

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-90(10)C
Corporation Tax
April 16, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C891205C

On December 5, 1989, a Petition for Advisory Opinion was received from Theatron Data Systems, Inc., 2633 N. San Fernando Boulevard, Burbank, California 91504.

The issue raised is whether Petitioner, Theatron Data Systems, Inc.'s sale of automated management systems for movie theaters in New York State makes it subject to franchise tax under Article 9-A of the Tax Law.

Petitioner is incorporated in and has its principal place of business in the State of California. Petitioner produces an automated management system for movie theatres, which it markets nationwide. All of its production and administrative functions are completed in California. All employees of Petitioner are based in California, except for one sales representative who works out of his home in Massachusetts. All orders for Petitioner's systems are accepted in California and shipped FOB California via common carrier.

Petitioner's systems consist of basic computer hardware, customized hardware, and software. When a new system is sold, the customer prepares the installation site, including all necessary wiring, before the system arrives. When the system arrives, Petitioner sends an employee to the installation site. Petitioner's employee connects the hardware, loads the software, and tests the system to ensure that it is functioning properly. This typically takes one or two days. Petitioner's employee may also spend an additional one or two days training customers who are unfamiliar with the system. Petitioner's employees conduct no further activities at the installation site.

Petitioner has eight employees who install new systems, all of whom reside in California and work out of Petitioner's office there. Petitioner does not charge separately for installation, regardless of whether training is required. Customers reimburse Petitioner for travel expenses incurred by its employees to, from, and at the installation site.

Petitioner sells maintenance service contracts to nearly all purchasers of its systems. These contracts cover both software support and hardware maintenance. Theatron's technical support staff provides software support by telephone from the California office. Petitioner contracts with several third parties who provide hardware maintenance. When a customer encounters a problem, the customer calls Petitioner's technical support staff in California. If Petitioner's personnel determine that the problem involves the system hardware, they dispatch a third party maintenance provider to the customer's place of business.

Petitioner has no offices or assets located in New York, and no employees based there. The corporation does not actively solicit business in the state and no employees enter the state on a regular basis. Petitioner has sold just one system to a Customer based in New York. Petitioner's only other connections with New York result from the sale of systems to customers headquartered outside New York for installation at a site inside the state. Petitioner's sales volume during the years in issue were as follows:

<u>Year</u>	<u>Total Revenues</u>	<u>New York Revenues</u>	<u>Ratio of N.Y. Revenues to Total Revenues</u>	<u>Income Allocable To N.Y.</u>
1983	\$ 897,163	\$ 35,083	3.9%	\$ (234)
1984	1,232,925	29,924	2.4%	(144)
1985	2,542,607	37,443	1.5%	413
1986	2,708,733	183,146	6.8%	2,902
1987	<u>3,587,427</u>	<u>123,122</u>	<u>3.4%</u>	<u>1,734</u>
Total	\$10,968,855	\$408,718	3.7%	\$ 4,671

As with other sales, on those occasions when Petitioner sells a system that will be installed in New York, the corporation sends an employee to New York to install the system and to train the customer's employees in its use. The number and length of these trips in the years at issue were as follows:

<u>Year</u>	<u>Total Installations</u>	<u>N.Y. Installations</u>	<u>Percentage of Installations in New York</u>	<u>Total Days in N.Y.</u>
1983	27	1	3.7%	3
1984	46	1	2.2%	3
1985	81	2	2.5%	5
1986	86	5	5.8%	15
1987	<u>92</u>	<u>4</u>	<u>4.3%</u>	<u>14</u>
Total	332	13	3.9%	40

Petitioner's employees make no other visits to the installation sites. Maintenance for Petitioner's systems in New York is provided by Sorbus, Inc. and Computer Smith, neither of which is related to Petitioner or its shareholders.

Section 209.1 of Article 9-A of the Tax Law imposes the business corporation franchise tax on every foreign corporation, unless specifically exempt, for the privilege of doing business, or of employing capital, or of owning or leasing property in New York State in a corporate or organized capacity, or of maintaining an office in New York State.

Section 1-3.2(b) of the Business Corporation Franchise Tax Regulations (hereinafter "Article 9-A Regulations") provides that:

(1) [t]he term doing business is used in a comprehensive sense and includes all activities which occupy the time or labor of men 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, compared with the nature, continuity, frequency, and regularity of its activities elsewhere;

(ii) the purposes for which the corporation was organized, compared with its activities in New York State;

(iii) the location of its offices and other places of business;

(iv) the income of the corporation and the portion thereof derived from activities in New York State;

(v) the employment in New York State of agents, officers and employees; and

(vi) the location of the actual seat of management or control of the corporation. 20 NYCRR 1-3.2(b)

Section 1-3.2(c) of the Article 9-A Regulations provides that:

[t]he 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.
- 20 NYCRR 1-3.2(c)

Section 1-3.2(d) of the Article 9-A Regulations provides that:

[t]he 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 20 NYCRR 1-3.2(d).

Section 1-3.4(b)(9) of the Article 9-A regulations provides an exemption from taxation under Article 9-A for corporations which are exempt pursuant to the provisions of Public Law 86-272 (15 U.S.C.A. §§ 381-384). Such section provides that:

(i) A foreign corporation whose income is derived from interstate commerce is not subject to tax under article 9-A 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 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.

Section 1-3-4(b)(9)(v) of the Article 9-A regulations provides that:

[a]ctivities beyond mere solicitation will subject a corporation to tax in New York State. In general, activities of employees in New York State which are intended or designed to promote or encourage the marketing of the corporation's products in New York State or intended or designed to maintain a market already established in New York State are beyond mere solicitation and will make a corporation taxable. In determining whether a corporation's activities exceed mere solicitation, all of the corporation's activities in New York State will be considered. Examples of activities which go beyond mere solicitation 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) setting up displays of the corporation's products for customers;
- (f) giving technical advise on the use of the corporation's products.

Petitioner's principal place of business is in California and all production and administrative functions are completed in California. All employees are based in California except for one sales representative working out of his home in Massachusetts. Petitioner has no offices or assets located in New York and no employees based in New York.

Petitioner produces an automated management system for movie theatres that is marketed nationwide. All orders for Petitioner's systems are accepted in California and shipped FOB California via common carrier. When a new system is sold, an employee of Petitioner is sent to the installation site to connect the hardware, load the software, test the system and may train customers

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who are unfamiliar with the system. Consequently, Petitioner's activities in New York State go beyond the mere solicitation of orders and Petitioner is not exempt from tax by virtue of Public Law 86-272.

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 tax under Article 9-A is whether Petitioner is "doing business" in New York State.

Giving due consideration to the factors set forth in section 1-3.2(b)(2) of the Article 9-A Regulations, and viewing Petitioner's activities as set forth above in a comprehensive sense, such activities in New York State constitute "doing business" within the meaning of section 209.1 of the Tax Law.

When a corporation is doing business in New York State pursuant to section 209.1 of the Tax Law, such corporation is subject to tax under Article 9-A of the Tax Law.

Accordingly, pursuant to section 209.1 of the Tax Law and section 1-3.2(b) of the Article 9-A Regulations, Petitioner is subject to the franchise tax imposed under Article 9-A of the Tax Law for taxable years 1983 through 1987 and for all subsequent taxable years Petitioner is doing business in New York State. Petitioner must compute its tax under Article 9-A pursuant to section 210 of the Tax Law.

DATED: April 16, 1990

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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