

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

TSB-A-04(12)C  
Corporation Tax  
July 21, 2004

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C030912A

On September 12, 2003, a Petition for Advisory Opinion was received from G & S Creations Inc., 340 Bloomfield Ave, Verona, New Jersey 07044. Petitioner, G & S Creations Inc., submitted additional information pertaining to the Petition on April 22, 2004.

The issue raised by Petitioner, G & S Creations Inc., is whether it is subject to franchise tax under Article 9-A of the Tax Law.

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

Petitioner is a New Jersey corporation. It manufactures and sells fine jewelry. Its employees generally attend three one-day wholesale trade shows (not open to the public) each year in New York where they take orders for their merchandise, but no sales are made. The orders are taken to New Jersey for credit checks, etc. before being approved. After manufacturing the products, Petitioner bills the customers and ships the products to them from New Jersey.

In addition, Petitioner's employees attend three one-day trade shows each year in White Plains, New York that are open to the public. At these shows they take orders, make the retail sales and collect sales tax, and after manufacturing the products, Petitioner ships the products to the customers from New Jersey.

**Applicable law and regulations**

Section 209.1 of Article 9-A of the Tax Law imposes an annual franchise tax as follows:

For the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity, or of maintaining an office in this state, for all or any part of each of its fiscal or calendar years, every domestic or foreign corporation, except corporations specified in subdivision four of this section, shall annually pay a franchise tax, upon the basis of its 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 hereinafter provided, for such fiscal or calendar year or part thereof, on a report which shall be filed, except as hereinafter provided, on or before the fifteenth day of March next succeeding the close of each such year, or, in the case of a corporation which reports on the basis of a fiscal year, within two and one-half months after the close of such fiscal year, and shall be paid as hereinafter provided.

Section 1-3.2 of the Business Corporation Franchise Tax Regulations (“Regulations”), as amended January 22, 2004, provides, in part:

(b) *Foreign corporation – doing business.* (1) The 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.

(c) *Foreign corporation – employing capital.* The 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.

(d) *Foreign corporation – owning or leasing property.* The 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.

(e) *Foreign corporation – maintaining an office.* 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 salesperson's home, a hotel room, or a trailer used on a construction job site may constitute an office.

(f) Examples. The following are examples of foreign corporations which are subject to tax because they are doing business, or employing capital, or owning or leasing property in a corporate or organized capacity or maintaining an office in New York State.

\* \* \*

(9) A foreign corporation sends salespeople into New York State to solicit orders. The orders must be accepted at the home office of the corporation located in another state. The corporation displays goods in New York City at a space leased occasionally and for short terms. The corporation is subject to tax.

Section 1-3.3(a) of the Regulations, as amended January 22, 2004, provides, in part:

A foreign corporation will not be deemed to be doing business, employing capital, owning or leasing property in a corporate or organized capacity or maintaining an office in New York State because of:

\* \* \*

(7) the participation in a trade show or shows, regardless of whether the corporation has employees or other staff present at such trade shows, provided the corporation's activity at the trade show is limited to displaying goods or promoting services, no sales are made, any orders received are sent outside New York State for acceptance or rejection and are filled from outside the state, and provided that such participation is for not more than 14 days, or part thereof, in the aggregate during the corporation's taxable year for Federal income tax purposes;...

Section 1-3.4(b)(9) of the Regulations, as amended January 22, 2004, provides for an exemption from taxation under Article 9-A of the Tax Law, in part, as follows:

corporations which are exempt pursuant to the provisions of Public Law 86-272 (15 U.S.C.A. §§381-384).

(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.);

(i) participating in a trade show or shows, provided that participation is for not more than 14 days, or part thereof, in the aggregate during the corporation's taxable year for Federal income tax purposes....

(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. 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.

## **Opinion**

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.

Pursuant to section 1-3.2(f)(9) of the Regulations, where a corporation's employees solicit orders in New York and the orders are accepted outside of New York, and the corporation displays goods in New York City at a space leased occasionally and for short terms, the corporation will be subject to tax under Article 9-A of the Tax Law.

However, pursuant to section 1-3.3(a)(7) of the Regulations, a corporation will not be deemed to be doing business, employing capital, owning or leasing property in a corporate or organized capacity or maintaining an office in New York State because it participates in trade shows, regardless of whether the corporation has employees or other staff present at such trade shows, provided the corporation's activity at the trade shows is limited to displaying goods or promoting services, no sales are made, any orders received are sent outside New York State for acceptance or rejection and are filled from outside the state, and provided that such participation is for not more than 14 days or parts thereof within the corporation's federal taxable year.

Pursuant to section 1-3.4(b)(9) of the Regulations, a corporation will be exempt from taxation under Article 9-A of the Tax Law if it comes within the protection of Public Law 86-272. To be protected by Public Law 86-272, a corporation's contact with New York must be limited to the solicitation of orders by employees or representatives where the orders are sent outside New York for approval, and if approved, are filled by shipment or delivery from a point outside of New York. Activities in New York that go beyond the solicitation of orders will subject the corporation to tax under Article 9-A unless such activities are *de minimis*.

In this case, Petitioner states that it comes into New York to attend trade shows. At the wholesale trade shows orders are taken, but sent to New Jersey for approval. No sales are made at the trade shows and payment is not received. After the product is made in New Jersey, the customer is billed and the product is shipped from New Jersey. However, at the three one-day trade shows in White Plains, New York, orders for Petitioner's merchandise are taken and payments for the orders are collected at the trade shows. Where a sales order is taken, the sale made and payment is received at a trade show, the sale was approved at the trade show location. Since sales are approved and made at trade shows in New York State, such activity exceeds the mere participation in trade shows in New York as contemplated under the provisions of section 1-3.3(a)(7) of the Regulations. Such approval and making of sales in New York is an activity that also exceeds the solicitation of orders under the provisions of section 1-3.4(b)(9) of the Regulations. Further, such activities would not be *de minimis*, as contemplated under section 1-3.4(b)(9)(v) of the Regulations. Therefore, Petitioner is not exempt from taxation pursuant to such sections 1-3.3(a)(7) and 1-3.4(b)(9) of the Regulations.

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Pursuant to section 209.1 of the Tax Law and section 1-3.2 of the Regulations, Petitioner is doing business, employing capital, or owning or leasing property in a corporate or organized capacity in New York State when it participates in trade shows in New York State as described in this Advisory Opinion. Accordingly, Petitioner is subject to tax under Article 9-A of the Tax Law.

DATED: July 21, 2004

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