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

TSB-A-90 (7) I
Income Tax
May 31, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. I891205B

On December 5, 1989, a Petition for Advisory Opinion was received from Bryan R. Sullivan, 200 East Randolph Drive, Suite 7750, Chicago, Illinois 60601.

The issues raised by Petitioner, Bryan R. Sullivan, are whether the receipt, by a nonresident individual, of rental income from the leasing of one or more memberships in New York commodities exchanges would constitute New York source income taxable by New York and whether the receipt of such rental income, whether or not taxable, would result in imposition of New York tax on the nonresident's profits from trading for his own account.

Client B, who is a non-resident of New York, is a commodities trader. Client B trades solely for his own account. He does not perform any services as a dealer or broker.

Client B enters into numerous trades for his own account. Over the past several years, Client B has maintained Quotron machines at his home and at an office outside New York State. He evaluated the information from the machines and other sources, and telephoned instructions for the execution of trades on the floors of New York and Chicago commodities exchanges. In the future, he anticipates appearing more frequently on the floor of the various New York exchanges to execute his own trades.

Client B has always cleared his trades through various clearing firms. In an effort to reduce his clearing expenses, he formed a Delaware corporation. The corporation is qualified to do business in New York, and has leased an office in Manhattan. Client B is the corporation's sole shareholder. The corporation has elected subchapter S status for federal income tax purposes. A similar election has not been filed for New York tax purposes.

It is anticipated that the corporation will become a clearing firm on one of four New York exchanges (i.e., New York Mercantile Exchange ("NYMEX"), Commodity Exchange, Inc. ("Comex"), New York Cotton Exchange ("NYCE"), and/or Coffee, Sugar, & Cocoa Exchange, Inc. ("CS&C")). The corporation's clearing operation will be evaluated sometime after six months. A decision will be made whether to abandon the clearing operation, to maintain the clearing operation on only one exchange, or to expand operations by applying for clearing memberships on one or more additional exchanges. It is anticipated that the corporation will clear only the trades of Client B and, possibly, his retirement plan.

The corporation also might provide clerk services to Client B and/or manage a trading account for Client B. Client B will pay fees to the corporation in the event those services are provided.

In addition to clearing fees paid to a clearing firm, a trader also pays fees to an exchange for trades executed on the exchange. An exchange member is charged lower fees than is a non-member. In order to obtain the right to these lower fees, Client B acquired memberships on NYMEX, Comex, NYCE, and CS&C at various times. Client B also acquired an extra membership on one or more of the exchanges for investment purposes.

In researching the possibility of forming a corporation to clear his trades, Client B discovered that the exchanges generally require a clearing firm to hold interests in two memberships. In order to meet that requirement, Client B acquired additional memberships. Thus, Client B now owns two memberships on each of the four exchanges, NYMEX, Comex, NYCE, and CS&C. If the corporation becomes a clearing member of an exchange, Client B will confer membership privileges on the corporation with respect to both memberships.

From time to time, Client B might be holding one extra (i.e., the corporation will not be applying to become a clearing firm) or two extra memberships (i.e., Client B will not be trading for his own account, and the corporation will not be applying to become a clearing firm). Client B's and the corporation's plans may change from time to time. In order to maximize income, Client B would like to lease extra memberships at such times as either he and/or the corporation have no immediate need to use the memberships. Client B could be leasing as many as eight memberships at a time, but it is anticipated that Client B will lease, at most, four or five memberships and it is anticipated that the leases will run from six to twelve months.

New York stock exchange seats have been characterized by the United States Supreme Court as intangible property with a business situs in New York State. New York ex rel Whitney v Graves 299 US 366(1937). The Court therein noted that:

> [w]hen we speak of a "business situs" of intangible property in the taxing State we are indulging in a metaphor. We express the idea of localization by virtue of the attributes of the intangible right in relation to the conduct of affairs at a particular place... [T]he right may be identified with a particular place because the exercise of the right is fixed exclusively or dominantly at that place... [T]he localization for the purpose of transacting business may constitute a business situs quite as clearly as the conduct of the business itself. Here, we are dealing with an intangible right of a peculiar nature. It embraces the privilege of a member to transact business on the Exchange as well as a valuable right of property which is the subject of transfer with the approval of the Exchange and may survive resignation, expulsion or death... Its very nature localizes it at the Exchange. It is a privilege which can be exercised nowhere else. The nature of that right is not altered by the failure to exercise it...

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 equal to the tax computed as if the individual were a resident, reduced by certain credits and multiplied by a fraction, the numerator of which is the individual's New York source income and the denominator of which is the individual's federal adjusted gross income.

New York source income is determined under section 631 of the Tax Law. Such section provides that:

> (a) General. The New York source income of a nonresident individual shall be the sum of 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...
>
> (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:
>
> (A) the ownership of any interest in real or tangible personal property in this state; or
>
> (B) a business, trade, profession or occupation carried on in this state;
>
> . . .
>
> (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 131.4(a)(2) of the Income Tax Regulations defines a "business, trade, profession or occupation" for purposes of section 631(b) of the Tax Law as follows:

> A "business, trade, profession or occupation" (as distinguished from personal services as an employee) is carried on within New York State by a nonresident when such nonresident occupies, has, maintains or operates desk space, an office, a shop, a store, a warehouse, a factory, an agency or other place where such nonresident's affairs are systematically and regularly carried on, notwithstanding the occasional consummation of isolated transactions without New York State. This definition is not exclusive. Business is carried on within New York State if activities within New York State in connection

> with the business are conducted in New York State with a fair measure of permanency and continuity. A taxpayer may enter into transactions for profit within New York State and yet not be engaged in a trade or business within New York State. If a taxpayer pursues an undertaking continuously as one relying on the profit therefrom for such taxpayer's income or part thereof, such taxpayer is carrying on a business or occupation.

As determined by the United States Supreme Court in Whitney, supra., Client B's stock exchange memberships have a business situs in New York and it is at such site that Client B maintains such memberships and from which his affairs are systematically and regularly carried on. Any gain on the sale of such memberships will be subject to personal income tax. (See Whitney, supra, and Matter of Welles Murphey, Sr. and Ann Murphey, Dec St Comm, January 2, 1980, TSB-H-80(12)I.)

Petitioner states that: "In order to maximize income, Client B would like to lease extra memberships at such times as either he and/or the corporation have no immediate need to use the memberships." Petitioner also states that "Client B could be leasing as many as eight memberships at a time, but it is anticipated that Client B will lease, at most, four or five memberships and it is anticipated that the leases will run from six to twelve months." Under such circumstances, Client B's leasing activities are conducted in New York State "with a fair measure of permanency and continuity" rather than from casual or incidental transactions. In addition, Client B relies "on the profit therefrom for [his] income or part thereof."

Accordingly, the leasing of the stock exchange memberships would constitute the carrying on a business or occupation in New York State and Client B's income from such leasing activities would be New York source income under section 631(b)(1)(B) of the Tax Law.

Section 631(d) of the Tax Law provides:

> (d) Purchase and sale for own account. A nonresident, other than a dealer holding property primarily for sale to customers in the ordinary course of his trade or business, shall not be deemed to carry on a business, trade, profession or occupation in this state solely by reason of the purchase and sale of property or the purchase, sale or writing of stock option contracts, or both, for his own account.

In an Advisory Opinion previously issued to Petitioner (Adv Op Comm T&F, February 1, 1989, TSB-A-89(10)I) it was determined that where an individual's sole activities in New York consisted of trading commodities for the individual's own account such activities would not be deemed to be a trade or business for New York State income tax purposes and such trading profits would not be subject to tax under section 631(d) of Article 22 of the Tax Law. However, in Kenneth S. Davidson Partners, Adv Op Comm T&F, June 28, 1988, TSB-A-88(ll)I, it was

determined that a partnership will not be considered to be purchasing and selling solely for its own account if the partnership engages in other activities such as market making activities. Such partnership would be deemed to be carrying on a trade or business within the state.

Accordingly, Client B's leasing of stock exchange memberships in New York State would constitute a business, trade, profession or occupation in New York and the income from such leasing activities would constitute New York source income under section 631(b)(1)(B) of the Tax Law. However, Client B's purchase and sale of commodities for his own account is not deemed to be a business, trade, profession or occupation in New York State and the profits from such activities are not subject to personal income tax pursuant to section 631(d) of the Tax Law.

It should be noted that the New York City Nonresident Earnings Tax would not apply to Client B's income from the leasing of stock exchange seats.

DATED: May 31, 1990

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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