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

TSB-A-85 (15) C
Corporation Tax
July 22, 1985

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION PETITION NO. C821004B

On October 4, 1982 a Petition for Advisory Opinion was received from Space & Leisure Time, Ltd., 461 8th Avenue, New York, New York 10001.

At issue is whether under Article 9-A of the Tax Law, for fiscal years ended February 28, 1979 and February 29, 1980, Petitioner may allocate as non-New York business receipts those override commissions attributable to sales made by member agencies located outside New York State.

Petitioner, a taxpayer under Article 9-A, is a corporation which solicits the membership of retail travel agencies and represents a cooperative of approximately 700 retail travel agencies located primarily in New York, New Jersey and Connecticut. Each member agency pays an annual fee that gives it the right to participate in commission incentives that are negotiated by Petitioner. Petitioner is not itself a retail travel agency. Rather, Petitioner's top management contacts providers of travel services (hereinafter "travel providers"), such as airlines, railroads, bus companies, hotels, travel wholesalers, and tour operators, to enter into agreements to allow a member agency to arrange travel bookings with the travel providers for the member agency's customers. Payments for the travel bookings are made directly by the member agencies to travel providers' offices throughout the United States, rather than to the office of Petitioner in New York. Since Petitioner is providing the travel providers with an expanded sales force, Petitioner negotiates with the travel providers a commission to be paid to its member agencies. This commission would generally exceed the normal commission paid by a travel provider to a travel agency. For example, if a travel provider would ordinarily pay a seven percent commission to a travel agency when it booked business with the travel provider, the travel provider would pay a ten percent commission. This additional commission earned over the normal commission is called an "override commission." These override commissions are shared on a percentage basis by Petitioner and its member agencies.

Petitioner maintains its headquarters in New York City where employees handle general and administrative functions and where top management negotiate the commission packages. In addition, Petitioner has employees who work primarily out of their homes and come to the New York City office only to attend monthly sales meetings. These employees are assigned to geographic regions and they attempt to attract new members within their respective regions. More importantly, they spend much of their time visiting member agencies to keep in contact and encourage them to book tours that provide the most profitable override commissions and to make sure that the member agencies are made aware of the more profitable packages as they are negotiated. Petitioner contends that it is the continuing business generated by member agencies who deal directly with the travel providers that produces the commission and any bookings are individual, separate decisions made by the member agencies, without further involvement or approval of Petitioner.

Petitioner states that when member agencies execute the override commission packages, Petitioner is providing travel providers with a service, namely an expanded sales force. In exchange for this service Petitioner receives override commissions directly from the travel providers, keeping a portion for itself and transmitting the balance to the member agency booking the related transaction. However, Petitioner contends that its agreements with the various travel providers represent intangible assets that will produce income as those assets are used by the member agencies. Petitioner itself does not really use the intangible asset. Instead, Petitioner develops it and then merely collects income as member agencies actually put the asset to use in their respective geographic locations. Petitioner asserts that its override commissions should be treated as "other business receipts" in the calculation of the receipts factor and be allocated in accordance with the provision governing the allocation of patent and copyright royalties.

Petitioner's assertion that the override commissions are analogous to royalty income is incorrect. Petitioner's employees provide services to both the travel providers and the member agencies for which the Petitioner receives a portion of the override commissions. Petitioner provides the travel providers with the service of an expanded sales force by continually increasing its membership and encouraging the member travel agencies to participate in the negotiated commission packages for which the travel providers pay override commissions. Petitioner provides its members the service of negotiating the override commission packages for which Petitioner receives a percentage of the override commissions generated. The negotiations for the override commission packages are performed by top management in the New York City headquarters. Increasing memberships and encouraging participation in negotiated packages offering the most advantageous override commissions are performed by employees who work out of their homes but who are attached to the New York City office of Petitioner.

When computing the receipts factor of the business allocation percentage, commission receipts that are included in the numerator are determined pursuant to section 210.3(a)(2)(B) of the Tax Law and section 4-4.3 of the Business Corporation Franchise Tax regulations. Such regulation section 4-4.3 provides that commissions received by a taxpayer are allocated to New York State if the services for which the commissions were paid were performed in New York State. It also provides that if the services for which the commissions were paid were performed for the taxpayer by salesmen attached to or working out of a New York State office of the taxpayer, the services will be deemed to have been performed in New York State. Thus, all of the services performed by Petitioner were either performed in New York State or deemed to have been performed in New York State.

Accordingly, when computing the receipts factor of the business allocation percentage pursuant to section 210.3(a)(2) of Article 9-A of the Tax Law for fiscal years ended February 28, 1979 and February 29, 1980, all of Petitioner's override commissions constitute commissions earned

within New York State for services performed as contemplated by section 210.3(a)(2)(B) of such Article 9-A and section 4-4.3(b) of the Business Corporation Franchise Tax regulations and such commissions may not be allocated as non-New York business receipts.

DATED: July 11, 1985

s/ANDREW F. MARCHESE
Chief of Advisory Opinions

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