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

TSB-A-96 (8) I
Income Tax
December 24, 1996

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. I960911A

On September 11, 1996, a Petition for Advisory Opinion was received from Paul A. Curtis, P.O. Box 4616, Queensbury, New York 12804.

The issue raised by Petitioner, Paul A. Curtis, is whether an individual who moves out of New York State is required, under Article 22 of the Tax Law, to accrue a gain and pay personal income tax on the potential gain from a short sale on the individual's final New York State resident return.

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

An individual sells publicly traded stock short. While the short sale is still open, the individual moves out of New York State.

Section 639(a) of Article 22 of the Tax Law states that:

> [i]f an individual changes status from resident to nonresident [the individual] shall, regardless of [the individual's] method of accounting, accrue to the period of residence any items of income, gain, loss, deduction, items of tax preference or ordinary income portion of a lump sum distribution accruing prior to the change of status, with the applicable modifications and adjustments to federal adjusted gross income, itemized deductions and items of tax preference under [sections 612, 615 and 622], if not otherwise properly includible or allowable for New York income tax purposes for such period or a prior taxable year under [the individual's] method of accounting.

Pursuant to this provision, a taxpayer who changes his or her status from resident to nonresident is required to include in the resident portion of his or her year any income which has accrued before the date of the taxpayer's change of residence regardless of whether the taxpayer is a cash basis or accrual basis taxpayer.

> Section 154.10(a) of the Personal Income Tax Regulations states that:
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> [w]here the resident status of an individual ... changes from resident to nonresident ... in computing New York taxable income ... for the resident period, such individual ... must include all items required to be included if a Federal income tax return were being filed for the same period on the accrual basis, together with any other accruals such as deferred gain on installment obligations which are not otherwise includible or deductible for Federal or New York State income tax purposes ... either for such resident period or for a prior taxable period ....

Section 1.451-1 of the Treasury Regulations provides the general rule for determining the taxable year that income is included in gross income for Federal income tax purposes, and is instructive in determining whether income has accrued

within the meaning of section 639(a) of the Tax Law. Such section 1.451-1(a) states, in part, that:

> [g]ains, profits, and income are to be included in gross income for the taxable year in which they are actually or constructively received by the taxpayer unless includible for a different year in accordance with the taxpayer's method of accounting. Under an accrual method of accounting, income is includible in gross income when all the events have occurred which fix the right to receive such income and the amount thereof can be determined with reasonable accuracy ....

In R. W. Kaszubinski, Adv Op St Tax Commn, May 1, 1984, TSB-A-84(2)I, it was held that where an amount is received under a private annuity contract subsequent to the close of the resident period that is contingent upon the date of death of the annuitant, such amount can not in fact be determined with reasonable accuracy and is accordingly not accruable under the Federal rule. It was therefore not subject to the special accrual provision contained in section 654(c)(1) [now section 639(a)] of the Tax Law. See, Matter of John S. Litherland, Dec St Tax Comm, August 22, 1972.

In Susan Byrne Montgomery, Adv Op Comm T & F, August 29, 1995, TSB-A-95(7)I, the petitioner received a bonus of $Y determined at the end of 1990, based on the petitioner's performance and the profitability of the company. Pursuant to section 638(c) of the Tax Law, in effect for taxable year 1990 [now section 639(a)], section 148.10(a) [now section 154.10(a)] of the Personal Income Tax Regulations and section 1.451-1(a) of the Treasury Regulations, all of the events that fix the right to receive the bonus of $Y had not occurred and the amount thereof could not be determined with reasonable accuracy on February 28, 1990. Accordingly, no portion of the bonus of $Y was accruable for the petitioner's resident period of January 1, 1990 through February 28, 1990.

In this case, the gain from a short sale is at issue. A short sale is a contract for the sale of shares which the seller does not own or the certificates for which are not within the seller's control so as to be available for delivery at the time when, under the rules of the Exchange, delivery must be made. (G. D. Provost, 269 US 443) The seller, therefore, borrows the stock certificates or other property to be delivered to the buyer. At a later date, the seller either purchases similar stock or property necessary to "cover" the sale and delivers it to the lender. Section 1.1233-1(a) of the Treasury Regulations provides that a short sale is deemed consummated upon delivery of the stock or property to close the short sale. No gain or loss can be realized by the seller until the transaction is closed by a covering purchase and a settlement with the lender of the borrowed stock. (H.S. Richardson, 121 F2d 1; C. Levis Est., 127 F2d 796; B. Klinger, 8 TCM 546, Dec. 17,018(M); W.E. Hendricks, 51 TC 235, Dec. 29,225, Affd *per curiam* 423 F2d 485).

Accordingly, pursuant to section 1.1233-1(a) of the Treasury Regulations and Richardson, supra, Levis, supra, Klinger, supra, and Hendricks, supra, the amount of gain on a short sale cannot be determined until the security to close the short sale is delivered.

In this case, the short sale is consummated after the individual moves out of New York State. Therefore, pursuant to section 1.451-1(a) of the Treasury Regulations and Kaszubinski, supra, and Montgomery, supra, all of the events that fix the right to receive the gain, if any, will not occur and the amount thereof can not be determined with reasonable accuracy on the date that the individual

changes status from resident to nonresident. Accordingly, pursuant to section 639(a) of the Tax Law and section 154.10 of the Personal Income Tax Regulations, where a short sale is open on the date that an individual changes status from resident to nonresident of New York State, any gain derived when the short sale is closed during the nonresident period is not accruable for the individual's New York resident period.

DATED: December 24, 1996

s/John W. Bartlett
Deputy Director
Technical Services Bureau

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