New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-00(2)I
Income Tax
March 29, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. Z990803B

On August 3, 1999, a Petition for Advisory Opinion was received from Laura J. Silver, P.O. Box 2241, Fort Lee, New Jersey 07024.

The issues raised by Petitioner, Laura J. Silver, are:

1. Whether the limited liability company ("LLC"), as described below, or Petitioner, as the managing member of the LLC, is carrying on a business, trade, profession or occupation in New York State.

2. Whether the LLC, as described below, or Petitioner, as the managing member, is subject to any New York State or New York City tax law or filing requirements or fees (i.e. Partnership Return and Tax, Self-Employment Tax).

3. Whether the Trust, as described below, or Trustee(s), as described below, is subject to any New York State or New York City tax law or filing requirements or fees (i.e. Fiduciary Income Tax Return).

4. Whether the domicile of the Trustee(s) or Beneficiary affects the tax status of the Trust.

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

The LLC has two members and is organized pursuant to the laws of the State of Delaware. The LLC was organized by Petitioner who is the managing member with one percent interest in the LLC, and the other member is the Trust with 99 percent interest in the LLC. Petitioner will contribute 100 percent of the capital. Petitioner is domiciled in New York State and is a resident of the City of New York.

The LLC elects to be classified and treated as a partnership for federal income tax purposes. The LLC's only office is the statutory office in Delaware. The activities of the LLC will be dedicated exclusively for its own account to:

(a) manage its own assets which consist of working capital, and is currently comprised of monies on deposit in bank accounts outside New York State; and

(b) use the working capital to trade for its own account in stocks, bonds, debt obligations, interest investments such as certificate of deposits, money market accounts and various other securities and financial instruments some of which will be traded on public exchanges.

Petitioner, as the managing member, will conduct the business of the LLC by telephone, mail or fax from wherever Petitioner happens to be situated at the time (in or out of New York State). The mailing address for the LLC will be a Post Office Box in Rockland County, New York Acknowledgments, statements, tax documents etc. will, when needed, be sent to the P.O. Box. The P.O. Box will be the only thing the LLC will have in New York State. Petitioner states that all income and gains of the LLC will be derived from sources outside of New York State.

The Trust does not have an office in New York State, but does have a Post Office Box in Rockland County, New York. Petitioner is the trust grantor. The Trust is irrevocable and Petitioner transferred property to it while Petitioner was a domiciliary of New York State and a resident of New York City. The Trust is for the benefit of a third party or parties. The Beneficiary(s) is currently located in New York City. The Trustee of the Trust is an individual who is domiciled outside of New York. The entire corpus of the Trust consists of the 99 percent interest in the LLC. The Trustee will be a non managing member of the LLC, but will determine the payment, if any, of the annual floating rate, zero percent to 100 percent, of return on investments or profits to Petitioner.

Discussion

Section 2 of the Tax Law provides the definition of certain terms used in the Tax Law, and was amended by Chapter 576 of the Laws of 1994 which added the following:

5. The term "limited liability company" means a domestic limited liability company or a foreign limited liability company, as defined in section one hundred two of the limited liability company law.

6. "Partnership and partner," unless the context requires otherwise, shall include, but shall not be limited to, a limited liability company and a member thereof, respectively.

An LLC that is treated as a partnership for federal income tax purposes, is treated as a partnership for New York State tax purposes. (See, Department of Taxation and Finance Memorandum, TSB-M-94(6)I and (8)C, October 25, 1994.) Accordingly, for New York State personal income tax purposes, the LLC will be treated as a partnership.

Section 601(f) of Article 22 of the Tax Law provides that a partnership, as such, shall not be subject to tax under Article 22. Persons carrying on business as partners shall be liable for tax under Article 22 only in their separate or individual capacities.

Section 658(c)(1) of the Tax Law provides that every partnership having a resident partner shall make a return for the taxable year setting forth all items of income, gain, loss and deduction and such other pertinent information as the Commissioner of Taxation and Finance may, by regulations and instructions, prescribe.

Section 658(c)(3) of the Tax Law provides that every LLC that is treated as a partnership which has any income derived from New York sources, determined in accordance with the applicable rules of section 631 of the Tax Law is subject to an annual filing fee.

Section 631(b)(1) of the Tax Law provides that items of income, gain, loss and deduction derived from or connected with New York sources include those items attributable to (a) the ownership of any interest in real or tangible personal property located in New York State, or (b) a business, trade, profession or occupation carried on in New York State. Section 631(b)(2) of the Tax Law provides that income from intangible personal property, including annuities, dividends, interest, and gains from the disposition of intangible personal property constitutes 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 New York State.

Section 631(d) of the Tax Law provides that a nonresident, other than a dealer holding property primarily for sale to customers in the ordinary course of the individual's trade or business, shall not be deemed to carry on a business, trade, profession or occupation in New York State solely by reason of the purchase and sale of property or the purchase, sale or writing of stock option contracts, or both, for the individual's own account.

In Kenneth S. Davidson Partners, Adv Op Comm T&F, June 28, 1988, TSB-A-88(11)I, it was held that the purchase and sale by the partnership of options on indexes, foreign currencies, debt obligations and futures contracts and the exercise, closing out or expiration of such options solely for its own account did not constitute the carrying on of a business, trade, profession or occupation in New York State under section 631 of the Tax Law. However, the opinion noted that the partnership would not be considered to be solely trading for its own account if it engaged in certain other activities such as market making activities.

In Paul E. Singer, Adv Op Comm T&F, June 4, 1992, TSB-A-92(2)I, a partnership with its principal office in New York engaged in trading securities for its own account. It had two general partners, one was a nonresident individual and the other was a limited partnership. The opinion held that the partnership was not carrying on a trade or business in New York because it was engaged

solely in trading for its own account, thus the income attributable to the partnership was not New York source income under section 631 of the Tax Law, and this did not change despite the existence of a tiered partnership arrangement, where the partnership's income is funneled through the limited partnership before its ultimate distribution, or deemed distribution to the individual.

In MSD Capital, L.P., Adv Op Comm T&F, September 4, 1998, TSB-A-98(8)I, it was held that the activities of the petitioner, Portfolio LP, the Series G LLCs and Series J LLCs constituted trading for their own accounts pursuant to section 631 and 632 of the Tax Law. Accordingly, the distributive share of income that M or any of the other M Interests receive as partners of petitioner, or are deemed to receive, from Portfolio LP (whether directly or indirectly through the petitioner), from the Series G LLCs and Series J LLCs (indirectly through the petitioner), and/or from petitioner was not deemed to be attributable to a trade or business carried on in New York State. Therefore, M and the other M Interests did not have New York source income from these activities under section 631 of the Tax Law.

Section 605(b) of the Tax Law provides, in pertinent part, that a resident individual means an individual who is domiciled in New York State, unless the individual maintains no permanent place of abode in New York State, maintains a permanent place of abode elsewhere and spends in the aggregate not more than 30 days of the taxable year in New York State.

Section 611(a) of the Tax Law provides that the New York taxable income of a resident individual is the individual's New York adjusted gross income less the individual's New York deduction and New York exemptions. Section 612(a) of the Tax Law provides that the New York adjusted gross income of a resident individual means the individual's federal adjusted gross income as defined in the laws of the United States for the taxable year, with the modifications specified in that section.

Section 605(b)(3)(C) of the Tax Law defines a resident trust as follows:

> a trust, or portion of a trust, consisting of the property of:
>
> (i) a person domiciled in this state at the time such property was transferred to the trust, if such trust or portion of a trust was then irrevocable, or if it was then revocable and has not subsequently become irrevocable ....

Section 105.23(c) of the Personal Income Tax Regulations provides as follows:

> [t]he determination of whether a trust is a resident trust is not dependent on the location of the trustee or the corpus of the trust or the source of income; provided,

however, no New York State personal income tax may be imposed on such trust if all of the following conditions are met:

(1) all the trustees are domiciled in a state other than New York State;

(2) the entire corpus of the trust, including real and tangible property is located outside of New York State; and

(3) all income and gains of the trust are derived or connected from sources outside of New York State, determined as if the trust were a nonresident.

Issue 1

Petitioner is the managing member of the LLC which is treated as a partnership for New York State personal income tax purposes. The LLC's activities will be dedicated exclusively for its own account (1) to manage its assets comprised of monies on deposit in bank accounts outside New York State which is its working capital, and (2) to use the working capital to trade, for its own account, stocks, bonds, debt obligations, interest investments such as certificate of deposits, money market accounts and various other securities and financial instruments some of which will be traded on public exchanges.

As in Davidson, supra, Singer, supra, and MSD Capital, supra, the LLC's activities of managing its bank deposits and trading securities for its own account does not constitute the carrying on of a business, trade, profession or occupation in New York State for purposes of Article 22 of the Tax Law. Further, as the managing member of the LLC, Petitioner's conduct of such activities would not be considered to be carrying on a business, trade, profession or occupation in New York State.

Issue 2

The LLC, which is treated as a partnership for New York State personal income tax purposes, is not subject to tax under Article 22 of the Tax Law pursuant to section 601(f) of the Tax Law. Petitioner is a domiciliary of New York State and is a resident of New York City. Therefore, pursuant to section 605(b) of the Tax Law Petitioner is a resident of New York State.

Accordingly, pursuant to section 601(f) of the Tax Law, the LLC which is treated as a partnership, is not subject to tax under Article 22 of the Tax Law. However, the LLC has a resident member, and, pursuant to section 658(C)(1) of the Tax Law, the LLC must file a partnership return – form IT- 204, for each taxable year setting forth all items of income, gain, loss and deduction and

such other pertinent information as the Commissioner of Taxation and Finance may by regulations and instructions prescribe.

Since the LLC's activities of managing its bank deposits and trading securities for its own account does not constitute the carrying on of a business, trade, profession or occupation in New York State for purposes of Article 22 of the Tax Law, the LLC does not have income derived from New York sources, as determined under section 631 of the Tax Law. Therefore, the LLC is not required to pay the annual filing fee imposed under section 658(c)(3) of the Tax Law.

Petitioner, who is a resident of New York State, must file a resident income tax return – form IT- 201, for each taxable year, and compute Petitioner's New York taxable income pursuant to section 611(a) of the Tax Law. Such computation would include the Petitioner's share of all items of income, gain, loss and deduction derived from the LLC as determined for federal income tax purposes for the taxable year.

In addition, Petitioner, as a resident of New York City, is also liable for the City of New York resident tax. The New York City personal income tax is similar to the New York State personal income tax and is administered by New York State in the same manner as Article 22 of the Tax Law. Accordingly, it is also computed on form IT- 201.

Issue 3

The Trust is a trust consisting of property of Petitioner who was domiciled in New York State at the time such property was transferred to the trust, and when the trust became irrevocable. Accordingly, the Trust is a resident trust of New York pursuant to section 605(b)(3)(C) of the Tax Law. However, this fact does not, by itself, mean that it is subject to New York State personal income tax under Article 22 of the Tax Law.

In Charles B Moss Trust, Adv Op Comm T & F, April 8, 1994, TSB-A-94(7)I, it was held that the situs of intangible assets of a trust are deemed to be at the domicile of the trustee. (See, Safe Deposit & Trust Co. v Virginia, 280 US 83); Mercantile-Safe Deposit and Trust Company v Murphy, 19 AD2d 765, affd 15 NY2d 579; Taylor v State Tax Commission, 85 AD2d 821, 822.) Further, it was determined that where the three conditions of section 105.23(c) of the Personal Income Tax Regulations were met, no New York State personal income tax was imposed on the trust even though the trust was a New York resident trust pursuant to section 605(b)(3)(C) of the Tax Law. First, the sole trustee was domiciled in Colorado. Second, the corpus of the trust was located outside of New York State since it consisted solely of intangibles which are deemed to be located at the domicile of the trustee. Third, none of the assets of the trust were employed in a business carried on in New York and all income and gains of the trust were derived from sources outside of New York, determined as if the trust were a nonresident.

In this case, the three conditions contained in section 105.23(c) of the Personal Income Tax Regulations have been met. First, the trustee is domiciled outside of New York State. Second, the corpus of the Trust consists of intangible assets. The situs of the intangible assets of a trust are deemed to be at the domicile of the trustee. Therefore, the situs of the corpus of the Trust is deemed to be outside of New York State. Third, none of the assets of the Trust are employed in a business carried on in New York State and all income and gains of the Trust were derived from sources outside of New York State, determined as if the Trust were a nonresident.

Accordingly, the Trust is a New York resident trust. However, for the taxable years that the three conditions contained in section 105.23(c) of the Personal Income Tax Regulations are met, no New York State personal income tax is imposed on such Trust for those years. Further, no New York City personal income tax authorized under Article 30 of the Tax Law is imposed on the Trust for those taxable years.

Issue 4

The domicile of the Trustee of the Trust does affect the taxable status of the Trust. If the Trustee is domiciled in New York State, the Trust would not meet the three conditions contained in section 105.23(c) of the Personal Income Tax Regulations, and the Trust would be subject to New York State personal income tax. In addition, if the Trustee is a resident of the City of New York, the Trust would be subject to the New York City personal income tax authorized under Article 30 of the Tax Law. The domicile of the beneficiary does not affect the taxable status of the Trust.

DATED: March 29, 2000

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

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