STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Gold Fields Mining Corporation formerly Gold Fields American Corporation for Redetermination of a Deficiency or Revision of a Determination or Refund of Corporation Franchise Tax under Article 9A of the Tax Law for the Fiscal Years Ended 6/30/69-6/30/73 & 6/30/75.	AFFIDAVIT OF MAILING

State of New York :
ss.:
County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 14th day of March, 1985, he served the within notice of Decision by certified mail upon Gold Fields Mining Corporation, formerly Gold Fields American Corporation, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gold Fields Mining Corporation
formerly Gold Fields American Corporation
230 Park Avenue
New York, NY 10169

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
14th day of March, 1985.

David Parchuck

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Gold Fields Mining Corporation formerly Gold Fields American Corporation for Redetermination of a Deficiency or Revision of a Determination or Refund of Corporation Franchise Tax under Article 9A of the Tax Law for the Fiscal Years Ended 6/30/69-6/30/73 & 6/30/75.	AFFIDAVIT OF MAILING

State of New York :
ss.:
County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 14th day of March, 1985, he served the within notice of Decision by certified mail upon Eileen S. Silvers, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Eileen S. Silvers
Paul, Weiss, Rifkind, Wharton & Garrison
34 Park Ave.
New York, NY 10154

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
14th day of March, 1985.

David Parchuck

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

March 14, 1985

Gold Fields Mining Corporation
formerly Gold Fields American Corporation
230 Park Avenue
New York, NY 10169

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Eileen S. Silvers
Paul, Weiss, Rifkind, Wharton & Garrison
34 Park Ave.
New York, NY 10154
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of GOLD FIELDS MINING CORPORATION, formerly GOLD FIELDS AMERICAN CORPORATION for Redetermination of a Deficiency or for Refund of Franchise Tax on Business Corporations under Article 9-A of the Tax Law for the Fiscal Years Ended June 30, 1969, June 30, 1970, June 30, 1971, June 30, 1972, June 30, 1973 and June 30, 1975.	DECISION

Petitioner, Gold Fields Mining Corporation, formerly Gold Fields American Corporation, 280 Park Avenue, New York, New York 10017, filed a petition for redetermination of a deficiency or for refund of franchise tax on business corporations under Article 9-A of the Tax Law for the fiscal years ended June 30, 1969, June 30, 1970, June 30, 1971, June 30, 1972, June 30, 1973 and June 30, 1975 (File Nos. 35272 and 35718).

A formal hearing was held before Doris Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 19, 1984 at 10:30 A.M., with all briefs submitted by August 3, 1984. Petitioner appeared by Paul, Weiss, Rifkind, Wharton & Garrison (Eileen S. Silvers, Esq. and Mildred Ellen Robb, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether, for each of the fiscal years 1969 through 1972, petitioner was entitled to allocate its business income pursuant to Tax Law section 210.3(a).

II. Whether, for each of the fiscal years 1969 through 1972, petitioner was entitled to exclude from entire net income all income and gain derived from its Tennessee operations.

III. Whether petitioner was entitled to exclude from entire net income the gain realized in fiscal years 1972, 1973 and 1975 on the sale in 1972 of the assets utilized in its Tennessee operations.

IV. Whether the due process clause of the Fourteenth Amendment to the United States Constitution prevents New York from imposing franchise tax on the income arising from petitioner's operations in Tennessee and petitioner's gain on the sale of assets used in its Tennessee operations.

V. Whether the commerce clause of the United States Constitution prevents New York from imposing franchise tax on the income arising from petitioner's operations in Tennessee and petitioner's gain on the sale of assets used in its Tennessee operations.

VI. Whether certain notes and obligations held by petitioner in fiscal years 1972, 1973 and 1975 constituted investment capital within the meaning of Tax Law section 208.5.

FINDINGS OF FACT

1. The Audit Division issued to petitioner, Gold Fields Mining Corporation, formerly Gold Fields American Corporation, five notices of deficiency, asserting additional franchise tax due under Article 9-A of the Tax Law for the fiscal year ended June 30, 1969 through the fiscal year ended June 30, 1973, scheduled as follows:

FISCAL YEAR ENDED	DATE OF NOTICE OF DEFICIENCY	TAX	INTEREST	TOTAL
6/30/69	02/15/73	$ 20,487.70	$ 4,199.98	$ 24,687.68
6/30/70	11/15/73	12,871.00	2,445.50	15,316.50
6/30/71	11/15/73	16,255.00	2,113.16	18,368.16
6/30/72	10/28/81	120,872.00	70,202.00	191,074.00
6/30/73	10/28/81	20,975.00	13,283.00	34,258.00
		$191,460.70	$92,243.64	$283,704.34

Petitioner contests the deficiencies except to the extent noted below:

FISCAL YEAR	PORTION OF DEFICIENCY NOT CONTESTED
1969	$866.20
1970	$112.00
1971	$ 97.00

Petitioner claims refunds of franchise tax for fiscal years 1972, 1973 and 1975 in the respective amounts of $27,702.00, $19,879.00, and $8,731.00, plus interest.

2. Prior to January 1, 1968, Gold Fields American Corporation ("Gold Fields") was a Delaware corporation wholly-owned by Gold Fields Mining & Industrial Ltd. ("GFM&I"), a United Kingdom corporation that was not engaged in a United States trade or business. From the date of its incorporation on October 27, 1962 to January 1, 1968, Gold Fields maintained its sole office in New York City where it was engaged exclusively in the furnishing of management services to GFM&I.

3. Prior to January 1, 1968, petitioner, then known as Tri-State Zinc, Inc., was a Delaware corporation wholly-owned by GFM&I. From 1926 until January 1, 1968, petitioner was engaged in the business of mining, milling and smelting zinc ores, primarily in Virginia and Tennessee.

4. Effective as of January 1, 1968, Gold Fields was merged with and into petitioner. Petitioner was the surviving corporation under the merger. Petitioner changed its name to Gold Fields American Corporation following the merger.

5. Pursuant to an agreement dated June 1, 1960 (the "Original Agreement"), petitioner entered into a contractual arrangement with the American Zinc Company of Tennessee (which, after December 31, 1966, was known as the American Zinc Company ["American Zinc"]) to drill for, develop, mine and mill zinc ores

in Jefferson County, Tennessee. This arrangement was referred to by the parties as the New Market Zinc Company, or the New Market Mine ("New Market").

6. New Market was not organized as a partnership (or any other entity) under Tennessee law or under the law of any other state. Petitioner was advised by its Tennessee counsel, Franz, McConnell & Seymour, that, under Tennessee law, a corporation cannot enter into a partnership because the existence of such partnership would interfere with the management of the corporation by its regularly appointed officers and would hinder the activities of the stockholders because the corporation would be required to surrender certain of its power and authority to new agents over which it had no control. Petitioner was further advised by Tennessee counsel that "title to properties used in the joint venture must, of necessity, be held by the contracting parties separately or as tenants in common."

7. The Original Agreement was amended by letter agreements dated May 9, 1961, August 31, 1965 and June 30, 1967, and subsequently superseded by an agreement dated as of July 1, 1970 (the "1970 Agreement").

8. Because of the restrictions under Tennessee law described above, all real and personal property employed in the New Market operation continued to be owned individually by petitioner and/or American Zinc throughout the term of the arrangement. Section 3 of the Original Agreement provided as follows:

> "Title to the properties, real and personal, herein agreed to be provided, held or made available for the use and benefit of the Joint Venture, presently owned or hereafter acquired by the parties hereto, or either of them, shall be held by the respective parties in trust for the benefit of the Joint Venture and the parties hereto and shall be made available to their use, subject to the terms and provisions of this agreement, and shall not be encumbered, alienated or otherwise disposed of prior to the termination hereof except as may be agreed upon by the parties."

Pursuant to Sections 2 and 6(a)(ii) of the Original Agreement, and as confirmed in the preamble to the 1970 Agreement, petitioner constructed at its own expense a concentrating plant for the processing of zinc ores near New Market, Tennessee (the "Concentrating Plant") on lands owned by American Zinc and held for the use of the New Market operation pursuant to Section 3 of the Original Agreement. Pursuant to Section 6(a)(iii) of the Original Agreement, and as confirmed in the preamble to the 1970 Agreement, petitioner also provided for the use of the New Market operation other facilities such as electric power lines and machinery and equipment needed to supply or dispose of water and to store waste rock (together with the Concentrating Plant, the "Mining Facilities").

9. Both prior to and during the years at issue, petitioner consistently treated the Mining Facilities as its own property for purposes of the Tennessee corporation franchise and excise taxes.

10. During 1969 and 1970, the Concentrating Plant was not utilized exclusively in the operations of New Market, because it had capacity beyond that required for processing New Market ores. Therefore, pursuant to Section 7 of the Original Agreement, American Zinc shipped its own zinc ore to the Concentrating Plant for custom milling. Petitioner individually received fees for such custom milling pursuant to Section 7 of the Original Agreement.

11. During the fiscal years 1969 through 1972, petitioner's distributive share of the income (loss) of New Market for federal income tax purposes was as follows:

FISCAL YEAR	AMOUNT OF INCOME (LOSS)	CHARACTER OF INCOME (LOSS)
1969	$ 777,221	ordinary
1970	(1,450,227)	ordinary
1971	74,758	ordinary
1972	1,592,996	ordinary
	1,419,508	IRC §1231

12. Petitioner did not qualify to do business in New York prior to January 1, 1968, the date it merged with Gold Fields. During the fiscal years at issue, petitioner's only activities in New York were the management services operations for GFM&I previously conducted by Gold Fields; neither petitioner nor New Market conducted any mining activities in New York. The employees of petitioner's New York operation were distinct from its employees engaged in the New Market operation, and no employees of the New York operation performed services for New Market or vice-versa.

13. In 1972, petitioner and American Zinc sold all of the assets of New Market to the American Smelting and Refining Company ("ASARCO") pursuant to an installment sale agreement (the "Installment Sale Agreement") among ASARCO, petitioner and American Zinc for payments of cash and notes, together with contingent rights to receive additional payments based upon the amount of zinc mined by ASARCO at the New Market location and the prevailing price of zinc. New Market was not a party to the Installment Sale Agreement and all payments thereunder were to be made directly to petitioner and American Zinc.

14. In the fiscal years 1972, 1973 and 1975, petitioner recognized the following amounts of gain attributable to payments under the Installment Sale Agreement for federal income tax purposes:

FISCAL YEAR	AMOUNT OF GAIN
1972	$1,419,508
1973	215,981
1975	1,270,772

15. (a) For fiscal year 1969, petitioner reported New York franchise tax liability of $1,276 based on allocated business and investment capital. Petitioner's business allocation percentage of 9.29 percent was computed as shown below.

	NEW YORK	EVERYWHERE
PROPERTY		
Average value of real estate rented	$329,160	$ 329,160
Average value of other tangible personal property owned	18,899	4,403,877
Total	$348,059	$4,733.037
Percentage in NY		7.35
RECEIPTS		
Sales of tangible personal property where shipments made to points within NY	-	X
All sales of tangible personal property	X	$3,165,490
Services performed	$103,850	103,850
Royalties	-	816
Other business receipts	426,008	430,608
Total	$529,858	$3,700,764
Percentage in NY		14.31
PAYROLL		
Wages, salaries and other compensation of employees	$ 39,670	$ 637,699
Percentage in NY		6.22
BUSINESS ALLOCATION PERCENTAGE		9.29

The business allocation percentage as computed by petitioner reflected the allocation to Tennessee of (i) petitioner's 60 percent share of the New Market gross receipts and payroll, and (ii) all of petitioner's real and tangible personal property (net of accumulated depreciation, depletion and amortization), including the Mining Facilities, utilized in its mining activities.

(b) In its Statement of Audit Adjustment dated February 15, 1973, the Audit Division disallowed petitioner's claimed business allocation percentage on the following ground:

> "The New York business allocation percentage is disallowed as there is no provision in the New York State Tax Law to include the investment in a joint venture in the business allocation percentage computation. Although the net distributive share may be included as other business receipts, the Corporation has no regular place of business outside of New York."

The Audit Division recomputed petitioner's franchise tax liability on the basis of entire net income. Such recomputation resulted in franchise tax liability in the amount of $21,763.70, for an asserted deficiency of $20,487.70.

(c) During fiscal year 1969, petitioner derived gross revenues of $104,000 (or less than 2 percent of its total gross revenues) from its New York management service activities and gross revenues of $5,276,000 from its share of the New Market operations. Petitioner derived a net profit of $777,000 from the New Market operation. Petitioner paid Tennessee franchise taxes in that year of $7,954 based on a 99 percent allocation factor.

16. (a) For fiscal year 1970, petitioner reported New York franchise tax liability of $4,559 based on allocated business and investment capital. Petitioner's business allocation percentage of 26 percent was computed as shown below.

	NEW YORK	EVERYWHERE
PROPERTY		
Average value of real estate rented	$262,760	$ 262,760
Average value of other tangible personal property owned	15,807	4,460,261
Total	$278,567	$4,723,021
Percentage in NY		5.90
RECEIPTS		
Sales of tangible personal property where shipments made to points within NY	-	X
All sales of tangible personal property	X	$ 452,959
Services performed	$140,350	140,350
Other business receipts	740,003	745,509
Total	$880,353	$1,338,818
Percentage in NY		65.75
PAYROLL		
Wages, salaries and other compensation of employees	$ 41,948	$ 660,868
Percentage in NY		6.35
BUSINESS ALLOCATION PERCENTAGE		26.00

(b) In its Statement of Audit Adjustment dated February 15, 1973, the Audit Division disallowed the claimed business allocation percentage "for the reasons explained in the statement of audit adjustment for the period ended June 30, 1969." The Audit Division recomputed petitioner's franchise tax liability on the basis of business and investment capital. Such recomputation resulted in franchise tax liability in the amount of $17,393, for an additional tax liability of $12,871.

(c) Petitioner paid Tennessee franchise taxes of $7,909 in fiscal year 1970 based upon a 99 percent allocation factor.

17. (a) For the fiscal year 1971, petitioner reported New York franchise tax liability of $2,513 based on allocated business and investment capital. Petitioner's business allocation percentage of 16.1 percent was computed as shown below.

	NEW YORK	EVERYWHERE
PROPERTY		
Average value of real estate rented	$264,048	$ 264,048
Average value of other tangible personal property owned	10,538	4,466,383
Total	$274,586	$4,730,431
Percentage in NY		5.80
RECEIPTS		
Sales of tangible personal property where shipments made to points within NY	-	X
All sales of tangible personal property	X	$1,602,815
Services performed	$174,717	174,717
Other business receipts	769,675	770,797
Total	$934,392	$2,548,329
Percentage in NY		36.70
PAYROLL		
Wages, salaries and other compensation of employees	$ 39,860	$ 685,816
Percentage in NY		5.81*
BUSINESS ALLOCATION PERCENTAGE		16.10

* A mathematical error on the report has been corrected.

(b) In its Statement of Audit Adjustment dated February 15, 1973, the Audit Division disallowed the claimed business allocation percentage "for the reasons explained on the statement of audit adjustment for the period ended June 30, 1969." The Audit Division recomputed petitioner's franchise tax liability on the basis of business capital. Such recomputation resulted in franchise tax liability in the amount of $19,893, for an additional tax liability of $16,255.

(c) Petitioner paid Tennessee franchise taxes of $8,004 in fiscal year 1971 based upon a 99 percent allocation factor, and a Tennessee excise tax of $3,840.

18. (a) For the fiscal year 1972, on its original return, petitioner reported New York franchise tax liability of $28,471 (plus a 25 percent surcharge) based on allocated entire net income. Petitioner included in such entire net income both investment income and the gain resulting from the sale in calendar year 1971 of the New Market assets, and allocated such entire net income on the basis of a business allocation percentage of 18.87 percent, computed as shown below.

	NEW YORK	EVERYWHERE
PROPERTY		
Average value of real estate rented	$239,664	$ 239,664
Average value of other tangible personal property owned	9,263	2,237,185
Total	$248,927	$2,476,849
Percentage in NY		10.05
RECEIPTS		
Sales of tangible personal property where shipments made to points within NY	-	X
All sales of tangible personal property	X	$1,270,499
Services performed	$154,775	154,775
Other business receipts	667,506	668,760
Total	$822,281	$2,094,034
Percentage in NY		39.27

PAYROLL		
Wages, salaries and other compensation of employees	$ 23,697	$ 325,497
Percentage in NY		7.28
BUSINESS ALLOCATION PERCENTAGE		18.87

(b) Petitioner subsequently filed an amended franchise tax report dated September 12, 1975 (the "Amended Report") and two claims for refund with respect to fiscal year 1972, one in the amount of $19,753 dated July 24, 1973, and the other in the amount of $7,949 dated September 12, 1975. The Amended Report and the claims for refund were based on (i) the exclusion from its entire net income of the gain derived from the sale of the New Market assets, and (ii) the application of former regulation section 4.40 which permitted the allocation of investment income and investment capital on the basis of the taxpayer's investment allocation percentage rather than the business allocation percentage. On the Amended Report, petitioner claimed an investment allocation percentage of 0.6173 percent and reported investment income of $661,098 attributable to interest received on certificates of deposit and investments in the General Motors Acceptance Corporation, Azcon Corporation, Consolidated Gold Fields, Ltd., Fastnet Inc. and the American Smelting and Refining Co. The Amended Report showed total tax liability of $769 based on allocated capital.

(c) In its Statement of Audit Adjustment dated October 28, 1981, the Audit Division disallowed the business allocation percentage claimed on petitioner's original franchise tax report for fiscal year 1972, recomputed the investment income claimed thereon, recomputed the investment allocation percentage claimed on the Amended Report, and recomputed petitioner's franchise tax liability on the basis of entire net income. Petitioner's franchise tax liability as so recomputed was $149,343, for an additional tax liability of $120,872 (over the amount reported on the original return).

The Audit Division's reduction of petitioner's investment income from $661,098 to $19,747 resulted from the exclusion from investment income of amounts denominated on the Amended Report as "Azcon Corporation Interest", "Consolidated Gold Fields Ltd. Interest" and "American Smelting and Refining Co. Interest". The reason stated for the exclusion of these amounts was as follows:

> "Advances to affiliates are not 'other securities' as defined by Sec. 3.31(c) ruling of the State Tax Commission, 3/14/62, but they are business capital per TSB-M-80(7)(c) and M-78(6)c REV. Accordingly, income derived from this source may not be allocated at the investment allocation percentage."

The Audit Division's adjustment of petitioner's investment allocation percentage resulted from the computation of that item without regard to petitioner's investments in Azcon Corp., Buell Engineering Co. and Consolidated Gold Fields Ltd. These investments were excluded under the rationale set forth above for exclusion of certain items of investment income.

(d) During fiscal year 1972, petitioner derived gross revenue from its management service activities in New York in the amount of $154,775, resulting in net income from such operation of $96,865.

(e) Petitioner paid Tennessee franchise taxes of $4,195 based upon an allocation factor of 50 percent and Tennessee excise tax of $138,863 for fiscal year 1972. In computing net income for Tennessee excise tax purposes, petitioner included therein capital gain in the amount of $3,101,612.

19. (a) For fiscal year 1973, petitioner reported New York franchise tax liability of $20,004 based on entire net income, plus an "Additional Charge" of $5,001. Petitioner allocated 100 percent of its net income to New York, but excluded from entire net income $215,981 of installment income derived from the sale in calendar year 1971 of the New Market assets.

(b) In its Statement of Audit Adjustment dated October 28, 1981, the Audit Division recomputed petitioner's franchise tax liability for fiscal year 1973 by including in entire net income the $215,981 of installment gain that had been excluded by petitioner. The Audit Division allocated 100 percent of entire net income as so recomputed to New York and recomputed petitioner's franchise tax liability on the basis of entire net income. Such recomputation resulted in franchise tax liability in the amount of $39,442.

(c) Petitioner claims a refund for fiscal year 1973 in the amount of $19,879 based on the application of former regulation section 4.40.

20. (a) For fiscal year 1975, petitioner reported New York franchise tax liability of $125 based on the statutory minimum liability. In computing entire net income, petitioner excluded $1,270,772 of installment income derived from the sale in calendar year 1971 of the New Market assets and reported a net loss for the year. Petitioner's franchise tax report showed prepayments and credits totaling $8,856. Petitioner therefore initially requested a refund in the amount of $8,731, but requested at a later date that $444 of this amount be applied to 1976. The net refund claimed was thus $8,287.

(c) The Audit Division denied in full petitioner's claim for refund with respect to fiscal year 1975 by a letter dated October 28, 1981. The Audit Division asserted that the $1,270,772 of installment gain should have been included in entire net income. The Audit Division also stated:

> "The tax due on capital based on the exclusion of 'advances to affiliates' per our Statement of Audit Adjustment for the period ended June 30, 1972 would have generated a tax due of $10,082 in lieu of the $125 reported."

Petitioner's franchise tax liability as recomputed by the Audit Division on the basis of revised net income was $16,642.

21. Prior to 1974, petitioner owned none of the stock of Azcon Corp.; during 1974, petitioner acquired 13.42 percent of the stock of such corporation.

22. During 1972, 1973 and 1975, petitioner owned none of the stock of Buell Engineering Company, Inc.

23. During 1972, 1973 and 1975, petitioner owned none of the stock of Consolidated Gold Fields, Ltd.

24. During 1972, 1973 and 1975, petitioner owned none of the stock of ASARCO.

25. Petitioner submitted 62 proposed findings of fact, all of which have been adopted with the exception of proposed findings 17, 19, 21, 22 and 23 which are not established by the evidence.

CONCLUSIONS OF LAW

A. That during the fiscal years at issue, Tax Law section 210.3(a)(4) required that any corporation, which did not maintain a regular place of business outside New York, allocate all its business income and capital to this state; the regulations promulgated under said provision and effective for the period under consideration defined a regular place of business, in relevant part, as "any bona fide office (other than a statutory office), factory, warehouse, or other space which is regularly used by the taxpayer in carrying on its business". (Former 20 NYCRR 4.11[b].)

During the years 1969, 1970, 1971 and 1972, petitioner owned and operated a zinc ore concentrating plant and other mining facilities in Tennessee, thereby entitling it to allocate its income and capital within and without this state during those years. At such facilities, petitioner processed ore for the benefit of the New Market joint venture and also, separate and apart from the venture, performed custom milling for American Zinc. It is notable that

petitioner calculated and paid Tennessee franchise tax during fiscal years 1969, 1970 and 1971 based on a 99 percent allocation factor, and during fiscal year 1972 based on a 50 percent factor.

Because New Market constituted a joint venture, it does not follow ipso facto that petitioner is unable to treat its Tennessee operations as its own place of business. Petitioner held the plant and equipment in its own name. Further, the Court of Appeals recognized, in Matter of Fischbach and Moore, Inc. v. State Tax Comm. (36 N.Y.2d 605), that joint venture income is to be included in the total amount of corporate income which is subject to allocation. (See also 20 NYCRR 4-6.5, effective April 1, 1981, which requires a taxpayer which is a partner in a partnership to "allocate its proportionate part of the partnership's property, receipts and payroll within and without New York State in computing its business allocation percentage." The term "partnership" is defined to include joint ventures and other similar unincorporated entities.)

With regard to the remaining years for which petitioner claimed an allocation, fiscal years 1973 and 1975, we are unable to conclude on this record that petitioner maintained a regular place of business outside New York.

B. That for any fiscal year at issue for which petitioner has been denied an allocation of its income and capital, petitioner requests the Commission to exercise the discretion granted by section 210.8 to exclude from petitioner's entire net income the income derived from its Tennessee operations and from the sale of its Tennessee assets. Petitioner also seeks to exclude from its fiscal year 1972, 1973 and 1975 entire net income, gain realized on the sale of its Tennessee assets, citing People ex rel. Sheraton Bldgs. v. Tax Comm. of State of N.Y., 15 A.D.2d 142, affd. mem., 13 N.Y.2d 802.

Petitioner's reliance upon section 210.8 is misplaced. Said subsection authorizes the Commission, in its discretion, to adjust a corporate taxpayer's business or investment allocation percentage to properly reflect its activity, business, income or capital within this state.

During fiscal years 1973 and 1975, petitioner evidently realized little, if any, income from mining activities in Tennessee and did not file Tennessee returns. No inequity arises from the inclusion of any small amount of mining income and the installment gains in entire net income where petitioner maintained a regular place of business only within this state, and where for earlier years petitioner consistently included the receipts and expenses attributable to its Tennessee operations in computing New York entire net income and consistently included the property, receipts and wages pertaining thereto in the business allocation formula.

C. That the constitutionality of the New York statutes and of the application thereof in particular instances is presumed at the administrative level of the Tax Commission.

D. That the final issue before us is whether petitioner's advances to Azcon Corporation, Consolidated Gold Fields, Ltd., and American Smelting and Refining Co. constituted investment capital, so that interest received thereon constituted investment income. Tax Law section 208.5 furnishes the definition of the term "investment capital" for purposes of Article 9-A as follows:

> "The term 'investment capital' means investments in stocks, bonds and other securities, corporate and governmental, not held for sale to customers in the regular course of business, exclusive of subsidiary capital and stock issued by the taxpayer, provided, however, that, in the discretion of the tax commission, there shall be deducted from investment capital any liabilities payable by their terms on demand or within one year from the date incurred, other than loans or advances outstanding for more than a year as of any date during the year covered by the report, which are attributable to investment capital...".

Among the factors to be considered in determining whether particular instruments are securities within the meaning of the above-quoted provision are the following: (1) whether they are of the type customarily sold on the open market or on a recognized exchange; (2) whether they are designed as a means of investment; (3) whether they are commonly recognized by investors as securities; (4) whether they are issued for the purpose of financing corporate enterprises and providing a distribution of the rights in or obligations of such enterprises; and (5) whether, once issued, they are traded as investments. Former 20 NYCRR 3.31(a) and (c); Matter of Avon Products, Inc. v. State Tax Comm., 90 A.D.2d 393.

There is little basis in the record to conclude that the advances in question possessed any of the aforementioned characteristics of securities. The Audit Division thus properly treated petitioner's interest income therefrom as business income.

E. That the petition of Gold Fields Mining Corporation, formerly Gold Fields American Corporation, is granted to the extent indicated in Conclusion of Law "A"; the notices of deficiency for fiscal years 1969, 1970 and 1971 (except as agreed to by petitioner) are cancelled; the Notice of Deficiency for fiscal year 1972 is to be modified in accordance with Conclusion of Law "A" but is otherwise sustained; the Notice of Deficiency for fiscal year 1973 is sustained; and petitioner's claims for refund are denied.

DATED: Albany, New York
MAR 14 1985

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER