

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

TSB-A-11(10)C
Corporation Tax
November 1, 2011

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C101019A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether its business activities in New York are covered by Public Law 86-272 (15 USC § 381, *et seq.*) so that it is not subject to corporate franchise tax in this State.

We conclude that because Petitioner's business within New York is limited exclusively to the sale of tangible personal property, and because Petitioner's use of third-party fulfillment services located in New York State falls under the exemption in Tax Law § 209.2 (f), the Petitioner qualifies for the Public Law 86-272 exemption and therefore is not subject to New York State corporate franchise tax under Article 9-A.

Facts

Petitioner sells gifts and awards to companies that wish to honor their employees. Many of Petitioner's products are personalized or customized in some way, such as casting, stamping, or laser engraving. Petitioner has manufacturing facilities and inventory warehousing facilities located in [REDACTED], North Carolina. Some of the gifts sold by Petitioner are manufactured at its North Carolina factory. However, Petitioner also sells other gifts that it acquires from third-party vendors. Some of these third-party vendors may be located in New York State. The Petitioner uses sales representatives throughout the United States, including some in New York State, to solicit sales.

Typically, a company will send a list of its employees to Petitioner along with a list of dates or milestones on which it wishes a gift or packet to be sent to each employee. The Petitioner tracks this information, and when an applicable milestone occurs, the Petitioner will send a packet or gift to the company's employee. If the company has chosen a packet instead of a gift, the employee will receive a packet listing available gift options. Then, the employee can select a gift and place an order by calling the Petitioner by phone, mailing the order to the Petitioner, or logging on to the Petitioner's website. The Petitioner then has the gift shipped to the employee using the U.S. Mail or a common carrier. Gifts produced at the Petitioner's manufacturing facility are shipped by the Petitioner, but if the gift is produced by a third-party vendor, Petitioner merely directs the third-party vendor to ship the gift to the employee. At no time does Petitioner assume title to any gift shipped by such a vendor. Petitioner bills the company for each item that is shipped; there is no additional charge for any other services provided by Petitioner to a company.

Analysis

Pursuant to Tax Law § 209.1 and section 1-3.2 of the Corporation Franchise Tax Regulations (20 NYCRR § 1-3.2), 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.

In this case, it appears that Petitioner is not employing capital in New York, does not own or lease property in New York, and does not maintain an office in New York. Therefore, the pertinent question in determining whether Petitioner is subject to corporate franchise tax under Article 9-A of the Tax Law is whether it is doing business in New York.

Section 1-3.2(a)(3) of the Regulations states 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, are filled by shipment or delivery from a point outside New York.

According to Tax Law § 209.2 (f), “the use of fulfillment services of a person other than an affiliated person¹ and the ownership of property stored on the premises of such a person in conjunction with such services” does not constitute doing business in New York State. Fulfillment services include the shipment of orders from an inventory of products offered for sale by a purchaser. Tax Law § 208.19.

Petitioner’s business, according to the facts presented in its petition, appears to be limited to the sales of tangible personal property. Although some of Petitioner’s orders may be filled by third-party vendors located within the state, this use of “fulfillment services” will fall under the exemption in Tax Law § 209.2 (f) as long as Petitioner is not affiliated with any of the third-party vendors. Because the use of fulfillment services is exempt from tax under Article 9-A, it does not disqualify Petitioner from the Public Law 86-272 exemption. See *Deloitte & Touche*, Adv Op Comm T & F, December 2, 1998, TSB-A-98(26)C, in which a foreign corporation’s use of public warehouses in New York State for the purpose of storing goods to be sold to customers in New York and throughout the country was found to be use of a fulfillment service, which allowed the corporation to be eligible for exemption under Public Law 86-272.

¹ “Affiliated persons” in this case are those “where one of such persons has an ownership interest of more than five percent, whether direct or indirect, in the other, or where an ownership interest of more than five percent, whether direct or indirect, is held in each of such persons by another person or by a group of other persons which are affiliated persons with respect to each other.” Tax Law § 209.2 (g).

Therefore, according to the facts provided by Petitioner, Petitioner's activities fall within the scope of Public Law 86-272, and Petitioner is exempt from corporate franchise tax under Article 9-A.

DATED: November 1, 2011

/S/

DEBORAH R. LIEBMAN
Deputy 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.