

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

TSB-A-93 (10) C  
Corporation Tax  
TSB-A-93 (5) I  
Income Tax  
April 30, 1993

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z930111A

On January 11, 1993, a Petition for Advisory Opinion was received from Samuel R. Buxbaum, Administrator Buxbaum-Banco Popular Settlement Fund, 60 East 42nd Street, New York, New York 10165.

The issue raised by Petitioner, Samuel R. Buxbaum, Administrator Buxbaum-Banco Popular Settlement Fund, is whether the income earned by a designated settlement fund created after 1986 is subject to New York State corporation franchise tax or New York State and New York City personal income taxes. If so, will New York State and New York City follow the federal lead and waive all penalties incurred prior to 1993.

Samuel R. Buxbaum, Esq. is the Administrator/Escrowee of Buxbaum-Banco Popular Settlement Fund (hereinafter "Settlement Fund"), a designated settlement fund pursuant to section 468B of the Internal Revenue Code (hereinafter "IRC"). The Settlement Fund was established and funded on May 18, 1990 by court order.

The Settlement Fund has remained intact in an interest bearing account in Emigrant Savings Bank (formerly Dollar Dry Dock) from inception to date. The legal matters which caused the formation of the fund have been resolved and Petitioner wishes to pay all liabilities, taxes and expenses before distributing, the remaining funds to the designated beneficiaries. No federal, State or city income tax returns have been filed, but the Settlement Fund will elect to be treated as a qualified settlement fund, under section 468B of the IRC, for federal income tax purposes.

Section 209.1 of the Tax Law imposes, annually, a franchise tax on every corporation for the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in New York State in a corporate or organized capacity, or of maintaining an office in New York State for all or any part of each of its fiscal or calendar years.

Section 208.1 of the Tax Law provides that:

The term "corporation" includes an association, within the meaning of paragraph three of subsection (a) of section seventy-seven hundred one of the internal revenue code, a joint-stock company or association, a publicly traded partnership treated as a corporation for purposes of the internal revenue code pursuant to section seventy-seven hundred four thereof and any business conducted by a trustee or trustees wherein interest or ownership is evidenced by certificate or other written instrument ...

The term "corporation" is defined in section 1-2.3 of the Business Corporation Franchise Tax Regulations, which provides, in part, that:

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(a) The term 'corporation' means an entity created as such under the laws of the United States, any state, territory or possession thereof, the District of Columbia, or any foreign country, or any political subdivision of any of the foregoing, which provides a medium for the conducting of business and the sharing of its gains.

. . .

(b) ... An entity conducted as a corporation is deemed to be a corporation.

. . .

(2) A business conducted by a trustee or trustees in which interest or ownership is evidenced by certificate or other written instrument includes, but is not limited to, an association commonly referred to as a business trust or Massachusetts trust. In determining whether a trustee or trustees are conducting a business, the form of the agreement is of significance but is not controlling. The actual activities of the trustee or trustees, not their purposes and powers, will be regarded as decisive factors in determining whether a trust is subject to tax under article 9-A of the Tax Law. The mere investment of funds and the collection of income therefrom, with incidental replacement of securities and reinvestment of funds, does not constitute the conduct of a business in the case of a business conducted by a trustee or trustees ....

For New York State franchise tax purposes, an unincorporated entity is not taxed as a corporation unless its activities are conducted in a manner whereby the entity presents itself as a corporation, in which case it is deemed to be a corporation.

The conduct of business is more than the ownership of property and the collection and distribution of income derived from that property. (Smadbeck v St Tax Comm, 33 NY2d 930 (1973); People ex rel Nauss v Graves, 283 NY 383, 386 (1940)). It is "more than the mere investment of funds and the collection of income therefrom, with the incidental replacement of securities and the reinvestment of funds that constitute the corpus, as in the case of an ordinary trust." (Burrell v Lynch 274 AD 347, 352 (1948); see also, City Bank Farmers Trust Co. v Graves, 272 NY 1, 6 (1936)).

Herein, the activities of Petitioner do not constitute the conduct of a business as contemplated by section 208.1 of the Tax Law and section 1-2.3 of the Business Corporation Franchise Tax Regulations. Accordingly, the Settlement Fund is not deemed to be a corporation for purposes of Article 9-A and is not subject to the tax imposed by such Article.

With respect to the New York State personal income tax under Article 22 of the Tax Law, the tax is imposed on resident and nonresident trusts.

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Section 607(a) of the Tax Law provides, in pertinent part, that:

Any term used in this article shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required ....

For federal income tax purposes, the Settlement Fund is a designated settlement fund that is treated as a qualified settlement fund. Pursuant to section 1.468B-1(b) of the Treasury Regulations, a fund, account, or trust that is a qualified settlement fund that could be classified as a trust within the meaning of section 301.7701-4 of the Treasury Regulations, is classified as a qualified settlement fund for all purposes of the IRC. Accordingly, since the Settlement Fund is not treated as a trust for federal income tax purposes, the Settlement Fund, pursuant to section 607(a) of the Tax Law, is not treated as a trust for purposes of Article 22 of the Tax Law.

Further, section 601(g) of the Tax Law provides that an association, trust or other unincorporated organization which is taxable as a corporation for federal income tax purposes shall not be subject to tax under Article 22 of the Tax Law. Herein, the Settlement Fund is a qualified settlement fund under section 468B of the IRC and pursuant to such section, the Settlement Fund is a person for federal income tax purposes that is taxed on its modified gross income and the tax imposed is treated as a tax on corporations.

Accordingly, the Settlement Fund is not subject to the tax imposed under Article 22 of the Tax Law.

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, the Settlement Fund is not treated as a trust for New York City personal income tax purposes and the Settlement Fund is not subject to the New York City personal income tax authorized under Article 30 of the Tax Law.

Since it has been determined that the Settlement Fund is not a taxable entity for New York State and New York City tax purposes, the question of whether penalties will be waived is moot.

DATED: April 30, 1993

s/PAUL B. COBURN  
Deputy Director  
Taxpayer Services Division

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