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

TSB-A-82(5)C
Corporation Tax
March 31, 1982

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION PETITION NO. C810618A

On June 18, 1981, a Petition for Advisory Opinion was received from Timex Corporation, Waterbury, Connecticut 06720.

At issue is whether the rental of a hotel room by a former Timex employee for the corporation's use, on an annual basis, constitutes activity beyond the activities protected by P.L. 86-272 (15 USC § 381), so as to subject Petitioner, a foreign corporation, to the Franchise Tax on Business Corporations imposed under Article 9-A of the Tax Law. It is concluded herein that such activity constitutes the leasing of property within New York in a corporate or organized capacity, within the meaning of section 209.1 of the Tax Law, so as to render Petitioner subject to tax.

Petitioner is a Delaware corporation, with headquarters at Waterbury, Connecticut. Petitioner states that it does not do business, employ capital, own or lease real or tangible personal property or maintain a business in New York except to the extent that either or both of the activities described below might be considered as such. These two activities are described by Petitioner as follows:

1. Petitioner's representatives located outside of New York solicit orders within the State for sales of tangible personal property. These orders are approved or rejected outside of New York, and approval orders are filled from outside the State.

2. A former Timex employee has leased a suite at a hotel in New York City on an annual basis since 1972. Such individual is fully reimbursed by Timex for business expenses incurred at the suite, including the rent paid. The purpose of the rental is to provide a standing hotel reservation to ensure that transient accommodations will be available for senior executives and officers of the corporation, as well as for executives of affiliated companies. Brief business meetings, such as with bankers, lawyers, advertising agency representatives and other of Petitioner's business consultants, have been held in the suite.

The suite is not used for the display of goods and is not held out as an office or place of business of Petitioner. No clerical or other personnel are stationed there, and no office equipment or office furniture is kept there. The hotel's rules and regulations stipulate that the "premises shall not be used for business purposes."

The lease between the former employee and the hotel is a standard printed lease form. It has the printed words "residing at", used to indicate a lessee's home address, crossed out and the words, "having offices at Timex Corporation, Waterbury, Connecticut 06708", inserted in their place. Another standard lease provision has been altered so as to open the use of the suite to "executives and guests of tenant," in place of the standard lease language limiting the use of rental premises to that of the tenant's immediate family.

Section 209.1 of the Tax Law, contained in Article 9-A thereof, imposes the Franchise Tax on Business Corporations, as follows:

> "For the privilege of exercising its corporate franchise, or 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, for all or any part of each of its fiscal or calendar years, every domestic or foreign corporation, shall annually pay a franchise tax . . . . "

Section 1-3.2(a)(1) of the Corporation Franchise Tax Regulations provides, in pertinent part, that "The tax is imposed on every foreign corporation whose activities include one or more of the following:

. . .

(iii) owning or leasing property in New York State in a corporate or organized capacity or in a corporate form; . . . . " 20 NYCRR 1-3.2(a)(1)

Section 1-3.2(d) of such Regulations provides, in pertinent part, that, "The owning or leasing of real or personal property within New York State constitutes an activity which subjects a foreign corporation to tax. Property owned by or held for the taxpayer in New York State, whether or not used in the taxpayer's business, is sufficient to make the corporation subject to tax." 20 NYCRR 1-3.2(d).

Petitioner contends that its former employee's leasing of the suite so as to ensure hotel accommodations in New York City for Timex executives and Timex business associates should not be considered to constitute doing business in New York State within the meaning of section 209.1 of the Tax Law, and that no distinction should be drawn between the annual rental of a hotel room for corporate executives and the rental for a traveling executive on a nightly or weekly reservation basis.

The law distinguishes between a nightly or short term letting of a hotel room and a long term occupancy of rented living quarters at a hotel. Among the factors to be considered in distinguishing between the innkeeper-guest relationship and the landlord-tenant relationship are the length of the period of occupancy, whether there is a written or oral lease, the nature of the rights and duties provided for in the lease, whether hotel services are provided, whether the rent is paid on a short or long term basis, as well as other indications as to the intended length of the occupancy. (See Chawla v. Horch, 70 Misc 2d 290).

The facts presented by Petitioner indicate that the suite has been rented since 1972 on an annual basis, the rental being paid yearly under a formal, written lease agreement typical of an apartment-type lease. Although usual hotel services, such as room service, are available, the preponderance of the relevant indicia compel the conclusion that the relationship created under the lease is that of landlord and tenant, as distinguished from the usual innkeeper-guest relationship in

which most business travelers finding temporary accommodations participate. The rental of property under such circumstances constitutes "leasing property in this state," within the meaning of section 209.1 of the Tax Law.

The submitted facts show that the former employee was acting on behalf of Petitioner when he leased the suite for the corporation's use. The corporation reimbursed him fully for the cost of the leasehold. The above-noted language changes in the lease further demonstrate that the suite was rented and held for Petitioner's use in its corporate capacity, with the hotel's knowledge, and not for the former employee's personal use. Furthermore, Petitioner stated in its submitted facts that the suite was rented for the purpose of serving as a "standing hotel reservation to insure that transient accommodations will be available" to meet corporate needs. The activity of leasing a hotel room on an annual basis in New York State renders Petitioner subject to New York's Franchise Tax on Business Corporations, imposed under Article 9-A of the Tax Law, pursuant to section 209.1, which imposes the tax on foreign corporations "owning or leasing property in this state in a corporate or organized capacity, for all or any part of each of its fiscal or calendar years . . . . "

P.L. 86-272 (15 USC § 381) limits the power of a state to impose a net income tax on "interstate income". Income derived from the interstate business activities of a corporation incorporated outside a state may not be taxed by that state if the activities carried on with the state are limited to:

> "(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
>
> (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1)."

While Petitioner's activities in soliciting, approving and filling orders, as described earlier, are activities of a type described in the foregoing federal statutory provision, the leasing of property within this state extends the sum of its activities in New York beyond the protected zone established by P.L. 86-272. That statutory provision, therefore, constitutes no bar to the conclusion regarding Petitioner's taxability arrived at herein.

DATED: March 31, 1982

s/GABRIEL DI CERBO
Deputy Director
Technical Services Bureau