

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-10(2)C
Corporation Tax
March 9, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C080411A

On April 11, 2008, a Petition for Advisory Opinion was received from Jayco Corporation, 903 South Main St., Middlebury, IN 46540.

The issue raised by Petitioner is whether it or any of its three subsidiaries is required to file franchise tax reports under Article 9-A of the Tax Law. While three of the corporations are not subject to tax under Article 9-A, one subsidiary, Jayco Enterprises, Inc., may be subject to tax under Article 9-A.

Facts

Petitioner is a holding company incorporated in Indiana and located in Middlebury, Indiana. For federal income tax purposes, it is taxed as an S Corporation that owns three qualified subchapter S subsidiaries: Jayco, Inc., Starcraft RV, Inc., and Jayco Enterprises Inc. Jayco, Inc. has manufacturing operations in Indiana and Idaho and Starcraft RV, Inc. has manufacturing operations in Indiana only. Jayco Enterprises Inc. is organized in Indiana.

Petitioner, as a parent company, does not engage in any significant operating activities, and has no activities in New York. Petitioner does not have an office, employees, representatives, or inventory in New York.

Jayco Inc. and Starcraft RV, Inc. are manufacturers of recreational vehicles and motorhomes that are sold through a network of unrelated dealers throughout the United States. Some of the unrelated dealers are located in New York. Employees of Jayco, Inc. and Starcraft RV, Inc. engage in solicitation of sales of tangible personal property in New York, with all orders accepted and approved in Indiana. All products sold and shipped by Jayco, Inc. and Starcraft RV, Inc. to dealers in New York are manufactured and shipped from outside New York. Jayco Enterprises, Inc. provides transportation services and occasionally delivers Jayco, Inc.'s and Starcraft RV Inc.'s products to dealers located in New York. It does not sell tangible personal property in New York, nor does it provide back-hauling services in New York.

Approximately 35% of Jayco Enterprises' revenue is from transportation services that it performs using vehicles leased from independent owner operators. An additional 4% of its revenues are from transportation services performed using its own trucks. The balance of its revenues is earned by providing freight forwarding services for Petitioner. Jayco Enterprises does not issue bills of lading, enter into transportation contracts in its own name, actually receive goods to be transported, or assume liability or responsibility for loss or damage to goods, in connection with its freight forwarding services.

Jayco Inc. and Starcraft RV, Inc. each maintain a list of their authorized dealers located throughout the United States that have been designated as authorized to provide warranty and non-warranty repairs to the recreational vehicles. These dealers are independent organizations that have entered into sales and service agreements with the companies. Jayco Inc. and Starcraft RV, Inc. will occasionally either request or require that the dealer's service and/parts department personnel attend training programs that they offer. All training is provided at a facility in Indiana. The training allows the dealers to make repairs to the recreational vehicles as provided by the terms of Jayco, Inc.'s and Starcraft RV Inc.'s Original Equipment

Manufacturer's Warranty. After the service work and repairs have been performed, Jayco, Inc. and Starcraft RV, Inc. will reimburse the dealer directly for the services performed on Jayco, Inc.'s and Starcraft RV, Inc.'s products.

The sales and service agreements between the dealers and Jayco Inc. and Starcraft RV, Inc. state that the "Dealer agrees to perform such work as an independent, authorized contractor." The agreements also state, "[T]his Agreement does not make either party the agent or legal representative of the other for any reasons, nor does it grant either party authority to assume or create any obligation in the name of the others."

Analysis

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 Business Corporation Franchise 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 sections 183 and 184 of the Tax Law, a transportation corporation organized outside of New York State is subject to tax under Article 9 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. (It should be noted that, for taxable years beginning on or after 1998, railroad and trucking corporations would be subject to tax under Article 9-A rather than Article 9, unless they made an election pursuant to Tax Law §183.10. See *Railroad and Trucking Corporations Subject to Tax under Article 9, 9-A or 32 of the Tax Law*, Technical Services Bureau Memorandum, December 22, 1997, TSB-M-97(8)C.)

In this case, it appears that Petitioner and its subsidiaries Jayco, Inc and Starcraft RV, Inc. are not employing capital in New York, do not own or lease property in New York, and do not maintain an office in New York. Therefore, the pertinent question, in determining whether Petitioner and these subsidiaries are subject to tax under Article 9-A of the Tax Law, is whether any of the entities is doing business in New York State.

Petitioner (the parent corporation) represents that it does not engage in any significant operating activities, and has no activities in New York. Thus, assuming this to be true, it is not doing business in New York.

Regulation sections 1-3.2(a)(3) and 1-3.4(b)(9)(i)(a) state that, pursuant to Public Law 86-272, a foreign corporation is exempt from taxation under Article 9-A of the Tax Law if the only activity of its employees in New York is the solicitation of orders for sales of tangible personal property, which orders are sent out of New York for approval and, if approved, orders are filled by shipment or delivery from a point outside New York. Thus, the activities of Jayco, Inc's and Starcraft RV, Inc's employees in the State, as described in this Opinion, will not cause the solicitation companies to be taxable under Article 9-A. The only remaining question is whether these agreements between these companies and the authorized dealers to perform service on their products constitutes "doing business" in New York.

In *Tower Cleaning Systems, Inc.*, Adv Op Comm T&F, May 31, 2002, TSB-A-02(6)C, the petitioner was organized outside of New York State and provided janitorial service for its customers. It did not have an office, employees, representatives, or inventory in New York State, and hired subcontractors in New York to conduct the janitorial services for the petitioner's New York customers. The opinion concluded that the hiring of subcontractors as independent contractors in New York to provide the janitorial services for the petitioner's New York customers did not constitute *doing business* in New York by the petitioner, and did not cause the petitioner to be subject to tax under Article 9-A of the Tax Law. (See *Ernst and Whinney*, Adv

Op Comm T&F, September 29, 1988, TSB-A-88(22)C.) However, the opinion further held that, if it was established that the subcontractors had an agency relationship with the petitioner, then pursuant to section 1-3.2(b)(2) of the Regulations the petitioner would be considered to be doing business in New York State and would be subject to tax under Article 9-A of the Tax Law. (See *GEF Funding Corp.*, Adv Op Comm T&F, January 26, 1988, TSB-A-88(2)C.)

In *Hamilton Manufacturing Corp.*, Adv Op Comm T&F, August 31, 2004, TSB-A-04(15)C, the petitioner manufactured currency changing and validation equipment at its manufacturing facility in Ohio. The petitioner's customers were located throughout the United States, including New York. Included in the petitioner's web site was a list of authorized service centers. This list included various independent repair organizations throughout the United States. These were all independent organizations that had been designated as *authorized* to provide warranty and non-warranty repairs to the equipment that the petitioner sold. These repair organizations were fully independent, with no contractual obligations to the petitioner. They had been trained to repair the machines, and were therefore *authorized* to make warranty repairs and bill the petitioner for service per the terms of the warranty. All training was provided at the petitioner's facility in Ohio. The opinion concluded that the authorized service centers were independent contractors and that the activities of the service centers were not considered activities that would subject the taxpayer to tax under Article 9-A.

Following *Tower Cleaning* and *Hamilton Manufacturing*, *supra*, the activities of third parties who enter into sales and service agreements with Jayco, Inc and Starcraft RV, Inc. appear to be independent contractors in New York State whose repair and service activities would not be considered activities conducted by Jayco, Inc. or Starcraft RV, Inc. The companies would not be deemed to be doing business in New York under section 1-3.2(b)(2) of the Regulations as a result of the activities of independent third parties in New York. Therefore, they would not be subject to tax under Article 9-A of the Tax Law. However, if it is determined that there is an agency relationship between the companies and the third parties, then pursuant to section 1-3.2(b)(2) of the Regulations, and following *GEF Funding*, *supra*, they would be considered to be doing business in New York. In that case, they would be subject to the tax imposed under Article 9-A of the Tax Law and would be required to annually file franchise tax reports under that article.

While the sales and service agreements state that the dealers are not agents, 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).

The final subsidiary to be considered is Jayco Enterprises, Inc. More than 50% of Jayco Enterprises' revenues are earned from freight forwarding services. In performing these services, Jayco Enterprises appears to be acting as a conduit between the provider of the goods and the carrier, rather than acting as a carrier itself. Accordingly, Jayco Enterprises is not principally engaged in transportation business. Therefore, it is not a transportation corporation subject to tax under Article 9 of the Tax Law. Jayco Enterprises is a freight forwarding or logistics company that would be subject to tax under Article 9-A of the Tax Law if it were doing business, employing capital, owning or leasing property in a corporate or organized capacity, or maintaining an office in New York State. The only standard that appears relevant to this company is the "doing business" standard. The determination of whether a company is "doing business" is a factual matter that generally is not susceptible of determination within the scope of an advisory opinion. (Tax Law, §171.(Twenty-fourth); 20 NYCRR 2376.1(a).) You have provided no information on the amount of the company's activities in New York other than your statement that the company occasionally delivers in New York. Accordingly, we cannot express an opinion on whether Jayco Enterprises is subject to tax in New York.

Because Jayco, Inc., Starcraft RV, Inc., and Jayco Enterprises, Inc. are qualified subchapter S subsidiaries (QSSS), if any of them is subject to tax in New York State, the shareholders of Petitioner would be entitled to make a New York S election under section 660(a) of the Tax Law. If the election is made, Petitioner and the QSSS would be taxed as a single New York S corporation and pay the applicable fixed dollar minimum tax under Article 9-A (*See* Tax Law §§208.9(k)(1), (3), 210.1(d), 210.1(g)(1)). Petitioner's shareholders' New York tax liability would be determined under section 660. If Petitioner's shareholders do not make the New York S election, the QSSS will be treated as a New York C corporation on a stand-alone basis and pay the tax prescribed under Article 9-A for New York C corporations. (*See* Tax Law §§208.9(k)(3)(B), 210.1)

DATED: March 9, 2010

/S/

Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.