

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

TSB-A-94 (6) C
Corporation Tax
April 7, 1994

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C940121B

On January 21, 1994, a Petition for Advisory Opinion was received from Richard Berman, CPA, Berman and Berman, One Penn Plaza #1605, New York New York 10119.

The issue raised by Petitioner, Richard Berman, CPA, involves the treatment of warehouse storage fees at public warehouses for purposes of the property factor of the business allocation percentage under Article 9-A of the Tax Law. Specifically, Petitioner asks:

1. Does the Department of Taxation and Finance consider the payment of fees to a public warehouse to be fees for the use of rental real estate?
2. Does the Department of Taxation and Finance consider storage fees or rental fees at public warehouses to be true rent even if a formal lease agreement does not exist?
3. Does the Department of Taxation and Finance distinguish between an entire warehouse being rented on a yearly basis under a binding lease and storage fees paid at a public warehouse on a per carton - per day basis?
4. Does the Department of Taxation and Finance require that the total storage fees at public warehouses be multiplied by eight and added to the value of real property rented?
5. Would the potential scenario of both inventory and its corresponding storage fees at public warehouses distort the entire property factor?

Corporation A holds inventory in various jurisdictions including New York State in public warehouses. The rent is not paid as a uniform monthly, weekly or annual rental charge as in the case with a conventional office rental lease.

Corporation A pays its warehouse rent on a per day - per carton basis. The rent varies from week to week and month to month on the amount of cartons stored.

Section 4-3.2 of the Business Corporation Franchise Tax Regulations (herein after "Regulations") provides that in computing the property factor of the business allocation percentage, real property rented to the taxpayer must be included.

Section 4-3.2 of the Regulations also provides that the term "gross rents" means the actual sum of money or other consideration payable, directly or indirectly, by the taxpayer or for its benefit for the use or possession of the property and includes, among other things, any amount payable for the use or possession of real property, or any part thereof, whether designated as a fixed sum of money or as a percentage of sales, profits or otherwise. The term "gross rents" does not include amounts payable for storage, provided such amounts are payable for space not designated and not under the control of the taxpayer.

Therefore, real property rented to the taxpayer is included in the property factor of the business allocation percentage. This would include space rented at a public warehouse. Storage fees or rental fees at a public warehouse are included within the meaning of gross rents under section 4-3.2 of the Regulations if such storage or rental fees are payable for designated space that is under the control of the taxpayer. If the storage fees or rental fees at a public warehouse are payable for space not designated and not under the control of the taxpayer, such storage fees or rental fees are not included in gross rents under section 4-3.2 of the Regulations.

Where the storage fees or rental fees at a public warehouse are payable for designated space that is under the control of the taxpayer, gross rents includes the actual sum of money payable for the use or possession of real property. It is immaterial whether there is a formal lease agreement or whether the rent is paid as a uniform charge or based on a per day - per carton charge. Section 210.3(a)(1) of the Tax Law and section 4-3.2 of the Regulations provides that for purposes of determining the value of the taxpayer's real and tangible personal property, the value of rented property shall be the product of eight times the gross rents payable for the rental of such property during the taxable year.

Accordingly, Corporation A must include in its property factor, both within and without New York State, eight times the gross rents (the actual amounts payable as storage fees or rental fees) for the use of public warehouse space that is designated for Corporation A's use and under Corporation A's control.

Section 4-3.2(d) of the Regulations provides that in exceptional cases, the use of the general method described herein may result in inaccurate valuations of rented real property and in such cases, any other method which properly reflects the value may be adopted by the Commissioner of Taxation and Finance either on its own motion or at the request of the taxpayer. Another method of valuation may not be used unless approved by the Commissioner. However, it is not within the scope

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of an Advisory Opinion to determine whether a discretionary adjustment under this section would be granted. An Advisory Opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to "a specified set of facts" §171.24; 20 NYCRR 2376.1(a).

DATED: April 7, 1994

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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