



Volume 13 Number 10

October 2006

# State Tax Return

## **Mi Casa es Su Casa: When Does a Home Office Create Nexus in New York State?**

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Just how far can a company go without creating nexus from an employee maintaining a home office in New York State? The New York State Department of Taxation and Finance ("Department") has issued yet another Advisory Opinion regarding when activities of an employee working out of a home office in New York State will subject the employer corporation to the New York State General Business Corporation Franchise Tax, Article 9-A.

TSB-A-06(3)C was issued in response to a corporation's request for an advisory opinion as to whether its current and planned New York activities are mere solicitation exempted from income-based taxes (such as the New York franchise tax) under Public Law 86-272 ("P.L. 86-272"). The Corporation, ("Company A") presented the following facts to the Department for consideration in issuing the advisory opinion.

Company A, a corporation organized outside of New York, is a manufacturer and wholesale distributor of plastic products and PVC fencing. Company A does not maintain a place of business in New York. Currently, its only activity in New York is the solicitation of orders for sales of tangible personal property by representatives based outside of New York. All customer orders are approved outside New York and shipped by common carrier from inventories maintained outside the State.

Company A is considering employing a sales representative who will work out of her home in New York and will be responsible for sales in the Midwestern United States. The sales representative will rent a post office box in New York. Company A will not list or present the sales representative's home telephone number or address as its own. However, the sales representative will likely prepare stationary that will include the sales representative's post office box and home or cellular telephone number.

The sales representative will make and receive telephone calls to and from customers from the home office for the purpose of solicitation. The sales representative will not meet with customers at her home. All orders taken by the sales representative will be sent to Company A's offices outside of New York for approval, and all orders will be filled from outside of New York. The use of the home office will be solely for the convenience of the sales representative.

Pursuant to New York State Tax Law Section 209.1 and New York State Regulation Section 1-3.2, every foreign (*i.e.*, non-New York) corporation is subject to New York's General Business Corporation Franchise Tax if the entity is doing business, employing capital, owning or leasing property, or maintaining an office in the state.

New York State specifically recognizes P.L. 86-272 in Regulation Section 1-3.4(b)(9), which provides a franchise tax exemption for corporations that are exempt pursuant to P.L. 86-272. This regulation addresses the use of a home office by a salesperson and provides that if the office is held out to the public as an office or place of business, the corporation will be considered to be maintaining an office. The Regulation also provides an example where a salesperson makes calls from and receives orders via a telephone located in the home office which is listed in the corporate employer's name. Under the facts set forth in the regulation, the home office would be considered an office of the corporation.

Corporations with significant sales into New York are understandably cautious with respect to having an employee working out of a home office in the State. A determination by the Department that an employee's activities within the State exceed mere solicitation within the meaning of P.L. 86-272 could result in significant exposure. Moreover, the Department will generally not be limited from assessing tax for prior years by any statute of limitations because tax returns are not likely to have been filed. Accordingly, a favorable Advisory Opinion in this area may be particularly valuable because it provides clarity and peace of mind.

According to the Department Advisory Opinion TSB-A-06(3)C, Company A will not be considered to be maintaining an office in New York based upon the sales representative's activities and use of a home office. The corporation will however, be required to file an activities report, Form CT-245, *Maintenance Fee and Activities Return for a Foreign Corporation Disclaiming Tax Liability*.<sup>1</sup>

TSB-A-06(C)3 is not the first Advisory Opinion issued by the Department on the issue of whether the activities related to the use of a home office will subject a corporation to tax in New York. A review of TSB-A(06)C and other Advisory Opinions<sup>2</sup> that address the application of P.L. 86-272 indicate that the following activities related to an employee performing solicitation activities in conjunction with use of a home office may not necessarily cause a corporation to be subject to tax under Article 9-A: (i) use by the representative of an automobile, laptop computer and/or facsimile machine leased by the employer; (ii) reimbursement of the employee for offices supplies used in the home office; (iii) maintenance of a nominal inventory to use as samples; (iv) rental of a New York post office box by the representative to receive business correspondence; and

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<sup>1</sup> Pursuant to New York State Regulation § 8-1.2(e), the filing of an activities report does not start the period of limitation within which the Department may assess tax under Article 9-A.

<sup>2</sup> *Daskzal Bolton LLP*, TSB-A-05(7)C (April 4, 2005), *Utility Engineering Corp.*, TSB-A-05(5)C (March 10, 2005), *Ernst & Young LLP*, TSB-A-99(14)C (March 1, 1999), *PWG Vintners USA, Inc.*, TSB-A-97(14)C (June 26, 1997), *Price Waterhouse LLP*, TSB-A-97(7)C (March 26, 1997), *Gulf Homes, Inc.*, TSB-A-84(10)C (August 10, 1984).

(v) preparation by the representative of stationary with the representative's address or telephone number.

While these favorable rulings apply P.L. 86-272 to the franchise tax, an employer should nevertheless consider requesting an Advisory Opinion if there is any question as to whether an entity's facts constitute mere solicitation within the meaning of P.L. 86-272. An Advisory Opinion is binding upon the Department with respect to the person to whom such opinion has been rendered.<sup>3</sup> For all others, Advisory Opinions are merely indicative of the Department's position regarding the particular facts set forth in any Advisory Opinion.■

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<sup>3</sup> New York State Tax Law § 171(24); New York State Regulation §§ 2375.5 and 2376.4.



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