New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-00(5)I
Income Tax
September 6, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. I990226B

On February 26, 1999, a Petition for Advisory Opinion was received from Ronald van der Horst, 166 La Pier, Glencoe, Illinois 60022.

The issue raised by Petitioner, Ronald van der Horst, is whether the gain from the sale of intangible assets owned by an Illinois partnership which conducts business both within and without New York State is taxable as New York source income for a partner who is a nonresident of New York.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Flashner Medical Partnership ("Partnership"), an Illinois partnership, performed administrative, management and medical oversight services for medical offices in New York, Illinois, Texas, Washington D.C., Virginia and Maryland. The medical offices had physicians on staff to provide the medical services. All administrative, management and medical oversight services were performed by Partnership in Illinois. These administrative, management and medical oversight services were performed by Partnership for 65 medical facilities. This included 13 medical facilities located in New York State that Partnership owned 100 percent, and 52 other medical facilities located outside of New York owned by Avanti Health Systems Inc. ("Avanti"), in which Partnership had acquired a 20 percent interest.

Partnership paid $1,653,425 in salaries to Illinois employees in 1994. Additionally, in 1994, Partnership paid rent for premises outside of New York State in the amount of $95,415.

Petitioner, a resident of Illinois and a partner in Partnership, was Medical Director of all medical offices and provided the medical oversight services for the partnership. Petitioner performed those services in Illinois.

Partnership, in 1994, was the owner of 20 percent of the outstanding common shares of Avanti which Petitioner states were held for investment purposes. Partnership performed its administrative, management and medical oversight services for Avanti medical facilities for which Partnership received a management fee. Partnership acquired the Avanti stock by receiving four percent of Avanti stock for each year it provided the oversight services. Partnership also had a share resource agreement with Avanti whereby it received an allocation of administrative expenses. Avanti did not have any offices in New York State.

In 1994, Partnership sold all of its shares of the Avanti stock. It also sold the 13 medical facilities which it owned in New York.

Discussion

Section 601(e) of the Tax Law imposes a personal income tax for each taxable year on a nonresident individual's taxable income which is derived from sources in New York State. The tax is computed as if the individual were a resident, reduced by certain credits, and apportioned to New York by the New York source fraction, the numerator of which is the individual's New York source income and the denominator of which is the individual's New York adjusted gross income.

Section 631(a) of the Tax Law provides that the New York source income of a nonresident individual includes the net amount of items of income, gain, loss and deduction entering into the individual's federal adjusted gross income derived from or connected with New York sources, including the individual's distributive share of partnership income, gain, loss and deduction, determined under section 632 of the Tax Law.

Section 632(a)(1) of the Tax Law provides that "[i]n determining New York source income of a nonresident partner of any partnership, there shall be included only the portion derived from or connected with New York sources of such partner's distributive share of items of partnership income, gain, loss and deduction entering into the individual's federal adjusted gross income. The determination of such portion shall be consistent with section 631 of the Tax Law.

Section 631(b)(1)(B) of the Tax Law provides that items of income, gain, loss and deduction derived from or connected with New York sources include those items attributable to a business, trade, profession or occupation carried on in New York State.

Section 631(b)(2) of the Tax Law provides that income from intangible personal property, including annuities, dividends, interest, and gains from the disposition of intangible personal property, shall constitute income derived from New York sources only to the extent that such income is from property employed in a business, trade, profession, or occupation carried on in New York State.

In Richard F and Diane L Horowitz, Dec Tax App Trib, July 17, 1997, TSB-D-97(43)I, a nonresident partner's share of the income derived from his New York law firm's investments in four tax shelter partnerships was subject to New York State personal income tax because the investments were made in the name of the firm, the firm had no offices outside New York and all of the firm's income was New York source income. Although the partner contended that the investments were made in the law firm's name for convenience purposes only and were, in reality, investments made by a group of 17 individuals who were partners in the firm, there was no documentary evidence indicating that the investments constituted anything other than ordinary income of the firm.

In this case, Petitioner, a nonresident of New York, is a partner in Partnership which, unlike Horowitz, supra, conducted business within and without New York for taxable year 1994. Partnership was in the business of providing medical services at the 65 medical facility locations in several states. The medical services were provided by physicians on site at the 65 locations. Partnership also performed administrative, management and medical oversight services for those medical facilities. All Partnership administrative, management and medical oversight services were performed in Illinois. Partnership received income from the provision of the medical services. Partnership also received fees for the performance of its administrative, management and medical oversight services for the Avanti medical facilities, which were located outside of New York.

The gain from the sale of the Avanti stock was included in the items of income, gain, loss and deduction of Partnership for 1994. Since Partnership carried on a business, trade, profession or occupation both within and without New York during 1994, pursuant to section 132.15 of the Personal Income Tax Regulations ("Regulations"), Partnership's items of income, gain, loss and deduction attributable to such business, trade, profession or occupation must be apportioned and allocated to New York on a fair and equitable basis in accordance with approved methods of accounting. Section 132.15(b) and (c) of the Regulations provide:

> (b) If the books of the business are so kept as regularly to disclose, to the satisfaction of the [Commissioner of Taxation and Finance], the proportion of the net amount of the items of income, gain, loss and deduction derived from or connected with New York State sources, the New York State nonresident personal income tax return of the taxpayer must disclose the total amount of such items, the net amount of such items allocated to New York State, and the basis upon which such allocation is made.
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> (c) If the books and records of the business do not disclose, to the satisfaction of the [Commissioner of Taxation and Finance] , the proportion of the net amount of the items of income, gain, loss and deduction attributable to the activities of the business carried on in New York State, such proportion will, except as provided in section 132.16 of the Regulations and section 112.7(b) of the Regulations, be determined by multiplying (1) the net amount of the items of income, gain, loss and deduction of the business by (2) the average of the percentages described in section 132.15(d) through (f) of the Regulations.

The determination of whether the gain, or a portion thereof, on the sale of the Avanti stock is income from property that was employed in a business, trade, profession or occupation carried in New York pursuant to section 631(b)(1)(B) and (2) of the Tax Law, is a factual matter that is not susceptible of determination in an Advisory Opinion. An Advisory Opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to a "a specified set of facts. " Tax Law, § 171.Twenty-fourth; 20 NYCRR 2376.1(a). However, the mere ownership of the Avanti stock by

Partnership is not conclusive that such stock was employed in a business, trade, profession or occupation carried on in New York by Partnership. Inasmuch as the question presented here arises within the context of an audit, the necessary factual determination will be made within such context, in accordance with the principles outlined above.

Also, it is not within the scope of this advisory opinion to determine whether the method used to allocate Partnership's items of income, gain, loss and deduction attributable to a business, trade, profession or occupation carried on in New York State, under section 132.15(b) of the Regulations, results in a fair and equitable attribution to the activities of such business, trade, profession or occupation carried on in New York State. Such determination is a factual determination that would have to be made within the context of the audit.

DATED: September 6, 2000

/s/
John W. Bartlett
Deputy Director
Technical Services Division

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