

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-10(5)I
Income Tax
June 8, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I100211A

On February 11, 2010 the Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether the trusts qualify as nontaxable resident trusts for purposes of Tax Law section 605(b)(3)(D). Because the trusts hold no real or tangible property in New York and their trustee is not domiciled in New York, the trusts are nontaxable trusts for purposes of Tax Law section 605(b)(3)(D).

Facts

In January 2005, [REDACTED], then a domiciliary of New York, created a trust. The trust was funded with cash, which was used to purchase equities. The trust agreement provided for two trustees: [REDACTED] (S), a domiciliary of New York City, and [REDACTED] (R), a non-domiciliary of New York State. R became the sole trustee upon the death of S on August 1, 2008. R remained a non-domiciliary of New York State after becoming sole trustee. The trust agreement provided that S was to receive trust income up until her death. After her death, the corpus of the trust was to be divided into two separate trusts, one for each of her children:

[REDACTED] Family Trust f/b/o [REDACTED] (Family Trust 1);

[REDACTED] Family Trust f/b/o [REDACTED] (Family Trust 2).

Both trusts were funded in December 2008, even though they were formed on S's death. R is the sole trustee of these two trusts.

The final 2008 federal and New York State fiduciary income tax returns of the [REDACTED] Family trust reflected income for the full calendar year but allocated the income on the K-1's as follows:

S - income from January 1, 2008 to August 1, 2008;

Family Trust 1– income from August 1, 2008 to December 31, 2008; and

Family Trust 2 - income from August 1, 2008 to December 31, 2008.

Analysis

Tax Law section 605(b)(3) defines a resident trust as follows:

- a trust, or a portion of a trust, consisting of property transferred by will of a decedent who at his death was domiciled in this state, or
- a trust, or portion of a trust, consisting of the property of:

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; or

a person domiciled in this state at the time such trust, or portion of a trust, became irrevocable, if it was revocable when such property was transferred to the trust but has subsequently become irrevocable.

Tax Law section 605(b)(3)(D)(i) provides that a resident trust is not subject to New York State income tax if all of the following conditions are satisfied:

(I) all the trustees are domiciled in a state other than New York; (II) the entire corpus of the trusts, including real and tangible property, is located outside the state of New York; and (III) all income and gains of the trust are derived from or connected with sources outside of the state of New York, determined as if the trust were a non-resident trust.

For purposes of section 605(b)(3)(D)(i), intangible property shall be located in New York State if one or more of the trustees are domiciled in the State. Tax Law section 605(b)(3)(D)(ii).

It is not clear from the facts presented whether Family Trusts 1 and 2 are resident trusts. Whether the trusts are resident trusts is moot because they would be nontaxable trusts even if they were New York resident trusts. Their sole trustee, R, was a non-domiciliary of New York. The trusts owned no real property or tangible personal property located in New York. Because the sole trustee is a non-domiciliary, trust income from intangible assets is not New York source income. *Charles B. Moss Trust*, Adv Op Comm T&F, April 8, 1994, TSB-A-94(7)I. Therefore, the trusts' income is not subject to New York income tax, as long as the conditions in Tax Law section 605(b)(3)(D)(i) are satisfied.

DATED: June 8, 2010

/S/

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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.