

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

TSB-A-02(7)C  
Corporation Tax  
June 3, 2002

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C001103A

On November 3, 2000, a Petition for Advisory Opinion was received from Grant Thornton LLP, 130 East Randolph Drive, Suite 700, Chicago, Illinois 60601.

The issue raised by Petitioner, Grant Thornton LLP, is whether a foreign corporation is exempt from franchise tax under Article 9-A of the Tax Law pursuant to Public Law 86-272 based on the following activities:

1. having “sales people” in New York on a regular basis to solicit small organizations to subscribe to its publication service,
2. distributing the publications in New York on a regular basis without charge, and
3. having sales people in New York on a regular basis to solicit sales of advertising space in the publications from local businesses.

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

The corporation (“Corporation”) is a federal S corporation incorporated outside of New York State and it is in the printing business. The Corporation’s sources of revenue nationwide (including New York State) can be segregated into two general categories. The first category represents mail order sales of printed and non-printed products (e.g., books, artwork, calendars, musical tapes, CD’s, etc.). The second revenue category represents the distribution of publications (e.g., newsletters, leaflets, bulletins, etc.) on a subscription basis to small, private organizations. Both revenue sources are roughly the same in annual dollar volume nationwide (and within New York State). Both product categories are distributed to New York State recipients from out of state on a regular basis. Neither solicitation nor order taking related to the mail order product category takes place within New York State.

The Corporation sends salespeople to New York to solicit private organizations to subscribe to its publication service, and to solicit local businesses for the sale of advertising space for placement in the publications.

The Corporation’s publications are distributed weekly on a subscription basis free of charge to private organizations. The publications are earmarked for perusal by the organization’s members. These organizations typically consist of vocational groups, non-profit organizations, churches, clubs, etc. The publications typically contain articles by the organization’s president, the week’s upcoming events, and announcements, specific to the organization.

The Corporation's salespeople visit private organizations in New York State to solicit subscriptions for the Corporation's weekly publication service. After the initial visit, all interested organizations are contacted by the Corporation's home office outside New York State where the subscription order is taken. The Corporation enters into a contract with the private organization requiring the organization to distribute the publication for a specified period, such as a year, at no charge. Soon after the contract is signed, the Corporation's salespeople canvas local businesses to place advertisements in future issues of the new subscriber's publication.

Fees paid by local businesses for the advertisements in the publications are the Corporation's sole revenue source for the publications at issue. The fees are based on a contract specifying advertising space to be placed in a fixed number of future issues of the publication. The private organization is not billed by the Corporation (nor will the organization issue payment on behalf of the local business) at any time. The local business creates its own advertisement that is then sent to the Corporation's printing facility outside of New York State to be incorporated into the publication. The Corporation's salespeople do not provide any assistance to the local business with regard to the creation of the advertisement.

The Corporation's activities in New York State are limited to those activities described above.

### **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.

Section 1-3.2(b) of the Business Corporation Franchise Tax Regulations ("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.

(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 Regulations states 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 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 Regulations states 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.

However, section 1-3.4(b)(9) of the 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, in part, 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....

(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 State 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....

(vi) Maintaining an office ... in New York State will make a corporation taxable....

TSB-A-02(7)C  
Corporation Tax  
June 3, 2002

Pursuant to section 209.1 of the Tax Law and section 1-3.2(b), (c), (d) and (e) of the Regulations, a corporation organized outside of New York State is subject to the tax imposed under Article 9-A of the Tax Law if the corporation is doing business, employing capital, owning or leasing property in a corporate or organized capacity, or maintaining an office in New York State. However, pursuant to section 1-3.4(b)(9) of the 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 limited to the solicitation of orders by employees or representatives in New York State for sales of tangible personal property and 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.

Public Law 86-272 only protects a corporation which is soliciting orders for the sale of its tangible personal property in a state other than the corporation's home state. In this case, the publications printed by the Corporation are tangible personal property. However, the Corporation does not sell the publications to the private organizations that subscribe to the Corporation's weekly publication service, and does not have any receipts from this activity. The Corporation's receipts are from the sales to local businesses of advertising space in the publications. The sale of advertising space does not constitute the sale of tangible personal property.

Accordingly, the Corporation's activities in New York State relating to subscribed publications do not constitute the solicitation of orders for sales of tangible personal property. Therefore, the Corporation is not protected under Public Law 86-272. Since the Corporation's activities are not protected under Public Law 86-272, the Corporation is not immune from taxation under Article 9-A of the Tax Law pursuant to section 1-3.4(b)(9) of the Regulations.

Since the presence of the Corporation's salespeople in New York to solicit organizations to subscribe to the Corporation's publication service and to solicit sales of advertising space in such publications constitutes doing business in New York State under section 1-3.2(b) of the Regulations, the Corporation is subject to the franchise tax imposed under section 209.1 of the Tax Law.

DATED: June 3, 2002

/s/  
Jonathan Pessen  
Tax Regulations Specialist IV  
Technical Services Division

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