New York State Department of Taxation and Finance

Taxpayer Services Division
Technical Services Bureau

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Corporation Tax
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Income Tax
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STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. Z950427A

On April 27, 1995, a Petition for Advisory Opinion was received from The Steinhardt-Caxton Consolidated Settlement Fund, c/o Joel L. Carr, Fund Administrator, 1101 Stewart Avenue, Suite 207, Garden City, New York 11530.

The issues raised by Petitioner, The Steinhardt-Caxton Consolidated Settlement Fund (the "Fund"), are il) whether the Fund is subject to the New York State franchise tax or the New York State and New York City personal income taxes and (2) what are the Fund's filing or reporting obligations.

The Fund is a consolidated settlement fund approved and established pursuant to the settlement incorporated in two final judgments of permanent injunction and other relief as to Steinhardt Management Company, Inc. ("Steinhardt") and Caxton Corporation ("Caxton"), respectively, each dated December 16, 1994, in the United States District Court for the Southern District of New York ("the Court"). The action is entitled Securities and Exchange Commission v Steinhardt Management Company, Inc. and Caxton Corporation, 94 Civ 9040 (SDNY)(RPP).

The Fund consists solely of cash and short-term United States Treasury Bills held through the Court Registry Investment System ("CRIS") maintained by the United States District Court for the Southern District of Texas. The Fund Administrator's office is located in Garden City, New York.

On December 16, 1994, in Securities and Exchange Commission v Steinhardt Management Company, Inc. and Caxton Corporation, supra., the Court entered final judgments of permanent injunction and other relief (together, the "Final Judgment") as to Steinhardt, a New York corporation, and Caxton, A Delaware corporation. Pursuant to the Final Judgment, on December 29, 1994, Caxton deposited $14 million and on December 29, 1994 Steinhardt deposited $21 million (together, this $35 million constitutes the Fund assets) in the registry of the Court for deposit with CRIS. Pursuant to the Final Judgment, CRIS serves as custodian of the Fund. CRIS invests the Fund solely in United States Treasury Bills. The Court appointed the Fund Administrator to administer the Fund.

Pursuant to the Final Judgment, the Fund's assets will be used to pay claims by certain investors against Steinhardt and Caxton arising out of their alleged activities in the government securities markets in violation of the Federal securities laws and antitrust laws. Claims may be made against the Fund, among other things, for compensatory and consequential damages arising from such activities as are alleged by the Securities and Exchange Commission in its complaint against Steinhardt and Caxton in 94 Civ 9040. Eligible claimants entitled to receive distributions from the Fund have yet to be determined. Three

years after the entry of the Final Judgment, or at such other time as the parties may agree or the Court orders, the Fund will pay to the Treasury of the United States, as residual distributee, any monies remaining in the Fund that have not been distributed to claimants, reserved against or placed in escrow pursuant to the terms of the Final Judgment.

The Final Judgment requires the parties and the Fund Administrator to take all necessary steps to enable the Fund to be a "qualified settlement fund" within the context of section 1.468B-1(c) of the Treasury Regulations. The Final Judgment provides that the Fund Administrator is to cause the Fund to pay Federal taxes as a "qualified settlement fund" as provided in section 1.468B-2 of the Treasury Regulations. 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, with respect to the period beginning as of the date of its inception in 1994.

The Federal income taxation of the Fund is governed by section 468B of the Internal Revenue Code ("IRC") and the Treasury Regulations promulgated thereunder. Section 468B of the IRC provides generally that escrow accounts and settlement funds are subject to current Federal income taxation. Under section 1.468B-1(c) of the Treasury Regulations, the Fund will be treated as a "qualified settlement fund". As a qualified settlement fund, the Fund 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.

Section 208.1 of the Tax Law provides that:

> [t]he 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.

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 1-2.5 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 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 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, 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 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.

After determining that the Fund is not a taxable entity for New York State and New York City tax purposes, the Fund has no New York State franchise tax or New York State or New York City personal income tax filing or reporting obligations.

DATED: August 3, 1995

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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