

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

TSB-A-05(14)C
Corporation Tax
October 24, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C050304B

On March 4, 2005, a Petition for Advisory Opinion was received from Fallfield Steel Services Inc., c/o Krol & O'Connor, 320 West 81 Street, New York, New York 10024. Petitioner, Fallfield Steel Services Inc., submitted additional information pertaining to the Petition on August 9, 2005.

The issue raised by Petitioner is whether its sole shareholder, who is also its president, is deemed to be a salesman attached to Petitioner's office in New York City for purposes of allocating to New York State any of Petitioner's receipts from compensation for services.

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

Petitioner is incorporated in New York State. Petitioner acts as a disclosed or undisclosed agent of nonaffiliated foreign suppliers of steel to customers located in the Midwest of the United States. Petitioner has no customers in New York State. Petitioner's receipts include receipts from commissions on the sale of steel to businesses in the Midwest.

Petitioner has an office in New York City, which serves as a mailbox and bookkeeping location. Petitioner states that it engages an individual in New York City to take care of the mail, pay bills, and deposit checks. Petitioner also has offices in Berlin, Germany, and London, England. According to Petitioner, its president is its only employee.

One individual is both the sole shareholder and president of Petitioner. He is never physically present at Petitioner's New York City office and does not use that office to conduct business. He is a citizen of Germany and a resident of England. He is in the United States infrequently, for periods of a few days at a time, for the purpose of visiting Petitioner's customers in the Midwest. He mostly conducts Petitioner's business out of Petitioner's offices in Berlin and London.

Applicable law and regulations

Section 209.1 of Article 9-A of the Tax Law imposes an annual franchise tax, and provides, in part:

For the privilege of exercising its corporate franchise ... every domestic ... corporation ... 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....

Section 210.3 of the Tax Law provides, in part:

The portion of the entire net income of a taxpayer to be allocated within the state shall be determined as follows:

(a) multiply its business income by a business allocation percentage to be determined by

* * *

(2) ascertaining the percentage which the receipts of the taxpayer ... arising during such period from

* * *

(B) services performed within the state, ...

* * *

(D) all other business receipts earned within the state, bear to the total amount of the taxpayer's receipts, similarly computed, arising during such period from all sales of its ... services ... whether within or without the state;

Section 4-4.3 of the Article 9-A Regulations contains the provisions for determining receipts from compensation for services, and provides, in part:

(a) The receipts from services performed in New York State are allocable to New York State. All receipts from such services are allocated to New York State, whether the services were performed by employees, agents or subcontractors of the taxpayer, or by any other persons. It is immaterial where such receipts are payable or where they are actually received.

(b) Commissions received by a taxpayer are allocated to New York State if the services for which the commissions were paid were performed in New York State. If the services for which the commissions were paid were performed for the taxpayer by salesmen attached to or working out of a New York State office of the taxpayer, the services will be deemed to have been performed in New York State.

Opinion

Since Petitioner's president, its only employee, is not physically present at and does not conduct any business out of Petitioner's New York City office, Petitioner's president is not deemed to be a salesman attached to Petitioner's office in New York City for purposes of

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allocating to New York State any of Petitioner's receipts from compensation for services. Therefore, pursuant to section 210.3 of the Tax Law and section 4-4.3 of the Article 9-A Regulations, none of Petitioner's receipts from compensation for services are allocated to New York State.

DATED: October 24, 2005

/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.