

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

TSB-A-97(3)C
Corporation Tax
TSB-A-97(1)I
Income Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z961210D

On December 10, 1996, a Petition for Advisory Opinion was received from Fibreboard Asbestos Compensation Trust, c/o The Honorable Charles B. Renfrew; LeBoeuf, Lamb, Leiby & MacRae, One Embarcadero Center, Suite 400, San Francisco, California 94111.

The issue raised by Petitioner, Fibreboard Asbestos Compensation Trust, is whether it is subject to New York State franchise tax or New York State personal income tax.

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

Pursuant to a settlement (the "Global Settlement") reached among Fibreboard Corporation, Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company, Pacific Indemnity Company, representatives of the plaintiff class and representatives of a third party class (mainly co-defendants), Petitioner (the "Trust") was formed on December 23, 1993. The Trust was formed under the jurisdiction of the United States District Court for the Eastern District of Texas (the "Court") as part of its resolution of a class action lawsuit brought for the benefit of a large class of persons with asbestos related claims against Fibreboard Corporation and its insurers, the various casualty and indemnity companies named above. The Court entered a judgment on July 27, 1995 confirming the Global Settlement and approving the Trust as the vehicle for receiving and disbursing the funds to be deposited with the Trust for the benefit of the plaintiff class and other claimants in accordance with the Trust terms. The judgment of the Court was appealed to the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit") on grounds unrelated to the issues involved in this advisory opinion, and affirmed on July 26, 1996. A motion for en banc review was made by appellants before the Fifth Circuit and was denied on November 26, 1996.

The relevant terms of the Trust Agreement are as follows:

1. The defendants are required to pay certain substantial amounts into a fund that will become the trust corpus.
2. The Trust is irrevocable and independent of any of the parties to the lawsuit.
3. The Trust has three Trustees, with five-year, renewable terms.

TSB-A-97(3)C
Corporation Tax
TSB-A-97(1)I
Income Tax

4. The Trustees have typical fiduciary powers and responsibilities to conserve and administer the Trust. The Trust's primary purposes and, therefore, the Trustees' primary responsibilities are: (a) the distribution of trust assets to the beneficiaries whose asbestos-related claims were settled by the Court's Judgment; and (b) the enhancement and preservation of the trust estate through prudent, conservative investments, so that it can be used to accomplish the beneficial purpose set forth in (a). The principal activity of the Trust will be administering Trust distributions.

5. The Court has retained continuing, exclusive jurisdiction over the maintenance, administration, and distribution of the Trust.

6. The Trust will terminate when its purposes have been accomplished as approved by the Court. Upon termination of the Trust, the remaining trust estate will be distributed for such charitable purposes as the Trustees shall determine.

While the Trust is not yet funded (with the exception of nominal assets), it is expected that such funding pursuant to the Global Settlement Agreement will occur in the near future and at that time the Trust will receive liquid assets in a substantial dollar amount. It is expected that the Trust will establish and maintain an office in New York State and will retain and employ a Trust executive officer, other employees, as well as engage the services of independent professionals and/or independent contractors, including money managers and other personnel, in the furtherance of its functions and will keep some of its assets in New York State. It may be assumed that New York State will be the principal situs of the Trust.

The only receipts that the Trust is expected to have are its funding pursuant to the Global Settlement among the parties, and income from passive investment of the Trust assets (the assets will be deposited in a variety of places, including New York, that will likely change from time to time).

The Internal Revenue Service has ruled that the Trust is a qualified settlement fund under section 468B of the Internal Revenue Code (the "IRC") and section 1.468B-1 of the Treasury Regulations.

Section 468B of the IRC provides generally that escrow accounts and settlement funds are subject to current federal income taxation. As a qualified settlement fund, the Trust is treated as a separate taxable entity taxable on its earnings at trust rates. For federal tax administrative and procedural purposes (rules for information returns and tax returns, the time and place for the payment of tax, etc.), a qualified settlement fund is treated as a corporation.

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.

TSB-A-97(3)C
Corporation Tax
TSB-A-97(1)I
Income Tax

Section 208.1 of the Tax Law provides that:

The term "corporation" includes (a) an association within the meaning of paragraph three of subsection (a) of section seventy-seven hundred one of the internal revenue code ... (b) a joint-stock company or association, (c) a publicly traded partnership treated as a corporation for purposes of the internal revenue code pursuant to section seventy-seven hundred four thereof and (d) 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 1-2.5 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.

TSB-A-97(3)C
Corporation Tax
TSB-A-97(1)I
Income Tax

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 Commn, 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 Trust do not constitute the conduct of a business as contemplated by section 208.1 of the Tax Law and section 1-2.5 of the Business Corporation Franchise Tax Regulations. (See, The Steinhardt-Caxton Consolidated Settlement Fund, Adv Op Comm T & F, August 3, 1995, TSB-A-95(14)C; and Samuel R. Buxbaum, Administrator Buxbaum-Banco Popular Settlement Fund, Adv Op Comm T & F, April 30, 1993, TSB-A-93(10)C.) Accordingly, the Trust is not deemed to be a corporation for purposes of Article 9-A of the Tax Law 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:

(a)ny 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 Trust 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 Trust is not treated as a trust for federal income tax purposes, the Trust, 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, The Steinhardt-Caxton Consolidated Settlement Fund, supra; and Samuel R. Buxbaum, Administrator Buxbaum-Banco Popular Settlement Fund, supra.)

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 Trust is a qualified settlement fund under section 468B of the IRC and pursuant to such section, the Trust 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.

TSB-A-97(3)C
Corporation Tax
TSB-A-97(1)I
Income Tax

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

DATED: January 21, 1997

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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