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

TSB-A-90(25)C
Corporation Tax
December 13, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C900419B

On April 19, 1990, a Petition for Advisory Opinion was received from Bleakley Platt & Schmidt, P.O. Box 5056, 1 North Lexington Avenue, White Plains, New York 10602.

The issue raised by Petitioner, Bleakley Platt & Schmidt, is whether a foreign bank is subject to the franchise tax on banking corporations imposed by Article 32 of the Tax Law when it has activities and contacts with New York State as set forth in the following four alternatives.

Alternative I

1. The foreign bank (hereinafter referred to as the "Bank") is incorporated under the laws of Connecticut.

2. The Bank has no employees, no office and no agent working in New York State.

3. The Bank makes loans to New York residents, corporations, partnerships, trusts and other organizations, and because of such loans it may acquire a security interest in real or personal property located in New York State.

4. The Bank may acquire title to property located in New York State through the foreclosure of security interests held by the Bank on New York State real estate.

5. All commitments for its loans are issued from the Bank's offices in Connecticut.

6. Loans may originate from direct applications to the Bank from the borrower or through a broker, who may be either from New York or Connecticut and whose fee will be paid by the borrower, or the Bank may be a participant in credits originated by a New York bank.

7. All negotiations for loan commitments made by the Bank will be conducted at the Bank's offices in Connecticut.

8. Bank officers and employees may visit property located in New York State on which security interests may be acquired.

9. Appraisers from either Connecticut or New York may be retained by the Bank to determine the value of New York property on which the Bank will acquire a security interest.

10. Bank loans will be closed by New York attorneys in New York.

Alternative II

1. The same facts as set forth in 1 through 9 of Alternative I.

2. Bank loans will be closed in Connecticut by Connecticut attorneys. The Connecticut attorneys may also be admitted to practice in New York.

Alternative III

1. The same facts as set forth in Alternative I.

2. The Bank may make construction loans on New York State real estate. If construction loans are made, the Bank will hire architects or engineers to make inspections and approve the borrower's requisition for advances. The architects or engineers may be licensed in New York.

Alternative IV

1. The same facts as set forth in Alternative II.

2. The Bank may make construction loans on New York State real estate. If construction loans are made, the Bank will hire architects or engineers to make inspections and approve the borrower's requisition for advances. The architects or engineers may be licensed in New York.

Section 1451 of the Tax Law imposes, annually, a franchise tax on banking corporations for the privilege of doing business in New York State in a corporate or organized capacity.

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, anywhere, is a banking corporation.

Section 16-2.7 of the Franchise Tax on Banking Corporations Regulations (hereinafter "Regulations") defines "doing business" as follows:

> (a) The term "doing business" is used in a comprehensive sense and includes all activities which occupy the time or labor of people for profit. Every corporation organized for profit and carrying out any of the purposes of its organization is deemed to be doing business for purposes of the tax. In determining whether a corporation is doing business, it is immaterial whether its activities actually result in a profit or a loss.
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> (b) Whether a corporation is doing business in New York State is determined by the facts in each case. Consideration is given to such factors as:
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> > (1) the nature, continuity, frequency and regularity of the activities of the corporation in New York State;

(2) the purposes for which the corporation was organized;

(3) the location of its offices and other places of business;

(4) the employment in New York State of agents, officers and employees; and

(5) the location of the actual seat of management or control of the corporation.

Section 16-2.7(e) of the Regulations as amended July 30, 1990 provides that:

A corporation will not be deemed to be doing business in New York State if its activities in New York State are limited to such things as:

(1) the mere acquisition of one or more security interests in real or personal property located in New York State without otherwise doing business;

(2) the mere acquisition of title to property located in New York State through the foreclosure of a security interest without otherwise doing business; or

(3) the mere holding of meetings of the board of directors in New York State.

Section 16-2.7(e) of the Regulations provides that a corporation would not be deemed to be doing business in New York State when the corporation, that has no other contact with New York State, merely acquires, outside New York State, security interests in property located in New York State, regardless of the frequency of the transactions.

The rationale of the policy expressed in said regulations is consistent with the Advisory Opinions issued in Peat, Marwick, Mitchell & Co., Adv Op St Tax Comm, April 16, 1987, TSB-A-87(8)C and in GEF Funding Corp. Adv Op Comm of T&F, January 26, 1988, TSB-A-88(2)C, an interpretation of Article 9-A under similar circumstances. In Peat, Marwick, it was held that, under Article 32 of the Tax Law, the activity of a national banking association as a trustee for New York State industrial development bonds where all of the services are provided outside New York State, except for the signing of the trust agreement and the delivery of the securities to the underwriter in New York, was not sufficient to constitute doing business in New York State.

For purposes of Article 9-A of the Tax Law, the definition of doing business contained in section 1-3.2(b) of the Business Corporation Franchise Tax Regulations is identical to the definition of doing business for purposes of section 16-2.7(a) of the Regulations. In GEF Funding Corp., it was determined that for purposes of Article 9-A of the Tax Law, the activities of a corporation do not constitute doing business in New York State where the corporation is engaging in mortgage

loan activities when the loans are secured by real property located in New York State but the acceptance of application, processing, approval and servicing of the loans are conducted at the corporation's office outside New York State. However, it was also determined in GEF Funding Corp., that a corporation could be subject to tax if it is determined that an agency relationship exists between such corporation and a person or entity conducting business in New York State.

It should be noted, that under Article 32 of the Tax Law where a corporation acquires security interests in property located in New York State and such corporation conducts activities in New York State, such corporation could be deemed to be doing business in New York State. For instance, in Cuddy & Feder, Adv Op Comm T&F, June 1, 1988, TSB-A-88(13)C, it was determined that, for purposes of Article 32 of the Tax Law, where a corporation's chief operating officer comes into New York on a regular basis to negotiate mortgage loan purchases secured by New York residential property, and the corporation's agent in New York, on a regular basis, negotiates mortgage loan purchases for the corporation that are secured by New York residential property, the corporation was deemed to be doing business in New York State.

Herein, the Bank is a banking corporation pursuant to section 1452(a)(2) of the Tax Law, and is subject to the Franchise Tax on Banking Corporations imposed by Article 32 of the Tax Law if it is doing business within New York State.

When determining whether the Bank is doing business in New York State, many factors must be considered. The fact that the Bank acquires a security interest in real or personal property in New York State and acquires title to property located in New York State through foreclosure of security interests is not sufficient activity, by itself, to constitute "doing business" in New York. The retaining of independent contractors located in New York State would not constitute doing business in New York. However if an agency relationship exists between Bank and the brokers, appraisers, architects, engineers or attorneys, the Bank may be considered to be doing business as a result of such relationship. When Bank's officers and/or employees come into New York, such activity may constitute doing business as in GEF Funding Corp., supra. Likewise, the closing of loans in New York State may constitute doing business in New York. The totality of Bank's circumstances would determine Bank's taxable status.

The existence of an agency relationship 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 901.1(a).

DATED: December 13, 1990

PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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