

**New York State Department of Taxation and Finance  
Office of Counsel**

TSB-A-20(3)I  
Income Tax  
February 10, 2020

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

The Department of Taxation and Finance (“Department”) received a Petition for Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner asks whether the loss realized by its nonresident individual limited partners upon the liquidation and dissolution of Petitioner is derived from or connected with New York sources under Tax Law §§ 631(a)(1) and 631(b)(1).

We conclude that the loss is not derived from or connected with New York sources.

**Facts**

Petitioner is a limited partnership formed under the laws of another state as an affiliated investment entity of a national real estate investor and investment manager. Petitioner was formed to invest in U.S. real estate. Petitioner has more than 12,000 limited partners, many of whom are nonresident individuals. At formation, Petitioner incurred syndication costs that were not deductible or amortizable for federal or NY income tax purposes.

Petitioner invested in U.S. real estate and owned land and improvements in several states. Petitioner sold its real estate holdings and states that it liquidated on November 1, 2016. The last asset sold was a New York building that Petitioner owned and actively managed for over two years. In connection with the ownership of the building, each limited partner’s distributive share of income, gain, loss and deduction had been reported as attributable to a business carried on by Petitioner in New York under Tax Law §§ 631 and 632. The closing date of the sale of the building was November 1, 2016.

After the sale of the building, Petitioner recognized a taxable gain and paid any required estimated taxes relating to its New York source income associated with the building’s sale on behalf of its limited partners. At the time of the sale, the building was the only material asset held by Petitioner, other than any undistributed cash remaining from the disposition of other land and improvements. All of the cash was held for less than two years at the time of the sale of the building through the winding up of Petitioner.

After the building was sold, Petitioner states it wound up its operations and liquidated. The net proceeds from the sale were transferred on the date of sale to a bank account in a foreign country maintained by an affiliate of Petitioner’s general partner (“Affiliate”). Affiliate distributed the net proceeds to its limited partners on November 2, 2016, the day after the building was sold. Petitioner states that the proceeds were distributed on November 2, 2016, one

day after the closing of the New York property, because November 1, 2016 was a bank holiday in the country where its limited partners were located.

Upon Petitioner's liquidation, each limited partner is expected to recognize a capital loss under Internal Revenue Code § 731(a)(2) in an amount equal to the excess of each limited partner's outside tax basis in Petitioner over the amount of liquidation proceeds received. Petitioner states that part of the capital loss is expected to be attributable to unamortized syndication costs that will reduce partners' capital accounts under IRC § 705(a)(2)(B) and Treasury Regulation § 1.704-1(b)(2)(iv)(i)(2).

### **Analysis**

Tax Law § 631(a)(1) provides that the New York source income of a nonresident individual includes the individual's net amount of items of income, gain, loss and deduction entering into the individual's federal adjusted gross income that is derived from or connected with New York sources, including his or her distributive share of partnership income, gain, loss and deduction. Tax Law § 631(b)(1)(A) provides that items income, gain, loss and deduction derived from or connected to New York sources include items attributable to the ownership of any interest in real or tangible personal property in the state. The term "real property located in this state" includes an interest in a partnership that owns real property that is located in New York and has a fair market value that equals or exceeds fifty percent of all the assets of the entity on the date of sale or exchange of the taxpayer's interest in the entity. "Only those assets that the entity owned for at least two years before the date of the sale or exchange of the taxpayer's interest in the entity are to be used in determining the fair market value of all the assets of the entity on the date of sale or exchange." Tax Law § 631(b)(1)(A)(1). "The gain or loss derived from New York sources from the taxpayer's sale or exchange of an interest in an entity that is subject to [these provisions] is the total gain or loss for federal income tax purposes from that sale or exchange multiplied by a fraction, the numerator of which is the fair market value of the real property ... located in New York on the date of the sale or exchange and the denominator of which is the fair market value of all the assets of the entity on the date of the sale or exchange." Id.

As stated in the facts above, Petitioner sold its last "material asset," a building in New York, on November 1, 2016. At the time of sale, Petitioner recognized a gain on the sale of the building and paid estimated taxes relating to the NY source income associated with the sale on behalf of the limited partners. After the building was sold, Petitioner wound up its affairs, settled its accounts, and liquidated.<sup>1</sup> Petitioner asks whether each limited partner's loss, required to be recognized for federal tax purposes upon liquidation, will be recognized for New

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<sup>1</sup> Petitioner states that, upon the sale of the building, Petitioner was considered "functionally liquidated" and dissolved when it transferred its net proceeds to an account maintained by Affiliate. Therefore, Petitioner claims it should be treated as being liquidated on the date of sale and its limited partners should be treated as having sold their partnership interests. The Department expresses no opinion as to whether Petitioner is considered to be functionally liquidated on that date.

York tax purposes under Tax Law § 631(b)(1)(A) as a loss derived from New York sources that is attributable to the ownership of an interest in real property in New York.

As stated above, Tax Law § 631(b)(1)(A) provides that items of loss are attributable to New York sources if those items are attributable to the ownership of any interest in real property in New York. This includes an interest in a partnership that owns real property that is located in New York and has a fair market value that equals or exceeds fifty percent of all the assets of the entity on the date of sale or exchange of the taxpayer's interest in the entity. In this case, Petitioner sold its interest in the New York building on November 1, 2016, and transferred the net proceeds from that sale to Affiliate. Thereafter Petitioner was liquidated and the net proceeds were delivered to the limited partners on November 2, 2016. Therefore, any recognized loss by Petitioner's limited partners from their interests in Petitioner are not attributable to the Partnership's ownership of real property in New York because Petitioner did not own New York real property on November 2, 2016, the date on which those partnership interests were liquidated and distributed by the partnership to the partners.

DATED: February 10, 2020

/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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.