

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

TSB-A-07(1)I
Income Tax
February 7, 2007

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I061117A

On November 17, 2006, a Petition for Advisory Opinion was received from Jamestown 16, L.P., c/o Russell D. Levitt and Robert Zonenshein, 3625 Cumberland Blvd., 12th Floor, Atlanta, Georgia 30339.

The issue raised by Petitioner, Jamestown 16, L.P., is whether a gain from the sale by Petitioner of an interest in a lower-tier partnership constitutes gain from the sale of intangible personal property employed in a trade or business carried on in New York State.

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

Petitioner is a Georgia limited partnership (upper-tier partnership) formed for the purpose of acquiring, owning, operating, and selling three retail real estate investments described below. Petitioner has never been a dealer in partnership interests. The general partner of Petitioner is Jamestown, a Georgia general partnership. Jamestown has a 3% interest in Petitioner. The remaining 97% interest is held by various limited partners, virtually all of whom are residents of Germany.

On September 27, 1996, Petitioner became a 49.9% limited partner in 589 Associates, LP (lower-tier partnership). The main asset of 589 Associates, LP (589 LP) is a multi-tenant office building located at 589 Fifth Avenue, New York, New York 10017. The operations of 589 LP were governed by an Amended and Restated Limited Partnership Agreement (the Agreement), dated September 27, 1996. Section 8.1 of the Agreement provides that the business affairs and properties of the partnership shall be managed by the general partner and sets forth the specific powers of the general partner. The Agreement defines the general partner as being a certain individual resident of New York who is unrelated to Petitioner. The Agreement further provides that the property manager is a certain corporation unrelated to Petitioner. On March 1, 2006, Petitioner sold its interest in 589 LP to an unrelated company. The sale resulted in a gain for Petitioner and its partners.

In addition to its interest in 589 LP, Petitioner directly owned and operated a retail power center in San Antonio, Texas (from December 11, 1996, until December 15, 2003) and a retail power center in Seattle, Washington (from January 31, 1997, until December 30, 2003). Petitioner has been directly and actively involved in those activities.

Petitioner has not employed its partnership holding in 589 LP in any New York business activity (e.g., not as loan collateral or otherwise).

While engaging in these three activities, Petitioner used separate accounting for these three activities because this most accurately reflected the income and expenses attributable to each activity. Petitioner reported these activities separately on Form 8825 for federal income tax purposes and on the applicable state tax returns. Further, Petitioner reported gains (or losses) from the sales of the retail power center properties using separate accounting in the states in which the real property was situated.

Petitioner has been filing New York State partnership returns, Form IT-204.

Applicable law and regulations

Section 617(b) of the Tax Law provides, in part:

Character of items. Each item of partnership . . . income, gain, loss, or deduction shall have the same character for a partner . . . under this article as for federal income tax purposes. Where an item is not characterized for federal income tax purposes, it shall have the same character for a partner . . . as if realized directly from the source from which realized by the partnership . . . or incurred in the same manner as incurred by the partnership

Section 631 of the Tax Law provides, in part:

(a) General. The New York source income of a nonresident individual shall be the sum of the following: (1) The net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources, including: (A) his distributive share of partnership income, gain, loss and deduction, determined under section six hundred thirty-two, and

* * *

(2) The portion of the modifications described in subsections (b) and (c) of section six hundred twelve which relate to income derived from New York sources (including any modifications attributable to him as a partner. . .).

(b) Income and deductions from New York sources.

(1) Items of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to:

* * *

(B) a business, trade, profession or occupation carried on in this state; or

* * *

(2) 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 this state.

...

Section 632 of the Tax Law pertains, in part, to nonresident partners and provides, in part:

(a) Portion derived from New York sources.

(1) In 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 his federal adjusted gross income, as such portion shall be determined under regulations of the [Commissioner of Taxation and Finance] consistent with the applicable rules of section six hundred thirty-one.

* * *

(e) Application of rules for resident partners . . . to nonresident partners

(1) A nonresident partner's distributive share . . . of items shall be determined under subsection (a) of section six hundred seventeen.

(2) The character of partnership . . . items for a nonresident partner . . . shall be determined under subsection (b) of section six hundred seventeen.

Section 132.5(a) of the Personal Income Tax Regulations (Regulations) provides:

Items of income, gain, loss and deduction attributable to intangible personal property of a nonresident individual, including annuities, dividends, interest, and gains and losses from the disposition of intangible personal property, do not constitute items of income, gain, loss and deduction derived from or connected with New York State sources, except to the extent attributable to property employed in a business, trade, profession or occupation carried on in New York State. (See also section 3 of article XVI of the New York State Constitution.)

Section 137.6 of the Regulations provides:

Tiered partnerships. Where a nonresident partner is a member in a partnership, and such partnership (hereinafter referred to as the "upper tier partnership") is a partner in another partnership (hereinafter referred to as the "lower tier partnership"), the source and character of such nonresident partner's distributive share of each partnership item of the upper tier partnership which is attributable to the lower tier partnership retains the source and character determined at the level of the lower tier partnership using the provisions of section 137.1 and 137.5 of this Part. Such source and character are not changed by reason of the fact that such item flows through the upper tier partnership to such nonresident partner.

Opinion

Section 632(a)(1) of the Tax Law provides that the New York source income of a nonresident partner of any partnership includes 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 partner's federal adjusted gross income. The determination of such portion must be consistent with section 631 of the Tax Law.

Pursuant to section 631(b) of the Tax Law, 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.

A gain or loss (whether treated as a capital gain or loss or ordinary gain or loss for federal income tax purposes) from the sale of an interest in a New York partnership, except in certain situations not present here, does not constitute gain or loss derived from or connected with New York sources and is not includible as New York source income. (See Technical Services Bureau Memorandum entitled *New York Tax Treatment of Gains and Losses from the Sale by a Nonresident or Part-Year Resident of an Interest in a New York Partnership*, August 21, 1992, TSB-M-92-(2)I.)

In *McDermott, Will & Emery*, Adv Op Comm T&F, October 25, 2004, TSB-A-04(6)I, it was held that the nonresident partners' distributive shares of partnership income of an upper-tier partnership attributable to an investment in a lower-tier partnership that trades in intangible personal property solely for its own account was not New York source income under section 631(b)(2) of the Tax Law. The income attributable to the lower-tier partnership did not change its character despite the existence of a tiered partnership where the partnership's income was funneled through the upper-tier partnership before its ultimate distribution or deemed distribution.

In this case, Petitioner has not employed its partnership holding in 589 LP in any New York business activity (e.g., not as loan collateral or otherwise). Petitioner did not use its investment in 589 LP in a business, trade, profession, or occupation carried on in New York. Following TSB-M- 92-(2)I, and *McDermott, Will & Emery, supra*, the fact that the gain from the

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sale of an interest in 589 LP will funnel through Petitioner will not change the result that a gain from the sale of an interest in a New York partnership, except in certain situations not present here, does not constitute gain derived from or connected with New York sources and is not includible as New York source income.

Accordingly, the portion of Petitioner's income attributable to the gain from the sale of its interest in 589 LP does not constitute income from intangible personal property employed in a trade or business carried on in New York and is not considered income from New York sources pursuant to section 631(b)(2) of the Tax Law and section 132.5 of the Regulations.

DATED: February 7, 2007

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