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

TSB-A-81 (10) C
Corporation Tax
December 15, 1981

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION PETITION NO. C810420C

On April 20, 1981 a Petition for Advisory Opinion was received from Noga Holding (USA), Inc., 306 South State Street, Dover, Delaware.

The issue raised is whether Petitioner's proposed activities will render it subject to the Franchise Tax on Business Corporations imposed under Article 9-A of the Tax Law.

Petitioner describes its proposed activities as follows: Noga Holding (USA), Inc., ("Noga"), a Delaware corporation wholly owned by a non-U.S, corporation, owns 100% of the stock of two other Delaware corporations, Noga Commodities (Overseas) Inc. and Noga Realty Inc., both of which are engaged in business in New York City and have their principal offices in New York City. Noga does not and will not engage in any active business in New York City other than the holding of the stock of its subsidiaries. Noga does not plan to make loans to its subsidiaries or to guarantee loans obtained by its subsidiaries. Ail of Petitioner's business operations are managed and controlled by its non-resident alien President and directors from its office outside of the U.S. Petitioner has no employees or property (either owned or leased) in New York. All of its tangible assets are located outside New York, as are its bank accounts, and it maintains no office in New York. In addition, Petitioner has no telephone listing, building directory listing, or other form of address in New York. Finally, all of the operations of Petitioner's subsidiaries are conducted by each subsidiary's own officers.

Noga presently has five directors, all of which are nonresident aliens residing in a foreign country. The officers of Noga consist of a President, who is one of the nonresident alien directors, and the New York resident Secretary. Both officers function in a non-paying capacity. The Secretary is an attorney associated with the law firm which represents Noga, and this individual was elected as Secretary solely to facilitate corporate documentation. The Secretary, who is not compensated by Petitioner for serving in such office, has no corporate or decision-making powers. Petitioner will have all of its tax returns and internal administrative matters managed in New York City by its New York lawyers and accountants and by personnel employed by Noga's subsidiaries. For this reason, Noga will keep all of its books and records in New York City.

Article 9-A of the Tax Law imposes a tax on foreign corporations for "the privilege 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 . . . " Tax Law, §209.1. The Franchise Tax Regulations, noting that the term "doing business" is used in the statute in a comprehensive sense, provides that ". . . 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" imposed under

Article 9-A. 20 NYCRR §1-3.2(b)(1). Whether it is doing business in New York is a matter to be determined on a case by case basis, giving consideration to the following factors:

> "(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;
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> (ii) the purposes for which the corporation was organized, compared with its activities in New York State;
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> (iii) the location of its offices and other places of business;
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> (iv) the income of the corporation and the portion thereof derived from activities in New York State;
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> (v) the employment in New York State of agents, officers and employees; and
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> (vi) the location of the actual seat of management or control of the corporation" 20 NYCRR§1-3.2(b)(2).

Section 209.2 of the Tax Law provides that a "foreign corporation shall not be deemed to be doing business, employing capital. . .in this state, for purposes of this article, by reason of. . .(d) the maintenance of an office in this state by one or more officers or directors of the corporation who are not employees of the corporation if the corporation otherwise is not doing business in this state, and does not employ capital or own or lease property in this state, or (e) the keeping of books or records of a corporation in this state if such books or records are not kept by employees of such corporation and such corporation does not otherwise do business, employ capital, own or lease property or maintain an office in this state or (f) any combination of the foregoing activities."

As a general rule, a holding company, incorporated in another state, whose activities (with respect to New York) are confined to the owning and holding of securities of a corporation or corporations engaged in doing business in New York and the receipt and distribution of income derived therefrom, as well as activities aimed merely at maintaining its status as such, such as acts of internal management, will not be held to be doing business or employing capital in New York so as to subject it to the Franchise Tax on Business Corporations imposed under Article 9-A of the Tax Law. This will hold even in the presence of isolated actions supportive of the activities of its New York subsidiaries, as well as in the presence of an overlapping of officers and directors. People ex rel. Manila El. R.R. & L. Co. v. Knapp, 229 N.Y.502; People ex rel Butterick Co. v. Gilchrist, 213 App. Div. 533, aff'd 241 N.Y. 591; People ex rel. The Edison Light and Power Installation Co. v. Kelsey, 101 App. Div. 205; Proctor & Gamble Co. v.Newton, 289 F. 1013. However, such conclusion would not apply to a holding company which, in addition to the activities described above, substantially assisted its New York subsidiaries, as through loans or guarantees of loans, or by the coordination or supervision of their business activities. See in this regard Edwards v. Chile Copper Co., 274 US 718; Phillips v. International Salt Co., 274 U.S. 718 Thus, as was stated in

Proctor & Gamble Co. v. Newton, supra, while the general rule is as stated above, "...when there are added features in the relations of the two companies, from which it is apparent that the subsidiary is not left with any autonomy, but the parent is directly operating the business by its own agents and officers, the rule is different." Id., at 1016. The presence of such "added features" of direct control does not appear in Petitioner's statement of facts.

Based on all of the foregoing considerations, the proposed activities of Petitioner as described above would not constitute the doing of business, the employment of capital, the owning or leasing of property in New York in a corporate or organized capacity, nor the maintenance of an office in New York, within the meaning and intent of section 209 of the Tax Law and, accordingly, Petitioner would thus not be subject to the Franchise Tax on Business Corporations imposed under Article 9-A of the Tax Law.

DATED: December 14, 1981

s/LOUIS ETLINGER
Deputy Director
Technical Services Bureau