

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

TSB-A-93 (13) C
Corporation Tax
TSB-A-93 (7) I
Income Tax
May 27, 1993

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z930325B

On March 25, 1993, a Petitioner for Advisory Opinion was received from KPMG Peat Marwick, 345 Park Avenue, New York, New York 10154.

The issue raised by Petitioner, KPMG Peat Marwick, is whether a qualified settlement fund pursuant to section 468B of the Internal Revenue Code (the "IRC") is subject to tax under Article 9-A or Article 22 of the Tax Law.

Petitioner assumes that the United States District Court for the Southern District of New York (the "Court") approved a settlement agreement (the "Agreement") pertaining to Defendant A on July 1, 1992. Among its provisions, the Agreement requires Defendant A to make a settlement payment of \$10 million to a custodian who arranges for the investment of such monies in United States government obligations and/or commercial bank money market accounts, etc., until the assets can be disbursed to qualified claimants.

The \$10 million payment (the "Fund") represents a settlement fund for civil claims against Defendant A. The Fund is administered by an administrator (the "Fund Administrator") approved by the Court in accordance with the terms of the Agreement.

Claims may be made against the Fund for, among other things, compensatory damages related to activities of Defendant A in connection with allegations raised in a specific cause of action asserting liability arising out of a tort, breach of contract, or violation of law. Beneficiaries entitled to receive distributions from the Fund are yet to be determined with finality.

The Agreement requires the parties and the Fund Administrator take all necessary steps to enable the Fund to be taxable as a settlement fund under section 468B of the IRC. In particular, the Agreement provides that the Fund Administrator is to cause the Fund to pay taxes in a manner consistent with the treatment of the Fund as a qualified settlement fund as defined in section 1.468B-1 of the Treasury Regulations. In its first taxable year of existence, the Fund has elected to be treated as a qualified settlement fund for federal income tax purposes pursuant to section 1.468B-5(b)(2) of the Treasury Regulations.

Defendant A is incorporated in Delaware and is located in various jurisdictions including New York State. The Fund Administrator is an attorney-at-law located in New York State. The Court approved custodian that is to hold, invest and disburse the Fund's assets is located in New York State.

TP-9 (9/88)

Section 209.1 of the Tax Law imposes, annually, a franchise tax on every corporation for the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in New York State in a corporate or organized capacity, or of maintaining an office in New York State for all or any part of each of its fiscal or calendar years.

Section 208.1 of the Tax Law provides that:

The term "corporation" includes an association, within the meaning of paragraph three of subsection (a) of section seventy-seven hundred one of the internal revenue code, a joint-stock company or association, a publicly traded partnership treated as a corporation for purposes of the internal revenue code pursuant to section seventy-seven hundred four thereof and any business conducted by a trustee or trustees wherein interest or ownership is evidenced by certificate or other written instrument ...

The term "corporation" is defined in section 1-2.3 of the Business Corporation Franchise Tax Regulations, which provides, in part, that:

(a) The term 'corporation' means an entity created as such under the laws of the United States, any state, territory or possession thereof, the District of Columbia, or any foreign country, or any political subdivision of any of the foregoing, which provides a medium for the conducting of business and the sharing of its gains.

. . .

(b) ... An entity conducted as a corporation is deemed to be a corporation.

. . .

(2) A business conducted by a trustee or trustees in which interest or ownership is evidenced by certificate or other written instrument includes, but is not limited to, an association commonly referred to as a business trust or Massachusetts trust. In determining whether a trustee or trustees are conducting a business, the form of the agreement is of significance but is not controlling. The actual activities of the trustee or trustees, not their purposes and powers, will be regarded as decisive factors in determining whether a trust is subject to tax under article 9-A of the Tax Law. The mere investment of funds and the collection of income therefrom, with incidental replacement of securities and reinvestment of funds, does not constitute the conduct of a business in the case of a business conducted by a trustee or trustees

For New York State franchise tax purposes, an unincorporated entity is not taxed as a corporation unless its activities are conducted in a manner whereby the entity presents itself as a corporation, in which case it is deemed to be a corporation.

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The conduct of business is more than the ownership of property and the collection and distribution of income derived from that property. (Smadbeck v St Tax Comm, 33 NY2d 930 (1973); People ex rel Nauss v Graves, 283 NY 383, 386 (1940)). It is "more than the mere investment of funds and the collection of income therefrom, with the incidental replacement of securities and the reinvestment of funds that constitute the corpus, as in the case of an ordinary trust." (Burrell v Lynch 274 AD 347, 352 (1948); see also, City Bank Farmers Trust Co. v Graves, 272 NY 1, 6 (1936)).

Herein, the activities of the Fund Administrator do not constitute the conduct of a business as contemplated by section 208.1 of the Tax Law and section 1-2.3 of the Business Corporation Franchise Tax Regulations. (See Samuel R. Buxbaum, Administrator Buxbaum-Banco Popular Fund, Adv Op Comm T & F, April 30, 1993, TSB-A-93(10)C.) Accordingly, the Fund is not deemed to be a corporation for purposes of Article 9-A and is not subject to the tax imposed by such Article.

With respect to the New York State personal income tax under Article 22 of the Tax Law, the tax is imposed on resident and nonresident trusts.

Section 607(a) of the Tax Law provides, in pertinent part, that:

Any term used in this article shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required

For federal income tax purposes, the Fund is a qualified settlement fund. Pursuant to section 1.468B-1(b) of the Treasury Regulations, a fund, account, or trust that is a qualified settlement fund that could be classified as a trust within the meaning of section 301.7701-4 of the Treasury Regulations, is classified as a qualified settlement fund for all purposes of the IRC. Accordingly, since the Fund is not treated as a trust for federal income tax purposes, the Fund, pursuant to section 607(a) of the Tax Law, is not treated as a trust for purposes of Article 22 of the Tax Law. (See Samuel R. Buxbaum, Administrator Buxbaum-Banco Popular Settlement Fund, Adv Op Comm T & F, April 30, 1993, TSB-A-93(10)C.)

Further, section 601(g) of the Tax Law provides that an association, trust or other unincorporated organization which is taxable as a corporation for federal income tax purposes shall not be subject to tax under Article 22 of the Tax Law. Herein, the Fund is a qualified settlement fund under section 468B of the IRC and pursuant to such section, the Fund is a person for federal income tax purposes that is taxed on its modified gross income and the tax imposed is treated as a tax on corporations.

Accordingly, the Fund is not subject to the tax imposed under Article 22 of the Tax Law.

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The New York City personal income tax is similar to the New York State personal income tax and is administered by New York State the same as Article 22 of the Tax Law. Accordingly, the Fund is not treated as a trust for New York City personal income tax purposes and the Fund is not subject to the New York City personal income tax authorized under Article 30 of the Tax Law.

DATED: May 27, 1993

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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