

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

TSB-A-93 (12) C
Corporation Tax
TSB-A-93 (6) I
Income Tax
May 27, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z930315A

On March 15, 1993, a Petition for Advisory Opinion was received from The Salomon Inc and Salomon Brothers Inc Civil Claims Fund, c/o Joel L. Carr, Civil Claims Fund Administrator, 300 Old Country Road, Suite 241, Mineola, New York 11501.

The issues raised by Petitioner, The Salomon Inc and Salomon Brothers Inc Civil Claims Fund (hereinafter "The Fund"), are (1) whether the income earned by The Fund is subject to New York State corporation franchise tax or New York State and New York City personal income taxes and (2) what are The Fund's filing or reporting obligations.

The Fund is a \$100 million settlement fund established by order of the United States District Court for the Southern District of New York on May 26, 1992 in connection with the settlement of an action pending in such court entitled Securities and Exchange Commission v Salomon Inc and Salomon Brothers Inc. Claims may be made against The Fund for, among other things, compensatory damages arising from activities of Salomon Inc and Salomon Brothers Inc in connection with government securities sold at auction.

The Fund consists solely of cash and short-term United States treasury bills held through the Court Registry Investment System maintained by the United States District Court for the Southern District of Texas. The Fund administrator's office is located in Mineola, New York.

For federal income tax purposes, The Fund will be treated as a qualified settlement fund under section 468B of the Internal Revenue Code and section 1.468B-1 of the Treasury Regulations. The Fund will elect to be treated as a qualified settlement fund with respect to the period beginning as of the date of its inception in 1992.

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:

(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)).

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Herein, the activities of the administrator of The Fund, 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. (See Samuel R. Buxbaum, Administrator Buxbaum-Banco Popular Settlement Fund, Adv Op Comm T & F, April 30, 1993, TSB-A-93(10)C.) Accordingly, The 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.

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 Fund is 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 Internal Revenue Code. Accordingly, since The Fund is not treated as a trust for federal income tax purposes, The 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. (See Samuel R. Buxbaum, Administrator Buxbaum-Banco Popular Settlement Fund, Adv Op Comm T & F, April 30, 1993, TSB-A-93(10)C.)

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 Fund is a qualified settlement fund under section 468B of the Internal Revenue Code and pursuant to such section, The 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 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 Fund is not treated as a trust for New York City personal income tax purposes and The Fund is not subject to the New York City personal income tax authorized under Article 30 of the Tax Law.

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After determining that The Fund is not a taxable entity for New York State and New York City tax purposes, The Fund has no New York State franchise tax or New York State or New York City personal income filing or reporting obligations.

DATED: May 27, 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.