

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

TSB-A-93 (14) C  
Corporation Tax  
TSB-A-93 (8) I  
Income Tax  
June 18, 1993

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z930503A

On May 3, 1993, a Petition for Advisory Opinion was received from SEC v. Vaskevitch Escrow Fund, Paul A. Fischer, Receiver, 1025 Thomas Jefferson Street, N.W., Suite 400 East, Washington, DC 20007-0805.

The issue raised by Petitioner, SEC v. Vaskevitch Escrow Fund, Paul A. Fischer, Receiver, is whether the income earned by a qualified settlement fund is subject to New York State corporation franchise tax or New York State and New York City personal income taxes. If so, will New York State and New York City follow the federal lead and waive all penalties incurred prior to 1993.

SEC v. Vaskevitch Escrow Fund (the "Fund"), was established pursuant to judgments entered against multiple defendants in the securities fraud action Securities and Exchange Commission v. Vaskevitch, et al., 87 Civ. 1620 (S.D.N.Y.). Judgment was entered against David Sofer, Plenmeer, Ltd., and Meda Establishment on November 14, 1988, and a default judgment was entered against Nahum Vaskevitch on November 16, 1988. Assets recovered from these entities and persons were deposited in the Fund in the years 1987 through 1989.

From the date of the first recovery (July 15, 1987) until transferred to the receiver (April 30, 1992), all assets of the Fund were held in the court registry of the United States District Court for the Southern District of New York. No Federal, New York State or New York City income tax returns were filed and no Federal, New York State or New York City income taxes were paid while the Fund was held in the registry of the Court.

On January 28, 1992, Paul A. Fischer was appointed receiver of the Fund by the Court. On May 1, 1992, the assets of the Fund were invested in Goldman Sachs-Institutional Liquid Assets ILA Units, Treasury Instruments Portfolio.

On March 12, 1993, the receiver of the Fund filed Federal income tax returns treating the Fund as a qualified settlement fund pursuant to section 1.468B of the Treasury Regulations as promulgated on December 18, 1992. Pursuant to section 1.468B of the Treasury Regulations, the Federal income tax return of the Fund for each of the taxable years 1987 through 1992 included an election to treat the Fund as a qualified settlement fund for each such taxable year. Section 1.468B-5 of the Treasury Regulations provides that any otherwise applicable penalties are waived for any fund which files an election under such section and files the required Federal income tax returns and pays the required Federal income tax and interest on or before March 15, 1993. By its elections and filing of Federal income tax returns and payment of Federal income tax and interest, the Fund qualified for this waiver of penalties. New York State and New York City tax returns for the taxable years 1987 through 1992 were filed on March 12, 1993. Taxes and interest in the following amounts were paid by the receiver:

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<u>Year</u>	<u>Tax</u>	<u>Interest</u>	<u>Total</u>
1987	\$ 1,550	\$ 771	\$ 2,321
1988	4,156	1,625	5,781
1989	24,607	6,711	31,318
1990	23,774	3,743	27,517
1991	16,761	1,028	17,789

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

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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.

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 Settlement 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

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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.

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.

Since it has been determined that the Fund is not a taxable entity for New York State and New York City tax purposes, the question of whether penalties will be waived is moot.

DATED: June 18, 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.