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

TSB-A-90(5)C
Corporation Tax
February 8, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C891215C

On December 15, 1989 a Petition for Advisory Opinion was received from Nittetsu Leasing (U.S.A.) Inc., 229 South State Street, Dover, Delaware 19901.

The issue raised is whether Petitioner, Nittetsu Leasing (U.S.A.) Inc.'s, proposed activities will render it subject to the franchise tax on business corporations imposed under Article 9-A of the Tax Law.

Petitioner, a Delaware corporation which is wholly-owned by a non-U.S. corporation, is engaged in the business of (i) lending and financing and (ii) investing in securities. Petitioner plans to transfer certain of its lending and financing related assets to a newly incorporated New York subsidiary, Nittetsu Leasing (NY), Inc. ("NL NY"), in return for 100% of the stock of NL NY. NL NY will engage in the business of lending and financing and will have its principal office in New York City.

Petitioner is presently authorized to do business in New York. After NL NY is incorporated, however, Petitioner will cease any activities in New York and will withdraw its authorization to do business in New York, unless it is required to remain qualified under relevant corporation statutes.

Petitioner will be a passive investment holding company and will not engage in any business activity in New York. All of its business activities will take place outside of New York. Petitioner will not make any loans to NL NY or guarantee loans obtained by NL NY. Petitioner presently has three directors, all of whom are nonresident aliens. The officers of Petitioner consist of a President, a Treasurer and a Secretary, all of whom are nonresident aliens. The President and Secretary of Petitioner are also directors of Petitioner. All of Petitioner's business operations are managed and controlled by nonresident aliens. Petitioner has no salaried employees in New York, and it does not own or lease any property in New York. It will be managed by directors and officers in Japan, and will continue its current activities centering on the purchase of investment securities. All purchases and sales of securities held for investment will be effected in Japan.

Petitioner will not maintain an office in New York, nor will it have a telephone listing, building directory listing, or other form of address in New York. All of NL NY's operations will be conducted by NL NY's own officers and employees. Petitioner will not make loans to NL NY or guarantee loans obtained by NL NY.

Petitioner will maintain bank accounts in New York City. Petitioner will also 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 NL NY.

Accordingly, Petitioner will keep necessary corporate books and records in New York City.

Any services performed by NL NY's employees for Petitioner will be purely administrative, such as the forwarding of mail, confirmation of balances, etc. in bank accounts (without any authority whatsoever with respect to such accounts), and interacting with Petitioner's New York lawyers and accountants. NL NY employees will not be compensated by Petitioner for the above services. As Petitioner and NL NY are separate corporations, they will enter into a service agreement whereby Petitioner compensates NL NY on an arm's-length basis for the provision of these administrative services.

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, Section 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 Section 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 Section 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. . .(a) the maintenance of cash balances with banks or trust companies in this state. . .(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 Cooper 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. (Noga Holding (USA). Inc., Adv Op St Tax Comm, December 14, 1981, TSB-A-81(10)C).

DATED: February 8, 1990

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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