

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

TSB-A-86 (7) I  
Income Tax  
May 28, 1986

STATE OF NEW YORK  
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. I851101A

On November 1, 1985, a Petition for Advisory Opinion was received from Mark and Ann Schachter, 80 Salem Ridge Drive, Huntington, New York 11743.

The issues raised are (1) whether fees received by Petitioner for services rendered as an investment syndicator are subject to Unincorporated Business Tax imposed under Article 23 of the Tax Law and (2) whether income Petitioner received during 1980 as a result of his previous activities as an independent insurance agent is also subject to Unincorporated Business Tax.

Petitioner is an investment syndicator who co-ordinates the raising of monies within various states within the United States for building shopping centers and other real estate projects.

Petitioner travels to the state in which the shopping mall is to be built. To facilitate his fund raising activities, Petitioner sets up an office there. Initially, he is responsible for the expenses of the office. When Petitioner has the requisite number of investors committed to the project, a partnership is formed. At this time, the partnership takes over the Petitioner's office and all expenses related thereto. The office is no longer the Petitioner's place of business; it becomes and remains the partnership's place of business.

Most syndications are partnerships in which Petitioner is a general partner. The partnerships pay all expenses for prospectus publications, legal and accounting related thereto, office expenses and a guarantee fee to Petitioner for raising the money.

In 1980, Petitioner received guarantee fees from partnerships per the schedule below. Locations in the schedule below indicate the state in which the properties were sold, an office was set up and where all expenses for the operation were incurred.

	<u>Syndication</u>	<u>General Partner Fee</u>	<u>Location</u>
1.	Maple Property	\$25,000	Texas
2.	Pine Brook	30,000	Texas
3.	Townline Plaza	23,000	New York
4.	Middleforth	<u>15,000</u>	Kentucky
	TOTAL	<u>\$93,000</u>	

In addition, a fifth syndication was formed as a corporation in Nevada for which Petitioner received a fee of \$60,000.

Previous to being an investment syndicator, Petitioner worked as an independent insurance agent. He is no longer an insurance agent but does receive compensation on premiums paid for continuing policies maintained in force.

Section 701(a) of the Tax Law imposes a tax on "...the unincorporated business taxable income of every unincorporated business, wholly or partly carried on within this state." This applies to taxable years ending on or after December 31, 1960 through taxable years ending on or before December 31, 1981.

Section 703(a) defines "unincorporated business" as "...any trade, business or occupation conducted, engaged in or being liquidated by an individual or unincorporated entity, including a partnership or fiduciary or a corporation in liquidation.... "

Section 707(a) provides "If an unincorporated business is carried on both within and without this state, as determined under regulations of the tax commission, there shall be allocated to this state a fair and equitable portion of the excess of its unincorporated business gross income over its unincorporated business deductions. If the unincorporated business has no regular place of business outside this state, all of such excess shall be allocated to this state."

#### ISSUE 1

Petitioner is an investment syndicator. His business as an investment syndicator is a separate business distinct from the partnership syndications to which he belongs. Therefore, Petitioner, as an investment syndicator is a separate taxable entity subject to unincorporated business tax. Matter of the Petition of James F. Draper, State Tax Commission, October 5, 1984, TSB-H-84(172)I.

If a partner in a partnership is deemed to be a separate taxable entity, that partner, as a taxable entity, must carry on business without New York State in order to allocate income outside New York State. Cromwell v. Bates 284 A.D. 1001. In general, an unincorporated business is carried on at any place either within or without New York State where the unincorporated business entity has a regular place of business. 20 NYCRR §207.2(a). A regular place of business is any bona fide office, factory warehouse or other place which is systematically and regularly used by the unincorporated business entity in carrying on its business. *Id.* Therefore, in order for Petitioner to allocate his income outside New York State he must maintain a regular place of business in each of the states he wishes to allocate income to. It is not sufficient that the partnership to which he belongs maintains regular places of business in those states.

Petitioner does not maintain a regular place of business outside New York State. Although Petitioner initially sets up an office in the state in which a shopping mall is to be built, he maintains that office only until the partnership comes into existence. At that time, the partnership takes over

the Petitioner's office and all expenses related thereto. Never again is the office maintained by the Petitioner nor does Petitioner set up another office. The Petitioner may use the partnership's office to carry out his activities, however, as noted previously, this does not allow the Petitioner to allocate income outside New York State.

Petitioner does not maintain an office or any other place which is systematically and regularly used by him in any other state. Therefore, all of Petitioner's unincorporated business income is allocated to New York State.

## ISSUE 2

Commission income derived from activities as an independent insurance agent constitutes unincorporated gross income within the meaning of section 705(a) of the Tax Law. Matter of the Petition of Robert Tinkler, State Tax Commission, July 15, 1983, TSB-H-(240)I. Petitioner was an independent insurance agent prior to becoming an investment syndicator. Although he no longer sells insurance, he still receives compensation on premiums paid for continuing policies maintained in force. These renewal commissions received on policies sold while an independent insurance agent are subject to the imposition of unincorporated business tax. Matter of Leibowitz, State Tax Commission, November 14, 1980, TSB-H-(434)I.

Accordingly, both the fees earned as an investment syndicator and renewal commissions received on policies sold while an independent insurance agent are subject to unincorporated business tax imposed under Article 23 of the Tax Law.

DATED: May 28, 1986

s/ANDREW F. MARCHESE  
Chief of Advisory Opinions

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