

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

TSB-A-89 (8) I
Income Tax
September 21, 1989

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I890621A

On June 21, 1989, a Petition for Advisory Opinion was received from Robert and Maureen Goodheart, 63 Peony Road, Levittown, New York 11756.

The issue raised is whether, for purposes of Article 22 of the Tax Law, the gain on the sale of a business in New York State and the subsequent purchase of another business would qualify for the exclusion of a capital gain under section 612(o) or the deferral of a capital gain under section 612(p). In addition, where a "Tax Incentive Certificate for New Business (DTF-90)" has not been filed, would favorable treatment under these sections be denied.

Petitioner, Robert Goodheart, acquired 15 percent of the stock of Low Surgical and Medical Supply Co. He purchased this stock between February 1983 and February 1984 and owned the stock at least four years but less than five years. At the time the stock was purchased, no "Tax Incentive Certificate for New Business (DTF-90)" was filed by Low Surgical and Medical Supply Co. and no such certificate was filed subsequent to Petitioner's purchase of the stock.

Petitioner, Robert Goodheart, and the other shareholders sold the business in February of 1988. As a result of the sale of the company stock, a federal long term gain was realized. The property sold was a capital asset under section 1221 of the Internal Revenue Code. The property sold was not property used in a trade or business and did not result in a gain under section 1231 of the Internal Revenue Code.

The buyer of Low Surgical and Medical Supply Co. is completely unrelated to any of the prior shareholders. However, the buyer asked Petitioner, Robert Goodheart, if he would be interested in working with him and in buying five percent of the stock of the new business. In February of 1988, he did buy five percent of the stock.

The new business is a new corporation formed under the Laws of New York State and is taxed as such. All of the corporation's assets are located in New York State. It should be noted, that Petitioner, Robert Goodheart, reinvested an amount in a New York business within one year after the date of sale of a business. This new business is different from the old business in the following ways: more than 80 percent of the personnel are new; new locations are now being used to do business; there was a 90 percent ownership change; all new procedures are now employed; and new professionals have been engaged.

Based on the facts, Petitioners contend that the conditions of section 612(o) and (p) of the Tax Law have been substantially met except for two substance over form issues: the business certificate filing and the similar business rule. Petitioners feel that it is not the intention of the Legislature to deny Petitioner, Robert Goodheart, favorable treatment under such section

when, in fact, the substance of the transaction was met.

Section 612(c)(20) of the Tax Law provides that the amounts that may be subtracted from federal adjusted gross income for the modifications for new business investment gains and certain new business investments are computed pursuant to section 612(o) of the Tax Law.

Section 612(o) provides for the full or partial exclusion from federal adjusted gross income for a "new business investment gain" realized upon the sale of a "new business investment". Section 612(o)(1)(C) provides that a "new business investment" means and includes certain investments issued by a new business. Section 612(o)(1)(B) specifies the requirements a corporation must meet to qualify as a new business for purposes of section 612(o). Section 612(o)(1)(B) provides that a "new business" means a corporation or partnership, organized or formed under the laws of any state, which:

- (a) adopts a plan on or after July 1, 1981 to conduct a new business and to issue new business investments,
- (b) is subject to taxation for the first time by corporation tax (Article 9, excluding Section 182), or franchise tax on business corporations (Article 9-A),
- (c) is subject to tax the first time on and after July 1, 1981 and the first taxable period includes the date of the adoption of such plan (or the first taxable period of the business enterprise begins within one year from the date of adoption of such plan),
- (d) is conducted (or will be conducted) with at least 90 percent of the assets being located and employed in New York State and 80 percent of the employees are principally employed in New York State,
- (e) files a new business certificate with the State Tax Commission within 90 days after the adoption of the plan or when the first tax return is required to be filed, whichever is sooner, and files a new business certificate with any tax return required to be filed during the first four taxable years of such new business (where no tax return is required, the certificate shall be filed annually), and
- (f) for any taxable period, must have derived more than 60 percent of its total income from sources other than royalties, rents, dividends, interest, annuities and sales or exchanges of stock or securities.

A new business does not include:

- (a) any new business in which 25 percent or more of the stock is owned by a corporation which is subject to the franchise tax on business corporations or,
- (b) a business which is substantially similar in operation and in ownership to a business entity that was previously taxable or is taxable.

Herein, Low Surgical and Medical Supply Co. does not meet the requirements of section 612(o)(1)(B). The corporation never filed a new business certificate and, in addition, Petitioners have not shown that Low Surgical and Medical Supply Co. ever met any of the requirements of section 612(o)(1)(B) qualifying the corporation as a new business. Therefore, Petitioner, Robert Goodheart's, capital gain from the sale of Low Surgical and Medical Supply Co. stock is not a gain from the sale of a new business investment, and such capital gain does not qualify for the exclusion contained in section 612(c)(20) and 612(o) of the Tax Law.

Section 612(c)(23) of the Tax Law provides that the amounts that may be subtracted from federal adjusted gross income for the modification for new business investment deferral are computed pursuant to section 612(p) of the Tax Law. The provisions of section 612(p) provide for a deferral of a reinvested amount of long term capital gain realized from the sale of a capital asset that is not a new business investment where such amount is reinvested in a "New York new business". However, such provisions are applicable only to taxable years beginning before January 1, 1988. Assuming Petitioners are calendar year taxpayers, a capital gain realized in February 1988, does not qualify for the deferral. Even if they are fiscal year taxpayers, the capital gain would not qualify for deferral in the fiscal year that includes February 1988 because they state that the "new business" is substantially similar to the old business and there is no provision in the Tax Law to allow such a similar business to be considered a "New York new business" for purposes of section 612(p) of the Tax Law. Section 612(p)(3) of the Tax Law provides that a "New York new business" is a business enterprise which among other requirements "is not substantially similar in operations ... to a business entity ... previously taxable" under Article 9-A.

Therefore the capital gain Petitioner, Robert Goodheart, realized from the sale of Low Surgical and Medical Supply Co. does not qualify for either the exclusion of a capital gain under 612(c)(20) and 612(o) or the deferral of a capital gain under 612(c)(23) and 612(p) of the Tax Law.

DATED: September 21, 1989

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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