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

TSB-A-85 (17)C
Corporation Tax
September 23, 1985

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION PETITION NO. C830505B

On May 5, 1983, a Petition for Advisory Opinion was received from Schiavone-Bonomo Corporation, Foot of Jersey Avenue, Jersey City, New Jersey 07302.

The Petition also involves two other related corporations, Schiabo-Hudson Corporation, Port of Albany, Albany, New York 12202 and S-B Sales Corporation, 640 Canal Street, Stamford, Connecticut 06902.

The issues pertain to New York State's Business Corporation Franchise Tax, Article 9-A of the Tax Law, and are as follows:

1. whether Petitioner and Schiabo-Hudson Corporation (hereinafter referred to as "SH") are in a unitary business;

2. whether a combined report is required for fiscal years ending March 31, 1980, March 31, 1981 and March 31, 1982; and

3. whether Petitioner must file a consolidated report with S-B Sales Corporation (hereinafter referred to as "S-B DISC") for fiscal years ending March 31, 1980, March 31, 1981 and March 31, 1982.

The first and second issues raised by Petitioner relate to Petitioner and SH.

Petitioner, a New Jersey corporation, is a taxpayer under Article 9-A of the Tax Law and is engaged in the production of ferrous and non-ferrous scrap.

SH, a New York corporation, is also a taxpayer under Article 9-A of the Tax Law and is a wholly owned subsidiary of Petitioner. SH is engaged in the production of shredded scrap metal which is different from the scrap produced by any other division or subsidiary of Petitioner. Shredded scrap is a ferrous scrap that is produced by a costly machine and ancillary equipment. The resultant product is a highly purified form of the element iron. The processing requirements and end specifications of shredded scrap require a raw material (used automobiles) different from other ferrous scrap items. The process develops a relatively dense form of scrap that has a very high level of purity (the contaminants are removed by a number of post-shredding processes). Shredded scrap thereby permits high yields in steel making furnaces because of the high level of iron to the total volume of the recyclable product melted. This high iron product commands a higher price because the benefits derived from its characteristics are different from most other grades of ferrous scrap. Petitioner contends that ferrous and non-ferrous scrap are not similar products and as such, Petitioner and SH are not engaged in the same or related lines of business.

All of the officers of SH are officers of Petitioner, however, not all of the officers of Petitioner are officers of SH.

SH sells its product in both domestic and foreign markets. SH sells its product domestically directly to its own customers and also through brokers who act as a conduit for invoicing and the collection of funds. SH sells the vast majority of its goods overseas. However, as a marketing and administrative technique, SH sells under Petitioner's name. Petitioner acts as a broker for the export transactions of SH as well as the export transactions of unrelated companies. This broker relationship is an industry wide practice used when importing material into many European nations because it is necessary to obtain formal governmental approval for dollars to be remitted from these countries to the United States. The submission of one invoice rather than an invoice from each individual shipper greatly facilitates the paperwork necessary in order to obtain governmental approval for each shipment. The broker relationship also saves shipping costs which is a very significant cost factor. As a broker, Petitioner can arrange for vessels which are bound for foreign markets to contain the finished products of Petitioner, SH and unrelated producers thereby effecting a significant cost savings.

Due to the broker relationship, for marketing and administrative purposes, billings and collections with regard to SH's foreign customers are handled out of Petitioner's office. Upon collection, the proceeds are forwarded to SH. Petitioner does not make any profit on the various services it performs for SH. At no time do SH and Petitioner buy goods from one another, finance each other's sales or purchase goods for one another.

Petitioner contends that it and SH:

1. deal with different types of source product/raw material,

2. do not rely on each other for 100 percent of their respective income, and

3. are neither functionally inter-dependent nor so inter-related that operations of each company can not properly be determined for franchise/income tax purposes.

Petitioner also contends that the use in some circumstances of a one-company billing or processing procedure is due to an industrywide practice of saving of shipping costs; in dealing with customers abroad, it is due to the mode of operation required. Therefore, Petitioner asserts that it and SH do not meet the tests of a unitary business.

Section 211.4 of the Tax Law, states, in pertinent part:

> "4. In the discretion of the tax commission, any taxpayer, which owns or controls either directly or indirectly substantially all the capital stock of one or more other corporations, . . . may be required or permitted to make a report on a combined basis covering any such other corporations and setting forth such information as the tax

commission may require; provided, . . . that no combined report covering any corporation not a taxpayer shall be required unless the tax commission deems such a report necessary, because of intercompany transactions or some agreement, understanding, arrangement or transaction referred to in subdivision five of this section, in order properly to reflect the tax liability under this article .... "

Section 6-2.3(a) of the Business Corporation Franchise Tax regulations in effect for the taxable years at issue, states, in pertinent part:

"... the Tax Commission may permit or require a group of corporations to file a combined report if this method of reporting properly reflects the activities in New York State of the corporations. If the income or capital of a taxpayer is improperly or inaccurately reported because of intercorporate agreements, understandings or arrangements, the Tax Commission may permit or require the corporations to file a combined report. In deciding whether to permit or require combined reports the following two (2) broad factors must be met:

(1) the corporations are in substance parts of a unitary business conducted by the entire group of corporations, and

(2) there are substantial intercorporate transactions among the corporations."

Section 6-2.3(b) of the Business Corporation Franchise Tax regulations in effect for the taxable years at issue, states, in pertinent part:

"(b) In deciding whether each corporation is a part of a unitary business, the Tax Commission will consider whether the activities in which the corporation engages are related to the activities of the other corporations in the group, such as:

(1) manufacturing or acquiring goods or property for other corporations in the group; or

(2) selling goods acquired from other corporations in the group; or

(3) financing sales of other corporations of the group.

The Tax Commission will consider a corporation to be a part of a unitary business if it is engaged in the same or related lines of business as the other corporations in the group, such as:

(4) manufacturing similar products; or

(5) performing similar services; or

(6) performing services for the same customers."

Petitioner and SH are both in the business of producing ferrous scrap metal and are in related lines of business even though SH produces shredded scrap which requires a raw material different from other ferrous scrap (used automobiles), has a very high level of purity and commands a higher price than other grades of ferrous scrap which are produced by Petitioner. The unitary concept does not require that the exact identical product be produced by both corporations.

Petitioner performs a variety of services for SH on a no charge, no profit basis. Petitioner serves as a broker in finding customers overseas for SH. Petitioner also arranges to combine its shipments overseas with those of SH in the same vessel thus effecting substantial savings both for itself as well as for SH. In addition, for marketing and administrative purposes Petitioner handles all the billings and collections with regard to SH's foreign customers and then remits the total collections to SH. Because Petitioner performs such services for the sale of SH's product in foreign markets, which is the vast majority of SH's total sales, at a no charge no profit basis, there are substantial intercorporate transactions between Petitioner and SH.

Accordingly, Petitioner and SH have met the requirements of section 6-2.3(a) of the Business Corporation Franchise Tax regulations; namely, that the corporations are in substance parts of a unitary business with substantial intercorporate transactions.

However, the purpose of the combined reporting provision contained in section 211.4 of the Tax Law is to avoid distortion of, and more realistically portray true income of, closely related businesses. (Matter of Coleco Inds. v. State Tax Comm., 92 AD2d 1008, affd 59 NY2d 994). A combined report may not be required unless it will avoid distortion of and more realistically portray true income of closely related businesses. No single factor is decisive in properly reaching a determination that requiring combined reporting fulfills the statutory purpose (id. at 1009). Therefore, the existence of distortion must be decided based on the factual situation in each case.

Distortion is a question of fact not susceptible of determination in an Advisory Opinion. An Advisory Opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to "a specified set of facts". Tax Law, § 171, subd. twenty-fourth; 20 NYCRR 901.1(a). Therefore, a determination cannot be made in an Advisory Opinion as to whether a combined report shall be permitted or required. Inasmuch as the question of whether Petitioner and SH will be required to file a combined report for fiscal years ending March 31, 1980, March 31, 1981 and March 31, 1982 arises within the context of an Audit, the necessary factual determination will be made within such context, in accordance with the principles outlined above.

The last issue raised by Petitioner relates to Petitioner and S-B DISC.

S-B DISC, a domestic international sales corporation, is a Connecticut corporation and is a wholly owned subsidiary of Petitioner that has neither employees nor property nor does it do business within New York State. S-B DISC operates as a commission DISC and as such, has no purchases from Petitioner.

Section 3-9.3(a) of the Business Corporation Franchise Tax regulations, in pertinent part, defines a tax exempt DISC as being one which during a taxable year received more than five percent of its total receipts other than from sales or rentals from its stockholders, i.e. commissions.

Section 3-9.3(b) of the Business Corporation Franchise Tax regulations provides that if a corporation is subject to tax under Article 9-A, and owns stock in a DISC and such DISC is a tax exempt DISC, the corporation must file a consolidated report with such DISC. Therefore, Petitioner must file a consolidated report with S-B DISC.

Accordingly, Petitioner and SH are in a unitary business, but the determination as to whether the State Tax Commission may properly require the filing of reports on a combined basis for fiscal years ending March 31, 1980, March 31, 1981 and March 31, 1982 cannot be made within the context of an Advisory Opinion. However, Petitioner must file a consolidated report with S-B DISC for such fiscal years.

DATED: September 23, 1985

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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