that if the petitioner's activities in New York did constitute the solicitation of orders pursuant to Public Law 86-272, the manager's advice on the general application of products and on the safe use of the products would constitute "technical advice" as contemplated in section 1-3.4(b)(9)(v)(f). If such advice about the petitioner's products was given before the products were delivered, such advice would be ancillary to the solicitation of orders and the petitioner would be exempt from tax under Article 9-A pursuant to section 1-3.4(b)(9). However, if the advice was given after the products were delivered, such activity would be beyond the solicitation of orders, and the petitioner would not be exempt pursuant to section 1-3.4(b)(9).

Pursuant to section 1-3.4(b)(9) of the Article 9-A Regulations, a corporation is not subject to franchise 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 either (a) limited to the solicitation of orders by employees or representatives in New York State for sales of tangible personal property, or be entirely ancillary to such solicitation of orders, or (b) if the activities exceed the solicitation of orders, the activities must be considered to be *de minimis*. In addition, the orders must be sent outside New York State for approval or rejection; and if approved, must be filled by shipment or delivery from a point outside New York State.

In this case, Petitioner has sales employees soliciting orders for sales of tangible personal property in New York State. No contracts are made or executed in New York State. All orders and contracts solicited in New York are sent to Illinois for acceptance or rejection. Petitioner states that it does not employ capital or maintain any office, phone number, warehouse or inventory in New York, nor has it had any contacts with New York State other than its employees' activities in New York as described below.

During the five taxable years at issue, Petitioner had sales employees soliciting orders in New York State. Petitioner's solicitation activities in New York State by its sales employees constitute the solicitation of orders as described in section 1-3.4(b)(9)(iv) of the Article 9-A Regulations.

Petitioner also had Machinery Division employees performing repairs in New York State for a total of 30 hours during the five taxable years at issue. Some of the repairs were under warranty and some were billed. If all the repairs were billed, the total receipts from those repairs would have been less than one-quarter of one percent of Petitioner's total receipts. Making repairs exceeds activities ancillary to the solicitation of orders pursuant to section 1-3.4(b)(9)(v)(*a*) of the Article 9-A Regulations, and 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*.

Also, during the five taxable years at issue, 30 hours were spent by Petitioner's Machinery Division employees in New York State related to sales solicitation of existing New York customers. During these visits the employees did not make repairs, but visited other customers in the area where a repair was made to look at their existing machinery and to discuss new products and new techniques that are available to encourage new orders from the customers. Following Construction Forms, Inc., supra, if this activity was related to the solicitation of new orders, it would be ancillary to such solicitation. However, if the activity was related to providing technical advice for products already delivered, such activity would be beyond the solicitation of orders, and pursuant to section 1-3.4(b)(9)(v) of the Article 9-A Regulations, such activity in New York State would subject the corporation to tax in New York State unless such activity was *de minimis*.

In addition, the machines sold to customers in New York State were too large to transport in one piece, so the machines were transported by common carrier to the customer's location in three pieces on three skids. Petitioner's service employees were in New York State assembling the machines sold to New York customers during the five taxable years at issue as follows:

1993 – 15.5 hours assembling one machine that was accepted
1994 – 80 hours assembling five machines that were accepted
1995 – 40 hours assembling three machines that were accepted
1996 – 60 hours assembling three machines, two of which were accepted
1997 – 95 hours assembling five machines that were accepted

Also, in 1996 Petitioner's service people made three trips into New York to assist customers, which took 49 hours, and in 1997, Petitioner made one service call in New York taking 12.5 hours.

After the machines are assembled, they are accepted or rejected by the customer. If rejected, Petitioner's employees would disassemble machinery components for the common carrier to transport on the skids back to Petitioner. Petitioner's employees were not responsible for the preparation of pads, electrical connections, or water and sewage requirements for the installation of the machinery. However, the assembling and disassembling activities of these employees in New York State exceed delivery activities that are ancillary to the solicitation of orders as described in section 1-3.4(b)(9)(iv) of the Article 9-A Regulations. Such activities in New York State that go beyond the solicitation of orders will subject a corporation to tax in New York State unless such activities are *de minimis.*

For any taxable year that Petitioner's activities in New York State were *de minimis*, Petitioner would be exempt from the tax imposed under Article 9-A of the Tax Law. Petitioner's activities, including its warranty and repair services, in New York State for each taxable year, viewed in a comprehensive sense within the scope of section 1-3.4(b)(9)(v) of the Article 9-A Regulations, established a nontrivial additional connection with New York State. Therefore, for each taxable year at issue, Petitioner's activities in New York State that exceeded the solicitation of orders were not *de minimis* pursuant to section 1-3.4(b)(9)(v).

Accordingly, Petitioner is subject to tax under Article 9-A of the Tax Law for each of the taxable years at issue, 1993-1997, and Petitioner is required to file franchise tax returns pursuant to Article 9-A of the Tax Law for each of those taxable years.

DATED: September 18, 2002

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