

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

TSB-A-92(7) I
Income Tax
August 7, 1992

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I920428C

On April 23, 1992, a Petition for Advisory Opinion was received from Mahmoud M. Mahmoud, 10917 Woodland Falls Dr., Great Falls, Virginia 22066.

The issues raised by Petitioner, Mahmoud A. Mahmoud, are (1) whether dividends paid from accumulated New York C corporation earnings, by a federal S corporation which is now a New York S corporation, to nonresident shareholders are subject to New York State personal income tax; (2) how his residency status is affected by purchasing a business in New York

- (A) if he moves back to New York in August of 1992;
- (B) if he moves back to New York in 1993;
- (C) if he operates the business from Virginia and does not move back to New York; and

(3) will he be a nonresident of New York if he does not buy the New York business and he stays in Virginia.

Petitioner owns 40% of Azab & Company, Inc. (hereinafter "Azab"), his wife owns 40% and his children own the remaining 20%. Azab was incorporated in New York State in November 1984. In September 1985, Azab became a federal S corporation. Azab was a New York C corporation from the date of incorporation through 1987. Azab elected New York S corporation status for 1988 and 1989. For 1990 and 1991 Azab was a New York C corporation, but has applied for New York S corporation status for 1992. Azab had earnings from New York sources only in taxable years 1988 and 1989. Azab has no sales in New York and owns no property in New York. Azab has retained earnings from taxable years during which it was a New York C corporation and Petitioner was a resident of New York.

Petitioner and his family were New York State residents from 1975 until 1991 when they moved to Virginia.

In 1990, Petitioner decided to move to Virginia because the climate was better and Azab no longer had any sales in New York. In December of 1990, Petitioner and their family purchased their new home in Virginia. In early 1990, Petitioner listed their house in New York for sale and most of their belongings were moved to Virginia in April of 1991. Petitioner stayed in New York only until his children finished school in June.

After school let out Petitioner and his family went on vacation, stopped briefly in New York for a wedding and then went to their home in Virginia. Petitioner's children started school in Virginia as of the beginning of the 1991-92 school year. In late December of 1991 the sale of Petitioner's house in New York closed.

TSB-A-92(7) I
Income Tax
August 7, 1992

On the advice of his accountants in New York and Virginia, Petitioner and his wife filed as full year residents of New York in 1991 for simplicity.

Section 601(e)(1) of the Tax Law provides that personal income tax is imposed for each taxable year on the taxable income which is derived from sources in New York State of every nonresident or part-year resident individual which shall be equal to the tax computed under section 601(a) through (d) of the Tax Law, as the case may be, reduced by the credits permitted under section 606(b) and (c) of the Tax Law, as if such nonresident or part-year resident individual were a resident, multiplied by a fraction, the numerator of which is such individual's New York source income determined in accordance with sections 631 through 638 of the Tax Law and the denominator of which is such individual's federal adjusted gross income for the taxable year.

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, shall constitute 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 this state.

Accordingly, if Petitioner is a nonresident of New York and he receives a dividend that represents a distribution of Azab's accumulated earnings and profits from taxable years Azab was a New York C Corporation, such dividend is not New York source income pursuant to section 631(b)(2) of the Tax Law.

Section 605(b)(1) of the Tax Law defines a "resident individual" as an individual (1) 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 thirty days of the taxable year in New York State or (2) who is not domiciled in New York State but maintains a permanent place of abode in New York State and spends in the aggregate more than one hundred eighty-three days of the taxable year in New York State.

Section 605(b)(2) of the Tax Law defines a "nonresident individual" as an individual who is not a resident or a part-year resident.

Petitioner's purchase of a business in New York State will not affect Petitioner's resident or nonresident status. The determination of whether Petitioner has changed his domicile and is a nonresident of New York for a particular taxable year is a question of fact not susceptible of determination in an Advisory Opinion. An Advisory Opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to "a specific set of facts". Tax Law, §171. Twenty-fourth; 20 NYCRR 2376.1(a). Therefore, a determination cannot be made in an Advisory Opinion as to whether Petitioner has changed his domicile to Virginia and is a nonresident of New York for a particular taxable year.

TSB-A-92(7) I
Income Tax
August 7, 1992

However, as stated in Haythe & Curley, Adv Op Comm T&F, July 13, 1992, Petitioner should apply the rules as set forth in section 605(b) of the Tax Law and section 105.20 of the Income Tax Regulations as well as pertinent case law to determine whether Petitioner is domiciled and/or a resident of New York State.

DATED: August 7, 1992

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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