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

TSB-A-95 (20) C
Corporation Tax
December 13, 1995

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C950627B

On June 27, 1995, a Petition for Advisory Opinion was received from Clariden Asset Management (New York) Inc., 540 Madison Avenue, New York, New York 10022.

The issue raised by Petitioner, Clariden Asset Management (New York) Inc., is whether Petitioner is taxable under Article 9-A or Article 32 of the Tax Law.

Petitioner is a wholly-owned subsidiary of Clariden Bank, a Swiss corporation. The stock of Clariden Bank is owned by Leu Holding Ltd., a Swiss holding company. Leu Holding Ltd. is, in turn, owned 100 percent by CS Holding, another Swiss holding company. The activities of each entity in Petitioner's ownership chain are described below.

CS Holding is a Swiss corporation which owns the stock of several corporations, including Leu Holding Ltd. CS Holding does not do business in the United States and is not a bank holding company as defined in section 1462(f)(1) of the Tax Law and section 16-2.4 of the Franchise Tax on Banking Corporations Regulations ("Article 32 "Regulations"). Like CS Holding, Leu Holding Ltd. is a Swiss holding company. Leu Holding Ltd. does not conduct business in the United States and is not a bank holding company as defined in section 1462(f)(1) of the Tax Law and section 16-2.4 of the Article 32 Regulations. Leu Holding Ltd. owns 100 percent of the stock of Clariden Bank.

For purposes of section 1462(f)(1) of the Tax Law and section 16-2.4 of the Article 32 Regulations, the term "bank holding company" means any corporation subject to Article 3-A of the Banking Law, or registered under the Federal Bank Holding Company Act of 1956, as amended, or registered as a savings and loan holding company (but excluding a diversified savings and loan holding company) under the Federal National Housing Act, as amended.

Clariden Bank, Petitioner's direct parent corporation, is a Swiss corporation. It is not a bank holding company as defined in section 1462(f)(1) of the Tax Law and section 16-2.4 of the Article 32 Regulations. Clariden's principal business activity is to provide personalized investment management and advisory services to select, high net worth clientele located throughout the world. In providing quality services to clients, Clariden's advisors develop a comprehensive financial profile of each client prior to investing his assets. This profile enables the advisor to fully understand the client's circumstances, financial goals and attitudes towards investment and risk. The advisor then determines the appropriate portfolio structure for the client. Depending on the type of services requested, Clariden provides its clients with (i) portfolio and asset management where the Clariden investment advisor is authorized to make all investments at his own discretion within Clariden's policy; (ii) investment advice whereby the client

itself authorizes investments; and/or (iii) execution services to secure punctual and reliable execution of client orders at the best possible price, and custodial services for securities. In 1993, these services generated more than 50% of Clariden's total income. The remainder of Clariden's income for 1993 was derived from interest, income from bills and money market instruments, foreign exchange and precious metals dealing, income and gains on securities and other miscellaneous income.

Clariden also offers several investment products to its clients, including proprietary mutual funds, money market instruments, bonds, equities, foreign exchange and derivatives (i.e., futures, options). These products are offered to provide clients with broad-based investment options which complement Clariden's management and advisory services. Like many other private banks, Clariden also provides clients with collateral credit. For the most part, collateral credit is offered to provide clients with funds for short-term bridging purposes, medium-term financing of private or commercial commitments, or to leverage existing investments. The most common type of credit extended to clients is made as an overdraft on the client's current account (i.e., lending on margin). This type of collateral credit is generally granted where the client's need for funds are relatively small or temporary in nature. In some cases, Clariden also offers clients fixed term loans or letters of credit secured by the clients' investment portfolios. Finally, clients can also enter into forward foreign exchange/precious metals contracts and buy or sell options for investment or hedging purposes through the use of collateral credit.

In addition to investment and advisory services, Clariden also invests in a variety of securities for its own account. In 1993, Clariden derived approximately 13 percent of its total income from such investments. Moreover, approximately 18 percent of its total assets consisted of securities in 1993.

Although Clariden is not principally engaged in traditional banking activities (i.e., accepting deposits, making loans), under Swiss law it is required to hold a banking license. Swiss banking licenses are issued to commercial banks as well as to entities involved in investment activities, either exclusively or partially. Under Swiss law, corporations holding a Swiss banking license may conduct banking or investment activities. However, such corporations are not required to conduct both activities.

Petitioner, a New York corporation, is registered with the U.S. Securities and Exchange Commission as an investment advisor. Like Clariden Bank, Petitioner provides international investment advice and portfolio management services to U.S. and foreign individuals and institutions. In conducting its activities, Petitioner emphasizes global investing to maximize its clients' returns on their investments. Petitioner also manages two foreign investment funds established by its parent corporation. In 1993, Petitioner derived approximately 100 percent of its total income from the foregoing services.

Section 209.1 of Article 9-A of the Tax Law imposes an annual franchise tax on a domestic or foreign corporation for the privilege of exercising its corporate franchise, doing business, employing capital, owning or leasing property in a corporate or organized capacity, or maintaining an office, in New York State during the taxable year.

Section 209.4 of the Tax Law, provides that a corporation liable to tax under Article 32 of the Tax Law is not subject to tax under Article 9-A of the Tax Law.

Section 1451 of Article 32 of the Tax Law imposes an annual franchise tax on every banking corporation for the privilege of exercising its franchise or doing business in New York State in a corporate or organized capacity during the taxable year.

Section 1452(a) of the Tax Law defines "banking corporation" for purposes of Article 32 of the Tax Law. Section 1452(a)(1) of the Tax Law provides that "[e]very corporation or association organized under the laws of [New York State] which is authorized to do a banking business, or which is doing a banking business" is a banking corporation. Section 1452(a)(2) of the Tax Law provides that "every corporation or association organized under the laws of any other state or country which is doing a banking business" is a banking corporation.

Section 1452(a)(9) of the Tax Law provides that any corporation 65 percent or more of whose voting stock is owned or controlled, directly or indirectly, by a corporation or corporations subject to Article 3-A of the Banking Law, or registered under the Federal Bank Holding Company Act of 1956, as amended, or registered as a savings and loan holding company (but excluding a diversified savings and loan holding company) under the Federal National Housing Act, as amended, or by a corporation or corporation described in section 1452(a)(1) through (8) of the Tax Law, is a banking corporation provided that the corporation whose voting stock is so owned or controlled is principally engaged in a business, regardless of where conducted, which (i) might be lawfully conducted by a corporation subject to Article 3 of the Banking Law or by a national banking association or (ii) is so closely related to banking or managing or controlling banks as to be a proper incident thereto, as set forth in section 4(c)(8) of the Federal Bank Holding Company Act of 1956, as amended.

Section 1452(b) of the Tax Law provides that the words "banking business" as used in section 1452 mean, in part, "such business as a corporation or association may be created to do under article three, three-B, five, five-A, five-C, six, or ten of the banking law or any business which a corporation or association is authorized by such article to do... also ...such business as any corporation or association organized under the ... law of any other ... country has authority to do which is substantially similar to the business which a corporation or association may be created to do under article three, three-B, five, five-A, five-C, six or ten of the banking law or any business which a corporation or association is authorized by such article to do."

Herein, CS Holding and Leu Holding Ltd. are not corporations subject to Article 3-A of the Banking Law, and are not registered under the Federal Bank Holding Company Act or under the Federal National Housing Act. Therefore, Petitioner may be a banking corporation pursuant to section 1452(a)(9) of the Tax Law only if Clariden Bank is a banking corporation pursuant to section 1452(a) of the Tax Law.

There is a distinction between doing a banking business and the performance of isolated acts of which the business consists. Carrying on a banking business does not mean the performance of a single disconnected banking business act. "[I]t is only when the execution of such banking-like engagements become a principal activity of a business corporation, as contrasted with being a mere incident of the conduct of its principal enterprise, that the business corporation becomes engaged in banking." (Phillips v Investors' Syndicate, (1932) 145 Misc 361; also, see 9 NY JUR 2d 31 Banks.)

In the Matter of New York State Association of Life Underwriters Inc. v New York State Banking Department, (1994) 83 NY2d 353, the Court of Appeals stated that while it "has not sanctioned every activity engaged in by banks as an incidental power necessary to carry on the business of banking, commercial banks in [New York State] now engage in such activities as selling certificates of deposit, buying and selling securities on behalf of customers, establishing individual retirement accounts, and providing financial planning and investment counseling services."

Under section 96 of Article 3 of the Banking Law, the core activities of a bank or trust company are: to discount, purchase and negotiate promissory notes, drafts, bills of exchange, other evidences of debt, and obligations in writing to pay in installments or otherwise all or part of the price of personal property or that of the performance of services; purchase accounts receivable, whether or not they are obligations in writing; lend money on real or personal security; borrow money and secure such borrowings by pledging assets; buy and sell exchange, coin and bullion; and receive deposits of moneys, securities or other personal property upon such terms as the bank or trust company shall prescribe. Such bank or trust company shall also exercise all such incidental powers as shall be necessary to carry on the business of banking.

Herein, Clariden Bank's principal business activity is to provide personalized investment management and advisory services to its clients by providing portfolio and asset management, investment advice and/or execution services. In Underwriters, supra, such activities are permitted by a bank or trust company under Article 3 of the Banking Law as incidental powers necessary to carry on the business of banking under section 96 of the Banking Law. However, in Phillips, supra, the distinction was made that the conduct of an activity that is an incidental power necessary to carry on the business of banking does not mean that such activity constitutes a banking business. Accordingly, for a corporation to be engaged in banking, it must be principally engaged in the core activities that make a corporation subject to the Banking Law. Herein, Clariden Bank is not principally engaged in activities, that if conducted in New York State would make Clariden Bank an entity that would be subject to Article 3, 3-A, 5, 5-A, 5-C, 6 or 10 of the Banking Law. Therefore, Clariden Bank is not a corporation or association which is doing a banking business pursuant to section 1452(b) of the Tax Law.

Since Clariden Bank is not doing a banking business, it is not a banking corporation pursuant to section 1452(a)(2) of the Tax Law and Petitioner is not a banking corporation pursuant to section 1452(a)(9) of the Tax Law. Petitioner is organized in New York State, but is not created or authorized to do business under Articles 3, 3-B, 5, 5-A, 5-C, 6 or 10 of the Banking Law. Therefore, Petitioner is not doing a banking business pursuant to section 1452(b) of the Tax

Law and Petitioner is not a banking corporation pursuant to section 1452(a)(1) of the Tax Law. Accordingly, Petitioner is not subject to tax under Article 32 of the Tax Law. Petitioner is subject to tax under Article 9-A of the Tax Law.

DATED: December 13, 1995

s/DORIS S. BAUMAN
Director
Technical Services Bureau

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