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

TSB-A-02(6)C
Corporation Tax
May 31, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C990630A

On June 30, 1999, a Petition for Advisory Opinion was received from Tower Cleaning Systems, Inc., 1880 Markley Street, 2nd Floor, Norristown, Pennsylvania 19401.

The issue raised by Petitioner, Tower Cleaning Systems, Inc., is whether it is required to file franchise tax reports under Article 9-A of the Tax Law, based on its type of business activities.

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

Petitioner does not have an office, employees, representatives or inventory in New York State. Petitioner hires subcontractors in New York to conduct its janitorial service for its customers.

Petitioner is a federal S corporation. For purposes of this advisory opinion, it is assumed that Petitioner is organized outside of New York State.

Discussion

Section 209.1 of the Tax Law imposes, annually, a franchise tax on every corporation for the privilege of exercising its franchise, or 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 for all or any part of each of its fiscal or calendar years.

Section 1-3.2(b) of the Business Corporation Franchise Tax Regulations ("Article 9-A Regulations") provides that with respect to a foreign corporation:

> (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 a loss.
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> (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:
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> (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. Also, consigning property to New York State may create taxable status if the consignor retains title to the consigned property.

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

[a] foreign corporation which maintains an office in New York State is engaged in an activity which makes it subject to tax. An office is any area, enclosure or facility which is used in the regular course of the corporate business. A salesman's home, a hotel room, or a trailer used on a construction job site may constitute an office.

In Ernst and Whinney, Adv Op Comm T&F, September 29, 1988, TSB-A-88(22)C, a general insurance agency located outside of New York appointed licensed agents as associated independent contractors to market its insurance products in New York. These independent insurance agents also sold the insurance products of several unrelated insurance companies. The opinion held that the licensing or appointing of these independent insurance agents in New York and the selling of insurance policies in New York by such agents for the issuing company did not create nexus for the general insurance agency for purposes of Article 9-A of the Tax Law.

In GEF Funding Corp., Adv Op Comm T&F, January 26, 1988, TSB-A-88(2)C, a corporation located outside of New York engaged in mortgage loan origination and resale activities under various scenarios. The corporation had an arrangement with an unrelated bank whereby the corporation did all of the work regarding a loan but did not extend the funds. The bank actually made the loan to the borrower, and subsequently, the corporation purchased the loan from the bank. The opinion held that if the corporation's arrangement with the unrelated bank did not create an agency relationship with the bank, the activities of the bank would not create nexus for the corporation for purposes of Article 9-A of the Tax Law. However, if the bank was found to be an agent of the corporation, the corporation could be found to have nexus. The totality of the corporation's circumstances and its relationship with the bank would determine the corporation's taxable status.

In this case, it appears that Petitioner is not employing capital in New York, does not own or lease property in New York and does not maintain an office in New York. Therefore, the pertinent question in determining whether Petitioner is subject to tax under Article 9-A of the Tax Law is whether Petitioner is doing business in New York State.

Following Ernst and Whinney, supra, the hiring of subcontractors as independent contractors in New York to provide services for Petitioner for its customers does not constitute "doing business" in New York State by Petitioner and Petitioner would not be subject to the franchise tax imposed under Article 9-A of the Tax Law. In that case, Petitioner would not be required to annually file a franchise tax report. Nevertheless, if Petitioner is authorized to do business in New York State, Petitioner would be required to annually file form CT-245 – Maintenance Fee and Activities Return For a Foreign Corporation Disclaiming Tax Liability, and pay the maintenance fee of $300.

However, if it is established that the subcontractors have an agency relationship with Petitioner, or if any of Petitioner's employees, including officers, perform services in New York State, then pursuant to section 1-3.2(b)(2) of the Article 9-A Regulations and GEF Funding, supra, Petitioner would be considered to be doing business in New York State. In that case, Petitioner would be subject to the tax imposed under Article 9-A of the Tax Law and would be required to annually file form CT-3 or CT-4 – General Business Corporation Franchise Tax Return.

Note that the determination of whether an agency relationship exists is a factual matter not susceptible of determination in an advisory opinion. An advisory opinion merely sets forth the

applicability of pertinent statutory and regulatory provisions to "a specified set of facts." Tax Law, §171.Twenty-fourth; 20 NYCRR 2376.1(a).

DATED: May 31, 2002

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