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

TSB-A-93 (3) C
Corporation Tax
January 11, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C920505C

On May 5, 1992, a Petition for Advisory Opinion was received from Atlantic Control Systems Inc., 1333 60th Street, Brooklyn, New York 11219.

The issues raised by Petitioner, Atlantic Control Systems Inc., are:

1. Whether for fiscal years ended October 31, 1988, October 31, 1989 and October 31, 1990 a foreign sales corporation (hereinafter "FSC") organized in the North Mariana Islands is subject to New York State franchise tax;

2. Whether the federally exempt "foreign trade income" is exempt for New York franchise tax purposes and

3. Whether the FSC is permitted or required to file a combined report with its parent if the FSC is 100 percent owned by a New York State corporation.

Section 209.1 of Article 9-A of the Tax Law imposes the business corporation franchise tax on every foreign corporation, unless specifically exempt, for the privilege of doing business, or of employing capital, or of owning or leasing property in New York State in a corporate or organized capacity, or of maintaining an office in New York State.

Accordingly, FSC is an Article 9-A taxpayer if it is doing business in New York, employing capital in New York, owning or leasing property in New York or maintaining an office in New York. Otherwise, it is not a taxpayer but may be included in a combined report under certain circumstances.

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.

For the taxable years at issue 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.

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 Article 9-A franchise tax purposes.

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 North Mariana 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 the taxable years at issue, the Commissioner, pursuant to section 211.4 of the Tax Law and section 6-2.5 of the Regulations, is not precluded from requiring or permitting the inclusion of FSC in a combined report of its parent under the circumstances described herein if the Commissioner determines that inclusion is necessary to properly reflect the tax liability of its 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.

Section 3-2.2 of the Regulations, as amended on December 9, 1992, provides that:

[t]he exempt foreign trade income of a FSC, which is excluded from gross income for Federal income tax purposes pursuant to section 921 of the Internal Revenue Code, is not a specific exemption or credit for purposes of this subdivision. A "FSC" is a corporation which meets the definition of the term "FSC" contained in section 922 of the Internal Revenue Code and which has made an election to be treated as a

FSC under section 922(a)(2) of the Internal Revenue Code or an election to be treated as a small FSC under section 922(b)(1) of the Internal Revenue Code.

Accordingly, if FSC is an Article 9-A taxpayer or is included in a combined report, the exempt foreign trade income that is excluded for federal income tax purposes is not required to be added to federal taxable income when computing entire net income.

DATED: January 11, 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.