

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

TSB-A-97(12)C
Corporation Tax
TSB-A-97(4)
Income Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z970210A

On February 10, 1997, a Petition for Advisory Opinion was received from Harry W. Albright, Jr., Trustee of First American Corp, One Rockefeller Plaza, Suite 1002, New York, New York 10020.

The issues raised by Petitioner, Harry W. Albright, Jr., Trustee of First American Corp, are (1) whether the Fund is a corporation for purposes of Article 9-A of the Tax Law and subject to the tax imposed by Article 9-A, (2) whether the Fund is treated as a trust for purposes of Article 22 of the Tax Law and subject to the tax imposed by Article 22, (3) whether the Fund is treated as a trust for New York City personal income tax authorized under Article 30 of the Tax Law, and (4) what are the Fund's filing or reporting obligations.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Prior to 1992, First American Corporation ("FAC"), a U.S. corporation, was a bank holding company whose principal asset was the stock of First American Bankshares, Inc. ("FAB"). FAB was engaged directly and through subsidiary corporations in the commercial banking business. All of FAC's stock was owned by Credit and Commerce American Investment, B.V. ("CCAI"), a Netherlands corporation. All of CCAI's stock was owned by Credit and Commerce American Holdings, N.V. ("CAAH"), a Netherlands Antilles corporation. A substantial portion of the stock of CCAH was, in turn, controlled by BCCI through nominee shareholders. BCCI was a group of corporations organized in Luxembourg and the Cayman Islands.

The United States brought a criminal proceeding against BCCI under the Racketeer Influenced and Corrupt Organizations Act. As a result of this action, the United States District Court for the District of Columbia (the "Court") entered an order that all of FAC's and FAB's operating assets be sold under a Court-ordered plan of liquidation. FAC and FAB are currently in the process of liquidating.

Virtually all of the assets of value within the CCAH chain of corporations were owned by FAC and its subsidiaries. Thus, in order to protect the United States's interests in CCAH, the United States asked the Court (as part of a plea agreement with BCCI) to appoint a trustee to take control of all of the FAC stock. On June 23, 1992, the Court appointed Harry W. Albright Jr. as trustee (the "Trustee").

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The Trust Order states as follows:

The purpose of this Order is to enable the corporate defendants ("BCCI") to comply with their obligation under the Plea Agreement to divest themselves of any interest they hold in Credit and Commerce American Holdings N.V. ("CAH"), and its subsidiaries FAC and FAB, [and] to enable the government to realize its interest, arising under the Plea Agreement and the Order of Forfeiture, in the proceeds of the sale or other disposition of BCCI's interest in CAH and its subsidiaries....

....

The Trustee shall collect and hold, subject to any existing lien, all the issued and outstanding shares of FAC, and shall sell or otherwise dispose of such shares or cause the boards of directors of FAC and FAB to sell or otherwise dispose of all assets owned or controlled directly or indirectly by FAC at any given time, including, without limitation, all of the issued and outstanding capital stock of FAB or of the FAB subsidiaries, consistent with the purposes of this Order, to a purchaser or purchasers approved by the Federal Reserve....

....

The Trustee shall exercise all rights, titles, powers and privileges of a shareholder of FAC....

....

It is further ORDERED that following the sale or disposition of all of the FAC shares or assets, the Trustee shall give notice of such sale or disposition to the Court, counsel for the United States ... counsel for the Board of Governors of the Federal Reserve, all shareholders of record of CAH, pursuant to a list to be provided by the Federal Reserve Board, and all creditors of CAH and all creditors of Credit and Commerce Investment, B.V. ("CAI") Consistent with the Court's Order of Forfeiture of January 24, 1992, any proceeds remaining after the payment or reimbursement of the expenses of the Trustee ... shall be used to pay, in the following order of priority, such bona fide debts of FAB, FAC, CAI, and CAH as are required by binding contract or law to be paid. Any remaining proceeds should be held by the Trustee in an interest-bearing account or instrument pending further order of the Court.

Pursuant to the Trust Order, as part of the process of liquidating FAC, the Trustee has caused FAC and its subsidiaries to sell all of their operating assets for more than \$460 million in net proceeds. Part of these sale proceeds have been distributed to the Trustee. The remainder of the sale proceeds are

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currently held by FAB, under the direct control of its board of directors, and are being invested principally in short term U.S. government securities, pending liquidating distributions to the Trustee.

The Trustee's Functions With Respect to the Sale Proceeds

Under the Court's orders, the Trustee is to (a) receive the sale proceeds (the "Proceeds") and hold the Proceeds in a fund or funds (the "Fund"), (b) pay out of the Fund the bona fide debts of CCAI and CCAH, (c) make a Series of distributions out of the Fund to the United States, the Federal Reserve Bank of New York, and any other person entitled thereto (collectively, "beneficiaries"), (d) make short-term investments of the Fund and collect and reinvest the income therefrom, and (e) distribute all remaining amounts in the Fund, following the payment of all expenses, the beneficiaries of the Fund. The vast majority (more than 95%) of the proceeds distributed to date by FAC to the Trustee have been immediately used by the Trustee to pay CCAI's and CCAH's debts or have been immediately distributed by the Trustee to the beneficiaries of the Fund (and have not been invested by the Trustee).

The Trustee's activities are limited to those set forth above, and each of these activities are subject to Court supervision and approval. The Trustee's investment of the Fund will be limited to deposits in United States banks and purchases of short-term United States Treasury bills (i.e., those having a term to maturity of 183 days or less).

The Trustee and the Internal Revenue Service ("IRS") have entered into a Closing Agreement with respect to certain federal tax matters concerning the Fund and the Trustee. With respect to the taxable status of the Fund, the Closing Agreement provides as follows:

Although it is expressly understood that "the fund" described in paragraph 2 below is not a qualified settlement fund, it is agreed that for federal tax purposes the fund shall be subject to all of the rules set forth in Treasury Regulation ("Tres. Reg") §1.468B-2 [the qualified settlement fund rules], as modified by this Closing Agreement.

...

The Trustee will be treated as the administrator of a QSF [qualified settlement fund] within the meaning of §1.468B-2(k)(3).

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.

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Section 208.1 of the Tax Law provides that:

The term "corporation" includes (a) an association within the meaning of paragraph three of subsection (a) of section seventy-seven hundred one of the internal revenue code ... and (d) 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 1-2.5 of the Business Corporation Franchise Tax Regulations, which provides, in part, that:

(a) The term "corporation" means an entity created as such ... 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.

Herein, the activities of the Trustee do not constitute the conduct of a business as contemplated by section 208.1 of the Tax Law and section 1-2.5 of the Business Corporation Franchise Tax Regulations. Accordingly, the Fund is not deemed to be a corporation for purposes of Article 9-A of the Tax Law and is not subject to the tax imposed by Article 9-A.

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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:

[a]ny 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 being treated like a qualified settlement fund, and the Trustee is treated as the administrator of 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 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, Fibreboard Asbestos Compensation Trust, Adv Op Comm T & F, January 21, 1997, TSB-A-97(1)I; and The Steinhardt-Caxton Consolidated Settlement Fund, Adv Op Comm T & F, August 3, 1995, TSB-A-95(5)I.)

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 treated like a qualified settlement fund under section 468B of the IRC. Pursuant to section 468B, 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 the income of a corporation.

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 tax filing or reporting obligations.

Note that this advisory opinion does not address whether a franchise tax is imposed on FAC and FAB during liquidation.

DATED: May 19, 1997

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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