STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
HUGO BOSCA COMPANY, INC.	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Years 1975 through 1985.	:	

Petitioner, Hugo Bosca Company, Inc., 1905 West Jefferson Street, P.O. Box 777, Springfield, Ohio 45501, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the years 1975 through 1985 (File No. 803558).

On April 19, 1990 and May 2, 1990, respectively, petitioner, by its representative, Richard L. Huffman, Esq., and the Division of Taxation by William F. Collins, Esq. (Anne W. Murphy, Esq., of counsel) consented to have the controversy determined upon a stipulation of fact and submission of documents without hearing, with all briefs to be submitted by September 5, 1990. After due consideration of the record, Jean Corigliano, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the lease of a showroom in New York and the solicitation of orders in New York is sufficient to subject petitioner to the corporation franchise tax, notwithstanding a Federal statute prohibiting states from imposing tax on income from interstate commerce where the only business activity in a state is solicitation of orders.

II. Whether, if petitioner was subject to corporation franchise tax during the years in issue, it established that its failure to file reports and pay tax was due to reasonable cause and was not due to willful neglect.

FINDINGS OF FACT

Petitioner, Hugo Bosca Company, Inc. ("Bosca"), and the Division of Taxation ("Division") entered into a stipulation of fact which has been substantially incorporated into these findings of fact.

Bosca is an Ohio corporation which manufactures leather goods which it sells to retail stores throughout the United States. Its sole and principal office and its manufacturing plant are located in Ohio.

Bosca made sales in New York to independent wholesale accounts which sold at retail to the general public. These accounts ranged in size from large retailers with department stores in New York and New Jersey to small boutiques specializing in leather products. Bosca had approximately 130 wholesale accounts in New York.

Bosca had no employees in New York. It solicited sales through independent sales representatives who also represented other companies, including competitors of Bosca.

During all years in issue, Bosca leased a showroom in New York City for the use of its sales representatives. The showroom was used for three weeks out of every year called "market weeks". In these weeks, customers visited the showroom and examined the leather goods offered for sale by the Bosca representatives. The showroom was used for the same purpose throughout the year, for no more than a few hours a day, approximately three days a week. The sales representatives also called upon customers at their places of business. The showroom was not open to the public.

The goods on display in the showroom were used exclusively to promote sales of Bosca merchandise and were there for the benefit of the sales representatives to use in soliciting sales. Bosca did not maintain inventory in New York for any purpose other than for the solicitation of sales. All merchandise in the showroom was a "one of a kind" sample of the product. All sales, whether solicited at the showroom or at the customer's place of business, were approved or rejected at Bosca's office in Springfield, Ohio. All goods purchased from Bosca were shipped from Bosca's home office in Springfield, Ohio. No advertising, shipping, billing, or repairs were done in the showroom.

Bosca carries a large product line. It manufactures over 1,000 different items such as wallets, billfolds, purses, belts, briefcases, notepad covers and the like. These products come in many styles and sizes, and are made from the hides of various animals such as alligator, crocodile, cow, caiman, ostrich, snake and tinga. Further, these same items, whatever their style, size or skin hide, are dyed in one of several different colors to produce yet more variations in the product line.

Each leather product manufactured by Bosca is available in several different styles, sizes, colors and materials. As a consequence, success in selling these individual items depends in large measure on the availability of the product for visual and physical examination by the wholesale customer. Pictures and catalogs have proved to be inadequate. Transportation of this wide range of items to each of the wholesale accounts by the independent sales representatives is practically and economically impossible.

The independent sales representatives were paid by Bosca on a commission basis. Bosca paid the rent for the space used for the showroom. The commissions paid to the sales representatives would have been higher had Bosca not paid for the showroom space they used.

Bosca relied on its accountant to advise it of any and all tax obligations it might have. Its accountant is a licensed certified public accountant who practices exclusively in Springfield, Ohio. The accountant was not aware of any corporation franchise tax filing requirement for the State of New York and thus did not advise Bosca that it may have been obligated to file a tax return in the State of New York.

The State of New York did not send and Bosca did not receive any notice, written or oral, alleging that Bosca was liable for the taxes claimed here until August and October 1985. Upon notification, Bosca promptly paid the underlying tax claimed and filed for a refund which is the subject matter of this proceeding.

There is no evidence of lack of good faith by petitioner or willful neglect by petitioner to pay the claimed interest or penalties on the tax claimed due.

On January 30, 1986, the Division received from petitioner 10 corporation franchise tax

reports for the following taxable periods: periods ended December 31, 1975, December 31, 1976, December 31, 1977, December 31, 1978, December 31, 1979, December 31, 1980, December 31, 1981, December 31, 1982, December 31, 1983, and December 31, 1984. On the same date, the Division also received three metropolitan transportation business tax surcharge ("MBTS") reports for the periods ended December 31, 1982, December 31, 1983 and December 31, 1984.

With the returns filed, petitioner remitted the following payments: 1975: $631.60; 1976: $1,518.70; 1977: $2,785.90; 1978: $4,176.30; 1979: $3,641.60; 1980: $5,044.50; 1981: $6,521.60; 1982: $5,054.80; $909.86 (MBTS); 1983: $5,712.20; $971.07 (MTBS); 1984: $5,192.30; $882.69 (MBTS).

On March 6, 1986, the Division issued petitioner nine notices and demands for payment of corporation franchise tax for the following periods and in the following amounts: 1976: $21,630.78; 1977: $4,509.60; 1978: $6,286.19; 1979: $5,967.95; 1980: $6,447.64; 1981: $7,061.27; 1982: $4,035.98; 1983: $3,321.18; 1984: $2,027.98.

On March 6, 1986, the Division issued petitioner three notices and demands for payment of metropolitan transportation business tax surcharge for the following periods and in the following amounts: 1982: $726.48; 1983: $564.59; 1984: $344.76.

The notices and demands represent assessment of petitioner for interest and late filing/payment charges on returns filed by petitioner after the due dates for filing those returns, and payments made by petitioner with those returns after the due date for filing those returns, within the meaning and intent of sections 211 and 213 of the Tax Law.

On or about April 29, 1986, petitioner filed nine claims for credit or refund of corporation tax paid for the following periods and in the following amounts: 1976: $1,518.70; 1977: $2,785.90; 1978: $4,176.30; 1979: $3,641.60; 1980: $5,044.50; 1981: $6,521.60; 1982: $5,964.66; 1983: $6,683.27; 1984: $7,565.96.

On or about May 15, 1986, petitioner filed a corporation franchise tax report for the period ended December 31, 1985 and paid $5,709.40 with the report filed.

On October 20, 1986, petitioner filed a claim for credit or refund of corporation tax paid for the period ended December 31, 1985 in the amount of $5,709.40.

On June 5, 1986 and December 5, 1986, respectively, the Division denied petitioner's claims for refund or credit in full.

CONCLUSIONS OF LAW

A. Section 209.1 of the Tax Law provides for the imposition of a franchise tax on every domestic and foreign corporation "[f]or the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity or of maintaining an office in this state". In petitioner's view, its activities within New York are limited to solicitation of orders. Petitioner asserts that this minimal activity is immunized from taxation in New York by virtue of Pub L 86-272, 73 Stat 555, 15 USC 381, which provides:

> "(a) No State...shall have power to impose...a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both of the following:
>
> (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
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> (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).
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> * * *
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> (c) For purposes of subsection (a) of this section, a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, of tangible personal property.
>
> (d) For purposes of this section:
>
> (1) the term 'independent contractor' means a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of

tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities; and

(2) the term 'representative' does not include an independent contractor."

B. The position taken by the Division in its regulations is that the leasing of property in New York State in a corporate or organized capacity is in itself an activity which exceeds solicitation. 20 NYCRR 1-3.2(d) provides:

"Foreign corporation -- owning or leasing property. The 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. Also, consigning property to New York State may create taxable status if the consignor retains title to the consigned property."

20 NYCRR 1-3.2(f) provides the following examples of foreign corporations subject to tax because they own or lease property in New York in a corporate or organized capacity:

"A foreign manufacturing corporation has its factory outside New York State. Its only activity in New York State is the solicitation of orders for its products through a sales office located in New York State. The orders are forwarded to its home office outside the State for acceptance and the merchandise is shipped by common carrier from the factory direct to the purchasers. The corporation is subject to tax." (20 NYCRR 1-3.2[f][6].)

"A foreign corporation which operates several retail stores outside New York State leases an office in New York City for the convenience of its buyers when they come to New York State. Salesmen call at the office to solicit orders. The merchandise is shipped by the sellers directly to the offices of the corporation outside New York State. The corporation is subject to tax." (20 NYCRR 1-3.2[f][7].)

C. Petitioner maintains that the leasing of a showroom was merely incidental to the activity of soliciting orders in New York, and, in itself, was not sufficient to subject it to New York tax. This position is not only contrary to the regulations, it is contrary to the statute itself. Moreover, all of the cases cited by petitioner in support of its position are factually distinguishable from petitioner's situation in that none of the taxpayers in those cases owned or leased real property in New York. In Matter of Gillette Co. v. State Tax Commn. (56 AD2d 475, 393 NYS2d 186, affd 45 NY2d 846, 410 NYS2d 65), the court found that "Gillette has maintained no place of business in New York and has no telephone number nor mailing address

here" (Matter of Gillette Co. v. State Tax Commn., supra, 393 NYS2d at 188). Likewise, in the two State Tax Commission cases cited by petitioner (see, Matter of William Wrigley, Jr. Company, State Tax Commn., March 11, 1987 [TSB-H-87(10)C]; Matter of National Tires, Inc., State Tax Commn., October 17, 1980, [TSB-H-80(28)C]) there was no finding that the taxpayer owned or leased real property in New York.[1] A review of state court decisions interpreting Pub L 86-272 has not revealed any case where the sole question was whether the leasing of real property was of itself an activity distinguishable from solicitation. Section 209.1 of the Tax Law imposes the corporation franchise tax on all corporations "owning or leasing property in this state in a corporate or organized capacity". In light of this unambiguous legislative directive, it is concluded that the

leasing of a showroom by petitioner is distinguishable from solicitation and in itself subjected petitioner to New York's corporation franchise tax.

D. The penalties imposed for failure to file a required return or to pay the tax required to be shown on a return may be abated, if it is shown that failure to comply with the Tax Law was due to reasonable cause and not due to willful neglect (Tax Law § 1185[a][1],[3]). It is petitioner's position that its reasonable reliance on its Ohio accountant to file any and all tax returns required establishes reasonable cause.

Reasonable cause is defined by regulation to include:

> "Any other cause for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay and which clearly indicates an absence of willful neglect may be determined to be reasonable cause. Ignorance of the law, however, will not be considered as a basis for reasonable cause." (20 NYCRR 46.1[d][4].)

"In determining whether reasonable cause and good faith exist, the most important factor to be considered is the extent of the taxpayer's efforts to ascertain the proper tax liability." (20

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[1]The taxpayer in Wrigley owned automobiles which were used in New York by its sales representatives. The mere ownership of property used in New York was held not to constitute an activity which in itself subjected the taxpayer to corporation franchise tax (Matter of William Wrigley, Jr. Company, supra).

NYCRR 46.1[f][2]). The taxpayer has the burden of demonstrating that a penalty was improperly assessed (Matter of LT & B Realty Corp. v. New York State Tax Commission, 141 AD2d 185, 535 NYS2d 121, 122).

The case cited by petitioner in support of the proposition that reasonable reliance on the advice of an accountant is sufficient to establish reasonable cause (see, United States v. Boyle, 469 US 241, 85-1 US Tax Cas ¶ 13,602) is not dispositive here. The New York courts have specifically rejected the view that consulting with and following the advice of a tax professional will by itself constitute reasonable cause (Matter of Auerbach v. State Tax Commission, 142 AD2d 390, 536 NYS2d 557, 561; Matter of LT & B Realty Corp. v. New York State Tax Commission, supra; Matter of Franklin Mint Corp. v. Tully, 94 AD2d 877, 463 NYS2d 566, 569, affd 61 NY2d 980, 475 NYS2d 280).

Here, petitioner has not shown that it affirmatively solicited advice from its accountant as to whether it should file corporation franchise tax reports or pay tax in New York. Furthermore, petitioner's accountant was not licensed in New York and presumably would not be knowledgeable or conversant with New York State Tax Law, and petitioner does not even assert that it sought advice from an advisor familiar with New York Tax Law. Under these circumstances, petitioner's failure to comply with the Tax Law was not reasonable (cf., Matter of A & V Crown, Tax Appeals Tribunal, May 24, 1990; Matter of Norwest Bank International, Tax Appeals Tribunal, May 3, 1990; Matter of Dougherty Towing Co., Tax Appeals Tribunal, April 12, 1990).

E. The petition of Hugo Bosca Company, Inc. is denied in all respects.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE