

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

TSB-A-94 (7) I
Income Tax
April 8, 1994

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I940121A

On January 21, 1994, a Petition for Advisory Opinion was received from Charles B. Moss, Jr., Trustee Charles B. Moss Trust U/A/D 12/20/76, c/o Anchin, Block & Anchin, 1375 Broadway - 18th Floor, New York, New York 10018.

The issue raised by Petitioner, Charles B. Moss, Jr., Trustee Charles B. Moss Trust U/A/D 12/20/76, is whether Petitioner is exempt from personal income tax pursuant to section 105.23 (c) (formerly section 102.4(c)) of the Personal Income Tax Regulations, and consequently, whether Petitioner is entitled to refunds of New York State and New York City personal income tax paid in the amount of \$6,151 for taxable years not barred by the statute of limitations (1990-1992).

Petitioner is a complex inter vivos trust created on December 20, 1976 by a New York domiciliary, Charles Moss (now deceased). The sole trustee is his son, Charles B. Moss, Jr. In 1985, the trustee sold his New York home and became domiciled in the State of Connecticut. In 1991 he moved to Colorado, where he presently resides.

For the years at issue, 1990-1992, the corpus of the trust consisted solely of intangibles: cash in checking and money market accounts, marketable securities and U.S. Government obligations, and loans receivable from other trusts and companies affiliated with the trustee. The cash, securities, and U.S. Government obligations were held by Fiduciary Trust Company, which is located in New York City. None of the assets were employed in a business carried on in New York, and all income and gains of the trust were derived from sources outside of New York State, determined as if the trust were a nonresident.

The trust has filed New York State fiduciary income tax returns, and paid the New York State and New York City resident income tax since inception. For the years 1990, 1991 and 1992 these taxes amounted to \$1,311, \$1,480 and \$3,360 respectively.

Section 605(b)(3)(C) of the Tax Law defines a resident trust as follows:

a trust, or portion of a trust, consisting of the property of:

(i) 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

(ii) 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.

For the purposes of the foregoing, a trust or portion of a trust is revocable if it is subject to a power, exercisable immediately or at any future time, to revest title in the person whose property constitutes such trust or portion of a trust, and a trust or portion of a trust becomes irrevocable when the possibility that such power may be exercised has been terminated.

Section 105.23 of the Personal Income Tax Regulations provides as follows:

(a) A resident ... trust is:

...

(3) a trust or portion of a trust, consisting of the property of:

(i) a person domiciled in New York 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

(ii) a person domiciled in New York 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.

(b) For purposes of subdivision (a) of this section, a trust or portion of a trust is revocable if it is subject to a power, exercisable immediately or at any future time, to revest title in the person whose property constitutes such trust or portion of a trust, and a trust or portion of a trust becomes irrevocable when the possibility that such power may be exercised has been terminated.

(c) The determination of whether a trust is a resident trust is not dependent on the location of the trustee or the corpus of the trust or the source of income; provided, however, no New York State personal income tax may be imposed on such trust if all of the following conditions are met:

(1) all the trustees are domiciled in a state other than New York State;

(2) the entire corpus of the trust, including real and tangible property is located outside of New York State; and

(3) all income and gains of the trust are derived or connected from sources outside of New York State, determined as if the trust were a nonresident.

Herein, the Charles B. Moss Trust is a trust consisting of property of a person domiciled in New York State at the time such property was transferred to the trust, and the trust was irrevocable. Accordingly, the Charles B. Moss trust is a resident trust of New York pursuant to section 605(b)(3)(C) of the Tax Law and section 105.23 of the Regulations. However, this fact does not ipso facto mean that it is subject to New York State personal income tax under Article 22

of the Tax Law.

In *Mercantile-Safe Deposit and Trust Company v Murphy*, 19 AD2d 765, affd 15 NY2d 579, New York sought to tax dividends accumulated after the death of the donor by the nonresident trustee of an inter vivos trust created in Maryland by a resident of New York. The basis of New York's claim was that the trust was a resident trust under New York law and the beneficiaries were residents of New York even though they had no present right to the income. The Court of Appeals held "that the imposition of a tax in the State in which the beneficiaries of a trust reside, on securities in the possession of the trustee in another State, to the control or possession of which the beneficiaries have no present right, is in violation of the Fourteenth Amendment". The Appellate Division decision, affirmed by the Court of Appeals, specifically stated that the trust was a resident trust by statutory definition but that attempting to tax the income held by a trustee in another state was extending "the taxing power of the State to property wholly beyond its jurisdiction and thus [in] conflict with the due process clause of the Fourteenth Amendment of the Federal Constitution". (See, *Taylor v State Tax Commission*, 85 AD2d 821, 822: "The fact that the former owner of the property in question died while being domiciled in New York, making the trust a resident trust under New York tax law, is insufficient to establish a basis for jurisdiction".)

The situs of intangible assets of a trust are deemed to be at the domicile of the trustee. In a case where the State of Virginia sought to tax the entire corpus of a trust consisting of securities in the hands of a Maryland trustee, the Virginia tax being based on domicile in Virginia of the beneficial owners, the Supreme Court held that such a tax conflicted with the Fourteenth Amendment because Virginia was taxing things wholly beyond its jurisdiction (*Safe Deposit & Trust Co. v Virginia*, 280 US 83). [While no mention was made in *Safe Deposit Co.* of the residency of the trust, under New York Law it would have been a resident trust of Virginia because the Virginia grantor of the inter vivos trust reserved to himself a right of revocation which was unexercised at the time of his death.]

Based on the facts herein for the years in issue, the three conditions contained in section 105.23(c) of the Personal Income Tax Regulations have been met. First, Petitioner is the sole trustee of the trust and in 1985 he sold his New York home and became domiciled in Connecticut and, in 1991, he moved to Colorado, where he presently resides. Second, the corpus of the trust consisted solely of intangibles and that cash, securities and U.S. Government obligations were held by Fiduciary Trust Company located in New York State. Third, none of the assets of the trust were employed in a business carried on in New York and all income and gains of the trust were derived from sources outside of New York State, determined as if the trust were a nonresident. With respect to the second condition, the situs of intangible assets of a trust are deemed to be at the domicile of the trustee. (See: *Safe Deposit & Trust Co.*, supra.; *Mercantile-Safe Deposit and Trust Co.*, supra.; and *Taylor*, supra). Herein, the situs of the corpus of the trust is deemed to be outside New York State.

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Accordingly, the Charles B. Moss Trust is a New York resident trust. However, since the three conditions contained in section 105.23(c) of the Personal Income Tax Regulations have been met, for the taxable years at issue, 1990, 1991 and 1992, no New York State personal income tax is imposed on such trust for said years.

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, since the Charles B. Moss Trust has met the three conditions contained in section 105.23(c) of the New York State Personal Income Tax Regulations and no New York State personal income tax is imposed on such trust for taxable years 1990, 1991 and 1992, no New York City personal income tax authorized under Article 30 of the Tax Law is imposed on such trust for such taxable years.

DATED: April 8, 1994

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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