

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

TSB-A-04(17)C
Corporation Tax
December 13, 2004

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C040406A

On April 6, 2004, a Petition for Advisory Opinion was received from Humacare-Care Staff Inc., 9501 Union Cemetery Road, Loveland, Ohio 45140.

The issue raised by Petitioner, Humacare-Care Staff 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 professional employer organization (PEO) based in Ohio. There are two workers for whom it is withholding New York State income tax. The two workers are residents of New York who are truck drivers for an Ohio based trucking company. These two workers do not work in New York. Petitioner receives a small administration fee for processing the payroll checks for these workers. Petitioner does not exercise control over the worker's daily activities, but it is authorized by agreement to direct and control the workers. This is the only connection Petitioner has with New York State.

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") 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.

Opinion

Petitioner is a PEO based in Ohio. The two people at issue, who are residents of New York State, are truck drivers for an Ohio based trucking company and do not work in New York.

Since Petitioner is not doing business, employing capital, owning or leasing property or maintaining an office in New York pursuant to section 209.1 of the Tax Law and as described in section 1-3.2(b) of the Regulations, Petitioner is not subject to tax under Article 9-A of the Tax Law. Petitioner will not be subject to tax under Article 9-A of the Tax Law under these circumstances regardless of whether it is considered to be the employer of the truck drivers. Therefore, it is not necessary for this Advisory Opinion to address whether Petitioner is the employer of the truck drivers.

However, Petitioner would be subject to franchise tax under Article 9-A of the Tax Law pursuant to section 209.1 of the Tax Law if it is doing business, employing capital, or owning or leasing property in New York in a corporate or organized capacity, or maintaining an office in New York during a taxable year, as described in such section 209.1 of the Tax Law and section 1-3.2(b) of the Regulations.

DATED: December 13, 2004

/s/
Jonathan Pessen
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Technical Services Division

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