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

TSB-A-93 (1) C
Corporation Tax
January 5, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C920728A

On July 28, 1992, a Petition for Advisory Opinion was received from Price Waterhouse, 1900 Lincoln First Tower, Rochester, New York 14604.

The issue raised by Petitioner, Price Waterhouse, is whether under Article 9-A of the Tax Law, a domestic corporation is eligible to file a combined report with its subsidiary that is incorporated under the laws of the U.S. Virgin Islands.

A New York corporation (hereinafter "Parent") is a C-corporation for federal and New York State tax purposes and owns 100 percent of the outstanding stock of its subsidiary corporation. The subsidiary corporation is organized under the laws of the U.S. Virgin Islands and has elected, under section 922 of the Internal Revenue Code, to be treated as a foreign sales corporation (hereinafter "FSC").

The Parent and FSC are engaged in a unitary business and they have substantial intercorporate transactions. Both Parent and FSC are profitable.

Section 211.4 of the Tax Law authorizes the Commissioner of Taxation and Finance (hereinafter "Commissioner"), in his discretion, to require or permit a parent corporation and its wholly-owned subsidiaries to file a franchise tax report on a combined basis. However, a combined report including a corporation not a taxpayer (i.e., a foreign corporation not doing business in New York) cannot be required unless the Commissioner deems such a report necessary, in order to properly reflect the tax liability under Article 9-A because there are intercompany transactions or some agreement, understanding, arrangement 'or transaction referred to in section 211.5 of the Tax Law.

Section 6-2.5(b) of the Business Corporation Franchise Tax Regulations (hereinafter "Regulations") provides that an alien corporation may not be included in a combined report. However, for taxable years beginning on or after January 1, 1993, section 6-2.5(b) of the Regulations was amended on December 9, 1992 to provide that all FSCs, including those that are alien corporations, may be included in a combined report.

Section 1-2.3(a) of the Regulations states that:

> [t]he term "corporation" means an entity created as such under the laws of the United States, any state, territory or possession thereof, the District of Columbia, or any foreign country ....
>
> > (1) The term "domestic corporation" means a corporation incorporated by or under the laws of the State or colony of New York State.

> (2) The term "foreign corporation" means a corporation which is not a domestic corporation. (Emphasis added)

Accordingly, a possession of the United States is not a foreign country for purposes of Article 9-A of the Tax Law.

Section 3-8.3 of the Regulations defines an "alien corporation" as a corporation organized under the laws of a country other than the United States.

Herein, FSC is organized in the U.S. Virgin Islands which is a possession of the United States. Therefore, FSC is a foreign corporation but is not an alien corporation.

Section 6-2.5 of the Regulations provides that a foreign corporation not subject to tax in New York will not be required to be included in a combined report unless the Commissioner determines that inclusion of the corporation is necessary to properly reflect the tax liability of one or more taxpayers included in the group either because of substantial intercorporate transactions or because of some agreement, understanding, arrangement or transaction whereby the activity, business, income or capital of any taxpayer is improperly or inaccurately reflected.

Accordingly, for all taxable years, including those beginning prior to January 1, 1993, the Commissioner is not precluded from requiring or permitting the inclusion of FSC in a combined report of Parent under the circumstances described herein if the Commissioner determines that inclusion is necessary to properly reflect the tax liability of Parent.

Whether the inclusion of a corporation in a combined report is necessary 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 2376.1(a). Therefore, a determination cannot be made in an Advisory Opinion as to whether a combined report shall be permitted or required.

DATED: January 5, 1993

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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