

STATE OF **NEW** YORK

STATE **TAX** COMMISSION

In the Matter of the Petition

of

WILLIAM WRIGLEY, JR. COMPANY

DECISION

for Redetermination of a Deficiency or for
Refund **of** Corporation Franchise Tax under
Article 9A of the Tax Law for the Years 1975
through 1980.

Petitioner, William Wrigley, Jr. Company, 410 North Michigan Avenue,
Chicago, Illinois, 60611, filed a petition for redetermination of a deficiency
or for refund of corporation franchise tax under Article 9A of the Tax Law for
the years 1975 through 1980 (File No. 39340).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of
the State Tax Commission, W. Averell Harriman State Office Building Campus,
Albany, New York 12227 on February 24, 1986 at 1:15 P.M., with all briefs to be
filed by May 26, 1986. Petitioner appeared by Baker & McKenzie (H. Randolph
Williams, Esq., of counsel). The Audit Division appeared by John P. Dugan,
Esq. (Thomas C. Sacca, **Esq.**, of counsel).

ISSUE

Whether petitioner's activities within New York State during the years at
issue constituted the solicitation of orders, as defined by 15 U.S.C. §381 et
seq., thereby precluding this State from imposing a tax on petitioner's income.

FINDINGS OF FACT

1. Petitioner is an Illinois corporation which is engaged in the manufacture
and sale of chewing gum. Its principal place of business is located in Chicago,
Illinois.

2. On September 14, 1979, petitioner filed a timely claim for refund in the amount of \$92,357.69 plus interest for New York State corporation franchise tax paid by it for its taxable year ended December 31, 1975.

3. On October 17, 1979, petitioner filed the following timely claims for refund of franchise tax paid by it:

| <u>Period Ended</u> | <u>Amount of Claim</u> |
|---------------------|----------------------------|
| December 31, 1976 | \$121,542.79 plus interest |
| December 31, 1977 | 100,734.61 plus interest |
| December 31, 1978 | 105,784.25 plus interest |
| December 31, 1979 | 18,000.00 plus interest |

4. In 1981, the Audit Division conducted a field audit of petitioner's franchise tax reports for the periods ended December 31, 1978 through December 31, 1980. As a result of that field audit, the Audit Division proposed to disallow the claims for refund described in Findings "2" and "3" above, and to assert the following deficiencies in the franchise tax:

| <u>Period Ended</u> | <u>Amount of Deficiencies</u> |
|---------------------|-------------------------------|
| December 31, 1978 | (\$214.00) tax reduction |
| December 31, 1979 | \$76,056.00 |
| December 31, 1980 | \$30,840.00 |

5. On January 6, 1982, petitioner timely protested the proposed deficiencies and denial of claims, described in Finding "4" above.

6. On April 12, 1982, the Audit Division issued the following notices of deficiency:

| <u>Period Ended</u> | <u>Tax</u> | <u>Interest</u> | <u>Total</u> |
|---------------------|------------|-----------------|--------------|
| December 31, 1978 | \$ 169.00 | \$ 54.00 | \$ 223.00 |
| December 31, 1979 | 76,650.00 | 17,868.00 | 94,518.00 |
| December 31, 1980 | 30,964.00 | 4,586.00 | 35,550.00 |

These notices of deficiency constituted a denial of the claims for refund described in Findings "2" and "3" above.

7. On May 11, 1982, petitioner timely filed its petition to redetermine the deficiencies and disallowance of refunds, described in Finding "6" above.

8. The facts relevant to petitioner's claims are the same for all taxable years in question.

9. Petitioner employed approximately 30 sales representatives who operated in New York State. Sales representatives were responsible to a regional sales manager. The regional sales manager, in turn, reported to a district manager who maintained an office in Saddlebrook, New Jersey. Petitioner did not maintain a place of business in New York during the years in question.

10. During the year 1979, petitioner established a program known as "Key Account Manager". An individual assigned to this program was given the duty of trying to increase the sales volume of established high sales volume accounts

11. Petitioner paid each sales representative a salary, and provided the use of an automobile which was owned by petitioner. Petitioner reimbursed the sales representatives for the operation and maintenance expenses, including storage, of the automobile assigned to each representative. In all cases where a sales representative rented garage space to store the automobile, such space was rented by the representative individually and not in the name of petitioner.

12. Petitioner's sales representatives called upon "direct" customers to increase distribution of petitioner's products. A direct account is one which buys product directly from petitioner and includes wholesalers, large retail chains, and suppliers of vending machines. The goal of a sales representative when he called upon a direct account was to increase distribution of petitioner's products. A sales representative would seek to assure that the direct account carried as close to 100 percent of petitioner's product lines as possible. In order to increase distribution, the sales representative would call upon direct accounts to increase their purchases of petitioner's products.

account to initiate an order, to inform that individual of promotional campaigns and to encourage the optimal display of petitioner's products at the retail level. The direct account could submit an order to purchase petitioner's product, which the sales representative would then submit to the petitioner's district office in Saddlebrook, New Jersey for approval. From Saddlebrook, the order would be forwarded to the Chicago office for processing.

13. Petitioner's sales representatives also called upon "indirect" customers to increase distribution of petitioner's product. An "indirect" account, usually an independently owned retail store, is one which purchases a product from a direct account.

14. The goal of a sales representative when he visited an indirect account was to increase the distribution of petitioner's products through increased purchases by the indirect account from the direct account. When the sales representative visited an indirect account the representative would check displays of petitioner's product for out-of-stock products, out-of-date products, the location of the product and the number of product lines displayed. A sales representative would also explain current promotional and advertising campaigns.

15. Since a fresh product was necessary for continued sales, if a representative found out-of-date product in a display the representative would exchange, on a stick-for-stick basis, the out-of-date product with fresh product drawn from a small stock of product in his possession. Petitioner did not charge the indirect account for this exchange. The supplies of petitioner's products which were held by the sales representatives at any time, therefore, consisted of both salable and unsalable product and had negligible value.

16. On occasion, a sales representative replaced either out-of-date or Undisplayed product with stock in an indirect account's store.

17. Occasionally, petitioner supplied an indirect account with a display stand on which to display petitioner's product. Petitioner's sales representatives would also participate either alone, or with sales representatives of other companies, in the arrangement of the displays. Petitioner supplied these display stands to a retailer free of charge and did not own the stands or consider the stands to be inventory. **The** stands were purchased from suppliers throughout the United States and were often shipped directly to a customer.

18. Petitioner had no telephone listing or mailing address in New York State during the taxable years in question.

19. **All** manufacturing activities by petitioner were performed outside New York State during the taxable years in question.

20. Petitioner maintained no stock of goods, raw materials or supplies in New York State during the taxable years *in* question.

21. Petitioner owned **no** tangible personal property in New York State during the taxable years in question other than its product carried by the sales representatives, and the automobiles which the sales representatives used as transport between customers.

22. **All** sales by petitioner to New York customers were shipped via a common carrier from outside New York State pursuant to orders accepted by petitioner outside New York State.

23. Petitioner did not repair or service its products after sale.

24. Petitioner's sales representatives gave **no** technical advice on the use of its products.'

25. **In** accordance with the State Administrative Procedure Act §307(1), petitioners proposed findings of fact have been generally accepted. It is

noted, however, that proposed finding of fact "8" has been rejected as being in the nature of legal argument.

CONCLUSIONS of LAW

A. That 15 U.S.C. §381 (PI, 86-272) states, in pertinent part:

"(a) No State...shall have power to impose...a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person...are either, or both, of the following:

(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).

(b) The provisions of subsection **(a)** shall not apply to the imposition of net income tax by any State...with respect to --

(1) any corporation which is incorporated under the laws of such State; or

(2) any individual who...is domiciled in, or a resident of, such State --

B. That in order to be exempt from corporation franchise tax, the activities of the employees of the corporation must be limited to solicitation (20 NYCRR 1-3.4 [b][9][iv], effective January 1, 1976). Further, the term solicitation is to be narrowly construed (id.) However, "[s]ome activities incidental to offering tangible personal property for sale or pursuing offers for the purchase of tangible personal property will nevertheless be considered solicitation and will not make the corporation taxable." (Id.)

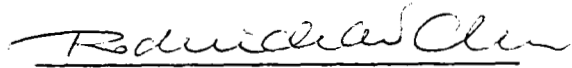
C. That upon all of the facts and circumstances presented, we find that petitioner's activities constituted solicitation within the meaning of 15 U.S.C. § 381 thereby precluding New York from imposing a tax on petitioner's income. In reaching this conclusion it is noted that in Matter of Gillette Co. v. State Tax Commn., (56 AD2d 475, affd 45 NY2d 846) the Court of Appeals held that activities substantially identical to those of petitioner were exempt from corporation franchise tax. In Gillette, as in this case, petitioner had no place of business, telephone listing or mailing address in New York, all manufacturing activities were performed outside of the State, petitioner maintained no stock of goods, raw materials or supplies in New York, the product carried by the sales representatives was of negligible value, sales representatives advised indirect accounts as to display techniques and all sales by petitioner were shipped via a common carrier from outside New York State pursuant to orders accepted by petitioner outside New York State. It is noted that, under the circumstances presented herein, the replacement of stale product with fresh product did not exceed the limits of solicitation (see United States Tobacco Co. v. Commonwealth, 386 A2d 471 [Pa] which was relied on by the Court in Hatter of Gillette Co. v. State Tax Commn., 45 NY2d 846, supra). Moreover, the fact that petitioner owned automobiles which were used in the state is of no consequence (20 NYCRR 1-3.4[b][91[iv][C]; United States Tobacco Co. v. Commonwealth, supra).

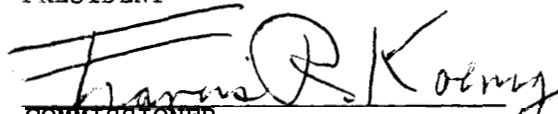
D. That the petition of William Wrigley, Jr. Company is granted, and the notices of deficiency issued April 12, 1982 are cancelled and the claims for refund are granted.


DATED: Albany, New York

STATE TAX COMMISSION

MAR 11 1987


PRESIDENT


COMMISSIONER


COMMISSIONER