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

TSB-A-98(19)C
Corporation Tax
TSB-A-98(12)I
Income Tax
TSB-A-98(3)M
Estate & Gift Tax
October 7, 1998

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. Z980810A

On August 10, 1998, a Petition for Advisory Opinion was received from Comptroller of the State of New York, Office of the State Comptroller, Governor Alfred E. Smith Office Building, 6th Floor, Albany, New York 12236, NYS Higher Education Services Corporation, 99 Washington Avenue, Room 1445 (14th Floor), Albany, New York 12255, and Teachers Insurance and Annuity Association of America, 730 Third Avenue, New York, New York 10017.

The issues raised by Petitioners, Comptroller of the State of New York, NYS Higher Education Services Corporation, and Teachers Insurance and Annuity Association of America, concern the New York State College Choice Tuition Savings Program and participants in the Program with respect to Corporation Franchise Tax, Personal Income Tax, Estate Tax, Gift Tax and the reporting responsibilities for the Program.

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

On September 10, 1997, The Governor of New York State signed the New York State College Choice Tuition Savings Program Act, 1997 NY Laws, c. 546 (the "Act"), which took effect immediately and is applicable to taxable years after December 31, 1997. Section 3 of the Act added Article 14-A to the New York Education Law (the "Education Law"), which provides for the establishment of the New York State College Choice Tuition Savings Program (the "Program"). The general purposes of the Program, as described in section 695-a of the Education Law, are to authorize the establishment of family tuition accounts and to provide guidelines for the maintenance of such accounts to enable residents of New York and other states to benefit from the tax incentive provided for qualified State tuition programs under section 529 of the Internal Revenue Code (the "IRC") and to attract students to public and private colleges and universities within the state. Under section 695-c of the Education Law, the Comptroller of the State of New York (the "Comptroller") and the New York State Higher Education Services Corporation (the "HESC") are directed to implement the Program under the terms and conditions established by Article 14-A of the Education Law and a Memorandum of Understanding relating to any terms or conditions not otherwise expressly provided for in Article 14-A. On November 10, 1997, the Comptroller and HESC entered into a Memorandum of Understanding relating to the implementation of the Program. Under section 652 of the Education Law, HESC is an agency functioning under the authority of the University of the State of New York, as established by action of the Board of Regents.

Under section 695-d of the Education Law, the Comptroller is authorized to implement the Program through the use of financial organizations as account depositories and managers. The Comptroller is directed to select the financial organization through a bidding process, and is authorized to enter into a contract with the financial organization providing for detailed terms as to the management of the Program. The Comptroller and HESC have selected Teachers Insurance and Annuity Association of America (the "TIAA"), a New York stock life insurance company, as the manager of the Program, and entered into a management contract on July 31, 1998.

Section 695-e(2) of the Education Law provides for the establishment under the Program of "family tuition accounts", which may be opened by any person who desires to save money for the payment of the qualified higher education expenses of the designated beneficiary. Section 695-e(4) of the Education Law provides that contributions to family tuition accounts under the Program may be made only in cash, which will include contributions made by check, payroll deduction or automatic deduction from a bank account.

Under section 695-b(8) of the Education Law, "qualified higher education expenses" mean any qualified higher education expenses included in section 529 of the IRC.

Section 695-e(7) of the Education Law provides that, in the case of any non-qualified withdrawal from a family tuition account, an amount equal to five percent of the portion of the withdrawal constituting income as determined in accordance with the principles of section 529 of the IRC shall be withheld as a penalty and paid to the Program's trust fund. A "non-qualified withdrawal" is defined in section 695-b(10) of the Education Law as any withdrawal from a family tuition account, except for (1) a qualified withdrawal, (2) a withdrawal made as the result of the death or disability of the designated beneficiary of the family tuition account, or (3) a withdrawal made on account of a scholarship. However, sections 695-e(8)and (9) of the Education Law give the Comptroller and HESC the power to increase or decrease the penalty, depending primarily on what is determined to constitute a greater than de minimis penalty for purposes of section 529(b)(3) of the IRC, and these agencies expect to ensure that the terms of section 529(b)(3) of the IRC are satisfied. Based on recent conversations with the Internal Revenue Service (the "IRS"), the penalty will be 10 percent. Pursuant to section 695-e(5) of the Education Law and regulations to be promulgated by the Comptroller, appropriate certifications will be required that will enable the determination as to whether a withdrawal is a qualified withdrawal or a non-qualified withdrawal.

Section 695-e(11) of the Education Law provides that the Program shall provide separate accounting for each designated beneficiary. As Program manager, TIAA will be primarily responsible for maintaining the separate accounts for the designated beneficiaries. Section 695-e(12) of the Education Law provides that

no account owner or designated beneficiary of any family tuition account shall be permitted to direct the investment of any contributions to an account or the earnings thereon. All investment decisions for the Program will be made by TIAA with oversight by the Comptroller. Section 695-e(13) of the Education Law provides that neither an account owner nor a designated beneficiary may use an interest in a family tuition account as security for a loan, and that any pledge of any interest in an account shall be of no force and effect.

Section 695-e(14) of the Education Law provides that the Comptroller shall promulgate rules or regulations to prevent contributions on behalf of a designated beneficiary in excess of $100,000 and to require that any excess balances with respect to a designated beneficiary be promptly withdrawn in a non-qualified withdrawal or transferred to another account. The Comptroller will promulgate such regulations.

Section 695-e(6)(a) of the Education Law provides that an account owner may change the designated beneficiary of a family tuition account to an individual who is a family member (as defined under section 529 of the IRC) of the prior designated beneficiary. Section 695-e(6)(b) of the Education Law further provides that an account owner may transfer all or a portion of a family tuition account to the family tuition account of another family member of the designated beneficiary. Any balance at the time of the designated beneficiary's graduation could also be applied to the designated beneficiary's postgraduate education or withdrawn as a non-qualified withdrawal.

Section 4 of the Act added section 78 to the New York State Finance Law (the "Finance Law"), which provides that the Program's assets (the "Assets"), consisting of contributions and earnings thereon pursuant to the Program, will be held by the Comptroller, as trustee, in a trust fund (the "Trust Fund"). Pursuant to section 78(3) of the Finance Law, the Assets will, in turn, be held by a newly-formed limited liability company (the "LLC"). The LLC will initially have two members, the Trust Fund and TIAA which will only have a nominal investment of $100,000. This nominal investment will be redeemed by the LLC on receipt of a ruling from the IRS that sole ownership by the Trust Fund will not have adverse federal tax consequences. After redemption of TIAA's interest, the Trust Fund will be the LLC's only member, and the LLC will be disregarded as an entity for federal income tax purposes, and all of its income will be income of the Trust Fund. During the period of TIAA's nominal investment in the LLC, the LLC will be treated as a partnership for tax purposes and the Trust Fund and TIAA will receive their respective portions of the LLC's income. TIAA, as a taxable entity, will be subject to tax on such income. Petitioners state that the income of the Trust Fund would be exempt pursuant to section 529 of the IRC and the New York State Tax Law.

The LLC will be managed by TIAA and will be structured as a series fund. Contributions to accounts will be invested in one of nine program series (the

"Program Series"). The age of a designated beneficiary will be used to determine into which of the nine Program Series a contribution will be invested. Each Program Series will operate as a fund of funds, investing in three other underlying portfolios (the "Underlying Portfolios") established solely for the use of the Program. Each Underlying Portfolio will have a distinct investment objective and pursue distinct investment policies with limitations, all as approved by the Comptroller. Initially, one will be a money market portfolio, one will invest primarily in bonds and other fixed-income investments, and one will invest primarily in growth stocks. Each Program Series will allocate assets among the three Underlying Portfolios with the basic goal of achieving investment returns over the applicable investment horizon for a particular designated beneficiary that at least equal the rate of increasing higher education expenses. For instance, a Program Series representing younger designated beneficiaries will have its investment allocations weighted more heavily toward the Underlying Portfolio invested primarily in stock, while a Program Series representing older designated beneficiaries will have its investment allocations weighted more heavily toward the Underlying Portfolios primarily invested in bonds and money market instruments.

The opinions set forth herein are premised upon the qualification of the Program as a "qualified state tuition program" within the meaning of section 529 of the IRC.

Corporation Franchise Tax

Applicable Law

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 Article 9-A 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 (including a limited liability company), (b) a joint-stock company or association, (c) a publicly traded partnership treated as a corporation for purposes of the internal revenue code pursuant to section seventy-seven hundred four thereof and (d) any business conducted by a trustee or trustees wherein interest or ownership is evidenced by certificate or other written instrument ...."

Section 1451 of Article 32 of the Tax Law imposes an annual franchise tax on every banking corporation for the privilege of exercising its franchise or doing business in New York State in a corporate or organized capacity during the

taxable year. Generally, a "banking corporation" for purposes of Article 32 of the Tax Law is a corporation which is doing a banking business or a corporation which is principally engaged in a business that is substantially similar to a banking business and is beneficially owned by a banking corporation.

Section 1501(a) of Article 33 of the Tax Law imposes a franchise tax on every insurance corporation for the privilege 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 its taxable year. An insurance corporation includes a corporation, association, joint stock company or association, person, society, aggregation or partnership, by whatever name known, doing an insurance business.

Section 2.5 of the Tax Law defines an LLC as a domestic limited liability company or a foreign limited liability company, as defined in section 102 of the Limited Liability Company Law.

It has been established that the classification of an LLC for New York State tax purposes will follow the classification accorded the LLC for federal income tax purposes under section 301.7701-3 of the Treasury Regulations. (See, FGIC CMRC Corp, Adv Op Comm T & F, April 1, 1996, TSB-A-96(11)C; and Department of Taxation and Finance Memorandum, TSB-M-94(6)I and (8)C, October 25, 1994.) Where a single member LLC does not make the election to be treated as an entity separate from its owner for federal income tax purposes, pursuant to section 301.7701-3 of the Treasury Regulations, it will not be classified as an entity separate from its owner for New York State tax purposes. If the owner is a corporation, the single member LLC will be considered a branch or division of the owner corporation. (See, McDermott, Will & Emery, Adv Op Comm T & F, July 24, 1996, TSB-A-96(19)C.)

Section 290 of Article 13 of the Tax Law imposes a tax on the unrelated business taxable income of every organization described in section 511(a)(2) of the IRC and every trust described in section 511(b)(2) of the IRC that carries on an unrelated trade or business in New York. Section 292 of the Tax Law provides that the unrelated business taxable income of a taxpayer subject to tax under Article 13 is the taxpayer's federal unrelated business taxable income, as defined in the IRC for the taxable year, with the modifications described in section 292 of the Tax Law.

Question 1. Will the Program, the Assets, the Trust Fund and the LLC, which is expected to be the investment vehicle that will hold the Assets, constitute legal entities subject to any of the franchise taxes imposed by New York State, including but not limited to, the franchise taxes imposed on business corporations, banking corporations and insurance companies?

Answer. Neither the Program, the Assets, the Trust Fund nor the LLC are entities subject to any of the New York State franchise taxes under Articles 9-A, 32 or 33 of the Tax Law. The Program, Assets and Trust Fund are not corporations or associations within the purview of these Articles, (nor are they a "person ... doing an insurance business" under Article 33.) As to the LLC, as provided in section 301.7701-3 of the Treasury Regulations, it may be either (1) a partnership (because of the initial ownership by both the Trust Fund and TIAA) or (2) a disregarded entity (because of ownership solely by the Trust Fund.) In either event, whether as a partnership or a disregarded entity, the LLC is not a corporation or association, and accordingly is not within the purview of the franchise taxes.

Question 2. Will the income and net worth of the Program, the Assets, the Trust Fund and the LLC be subject to any of the taxes referred to in **Question 1**?

Answer. Because the Program, the Assets, the Trust Fund and the LLC are not taxable entities within the purview of Articles 9-A, 32 or 33, as discussed in the Answer to **Question 1**, the income and net worth of these entities will not be subject to any of the taxes under those Articles, except that when the LLC is treated as a partnership, TIAA, a taxable entity that is a member of the LLC, will be subject to tax on its distributive share of the LLC's income.

Question 3. Will the income of the program, the Trust Fund and the LLC (collectively, the Program) be subject to tax on unrelated business income under Article 13 of the Tax Law?

Answer. The income of the Program, the Trust Fund and the LLC (collectively, the Program) will not be subject to tax on unrelated business income under Article 13 of the Tax Law. Section 529(a) of the IRC provides that a qualified state tuition program shall be subject to the federal tax on unrelated business income under section 511 of the IRC, and Article 13 of the Tax Law imposes a like tax if it is imposed at the federal level. There is no exclusion provided in Article 13 which would apply to the Program. However, it is the Department of Taxation and Finance's ("Department") position that the Program has been created for a public purpose and has a sufficiently close relationship with the State so as to be immune from taxation under Article 13, independent of the statutory exemption scheme of the Article. (*Matter of City of New York v Tully,* 88 AD2d 701, lv to app den 57 NY2d 606); *See, Matter of Town of Fishkill v Royal Dutchess Properties Inc.*, 241 AD2d 286)

Personal Income Tax

Applicable Law

Section 601(a),(b) and (c) of the Tax Law imposes, for each taxable year, the New York State personal income tax on the New York taxable income of every

resident of New York State. Section 601(e) of the Tax Law imposes, for each taxable year, the New York State personal income tax on the taxable income which is derived from sources in New York State of every nonresident which is equal to the tax base multiplied by the New York source fraction.

Section 611 of the Tax Law provides that the New York taxable income of a resident individual is the individual's New York adjusted gross income less the individual's New York deduction and New York exemptions as determined under Article 22 of the Tax Law.

Section 612(a) of the Tax Law defines New York adjusted gross income of a resident individual as the individual's federal adjusted gross income with certain modifications.

Section 612(c)(32) of the Tax Law provides that when computing New York adjusted gross income, federal adjusted gross income is decreased by contributions made during the taxable year by an account owner to one or more family tuition accounts established under the Program, to the extent not deductible or eligible for credit for federal income tax purposes, provided however, the contributions by the owner of an account or accounts for the taxable year shall not exceed $5,000.

Section 612(c)(33) of the Tax Law provides that when computing New York adjusted gross income, federal adjusted gross income is decreased by distributions from a family tuition account established under the Program to the extent includible in gross income for federal income tax purposes.

Section 612(b)(34) of the Tax Law provides that when computing New York adjusted gross income, federal adjusted gross income is increased by distributions received during the taxable year by a distributee of a family tuition account established under the Program, to the extent that the distributions are not qualified withdrawals within the meaning of section 695-b.9 of the Education Law.

Question 4. Will contributions by an account owner to a family tuition account under the Program be deductible from the account owner's New York adjusted gross income (to the extent not deductible or eligible for credit for federal income tax purposes) in an amount not to exceed $5,000 in the aggregate in any calendar year?

Answer. Contributions by an account owner to a family tuition account under the Program will be deductible in determining the account owner's New York adjusted gross income (to the extent not deductible or eligible for credit for federal income tax purposes) in an amount not to exceed $5,000 for all such accounts of the owner in any taxable year. (Section 612(c)(32) of the Tax Law.)

Question 5. Will contributions be includible in the New York taxable income of designated beneficiaries for New York personal income tax purposes?

Answer. Contributions will not be includible in the New York adjusted gross income of designated beneficiaries. (Section 612(a) of the Tax Law.)

Question 6. Will the deduction described in Question 4 be also available to the spouse of an account owner regardless of the amount of such spouse's New York adjusted gross income, provided that the spouses satisfy the requirements for filing a joint New York personal income tax return?

Answer. The deduction described in Question 4 will also be available to the spouse of an account owner regardless of the amount of such spouse's New York adjusted gross income, provided that the spouses file a joint New York personal tax return.

Question 7. If filing separately, will the deductions described in Question 4 be limited by the amount of the spouses' individual New York adjusted gross incomes?

Answer. If filing separately, the deductions described in Question 4 would be limited by the amount of the spouses' individual New York adjusted gross incomes.

Question 8. Will the income earned in a family tuition account under the Program be includible in the New York taxable income of either the account owner or the designated beneficiary of the account prior to withdrawal?

Answer. Income earned in a family tuition account under the Program will not be includible in the New York adjusted gross income of either the account owner or the designated beneficiary of the account prior to withdrawal. (Section 529(c)(1),(c)(3)(A) of the IRC; and section 612(a) of the Tax Law.)

Question 9. Will an individual be required to include any amount in New York taxable income for purposes of the New York personal income tax as a result of the substitution of a designated beneficiary with a member of the family of the prior designated beneficiary (within the meaning of section 529 of the IRC) or as a result of a transfer of amounts of a family tuition account to another family tuition account, the designated beneficiary of which is a member of the family of the beneficiary of the first account (within the meaning of section 529 of the IRC)?

Answer. No individual will be required to include any amount in New York adjusted gross income as a result of the substitution of a designated beneficiary for a member of the family of the prior designated beneficiary, if such substitution is excepted from federal income inclusion as provided in section 529(c)(3)(C)(ii) of the IRC. Likewise, no income inclusion will be required as

a result of a transfer of amounts of a family tuition account to another such account, the designated beneficiary of which is a member of the family of the beneficiary of the first account, if such transfer is excepted from federal income inclusion as provided in section 529(c)(3)(C)(i) of the IRC. (Section 612(a) of the Tax Law.)

Question 10. Will any portion of any qualified withdrawal from a family tuition account be includible in the New York taxable income of either the account owner or the designated beneficiary of the account for New York personal income tax purposes?

Answer. No portion of any qualified withdrawal from a family tuition account will be includible in the New York adjusted gross income of either the account owner or the designated beneficiary of the account. (Section 612(c)(33) of the Tax Law.)

Question 11. Will a qualified withdrawal from a family tuition account include a withdrawal because of death, disability or the receipt of a scholarship?

Answer. A qualified withdrawal does not include a withdrawal because of death, disability or the receipt of a scholarship. Such withdrawals are enumerated at section 695-b.10.b of the Education Law, separate from the reference to qualified withdrawals at section 695-b.10.a of the Education Law.

Question 12. Will non-qualified withdrawals from a family tuition account be includible in the New York taxable income of a distributee for New York personal income tax purposes? Also, will non-qualified withdrawals constitute ordinary income regardless of whether any portion of the amounts withdrawn were previously taxed?

Answer. Withdrawals from a family tuition account that are not qualified withdrawals are includible in the New York adjusted gross income of the distributee. (Section 612(b)(34) of the Tax Law.) Withdrawals that are not such qualified withdrawals are (1) non-qualified withdrawals, (2) withdrawals as the result of death or disability of the designated beneficiary or (3) withdrawals made on account of a scholarship. (Section 695-b.10 of the Education Law.) The New York income inclusion is without regard to the fact that some of the amount withdrawn may be attributable to funds which were previously taxed (because contributions made in prior years which were in excess of the $5,000 deduction limit were funded with, in effect, "after-tax" funds.)

The remaining type of withdrawal not addressed in the preceding paragraph is a withdrawal which meets the definition of a qualified withdrawal at section 695-b.9 of the Education Law (to pay the qualified higher education expenses of the designated beneficiary) but is not a qualified withdrawal by reason of section 695-e.18 of the Education Law, which provides that an account must be

open for at least three calendar years before a qualified withdrawal can be made. It is the Department's position that such "36 month" withdrawals are not includible in New York adjusted gross income, since the addback at section 612(b)(34) of the Tax Law refers solely to withdrawals that are not qualified within the meaning of section 695-b.9 of the Education Law.

Question 13. To the extent that it is deductible for federal income tax purposes, will any withdrawal penalty withheld from a non-qualified withdrawal offset taxable income so that only the net amount received will be includible in the distributee's New York taxable income for New York personal income tax purpose?

Answer. If a withdrawal penalty withheld from a non-qualified withdrawal is deductible for federal purposes in determining the amount of federal adjusted gross income recognized on the withdrawal, it will be deductible for New York purposes so that only the net amount of the distribution (withdrawal less penalty amount) will be includible in New York adjusted gross income under section 612(b)(34) of the Tax Law.

Question 14. Will a nonresident who is required to pay New York personal income tax and who makes a qualified contribution to a family tuition account be entitled to the same tax treatment described in **Questions 4 through 13** above as a resident for New York personal income tax purposes?

Answer. A nonresident who is required to pay New York personal income tax and who makes contributions to a family tuition account is entitled to the same tax treatment in the determination of New York adjusted gross income described in **Questions 4 through 13** as is a resident. (Section 601(e)(2) of the Tax Law.) However, the income and deductions recognized in New York adjusted gross income under that tax treatment are not New York source income and deductions of a nonresident for purposes of apportioning the tax to New York. (Sections 601(e)(3), 631(b) of the Tax Law.)

Question 15. Will the spouse of a nonresident, who files a joint New York personal income tax return, be also entitled to the treatment described in **Question 14** regardless of whether such spouse has New York adjusted gross income of such spouse's own?

Answer. The spouse of a nonresident, who files a joint New York personal income tax return, is also entitled to the treatment described in **Question 14**, regardless of whether such spouse has New York adjusted gross income of his or her own.

Question 16. Since the New York City personal income tax on residents and the City of Yonkers income tax surcharge on residents are generally based on New York adjusted gross income and there is no statutory requirement to add back any items

of excluded income, or to disallow any deductions, relating to the Program for local income tax purposes, will any rulings received with respect to the New York State personal income tax on residents be equally applicable for purposes of both the New York City personal income tax on residents and the City of Yonkers income tax surcharge on residents?

Answer. The tax treatment described in **Questions 4 through 13** applies as well (1) to a New York City resident under the New York City resident income tax (section 1303 of the Tax Law), and (2) to a resident of the City of Yonkers under the Yonkers resident income tax surcharge. (Sections 1321(a), 1323 of the Tax Law.)

Question 17. Will the deduction for contributions described in **Question 4** be available for purposes of the New York City earnings tax on nonresidents and the City of Yonkers earnings tax on nonresidents?

Answer. The deduction for contributions described in **Question 4** is not available under the New York City and City of Yonkers nonresident earnings taxes. These taxes are imposed on wages and net earnings from self-employment (section 25-m.2(a) of the General City Law, section 1340(c)2.(a) of the Tax Law), which bases do not include that contributions deduction.

Estate Tax

Applicable Law

Section 952 of the Tax Law imposes a tax on the transfer of the New York estate by every deceased individual who at his or her death was a resident of New York. Section 953 of the Tax Law provides that the New York taxable estate of a deceased resident is his or her New York gross estate computed under section 954 of the Tax Law, less the deductions allowable under section 955 of the Tax Law.

Section 954(a) of the Tax Law provides that the New York gross estate of a deceased resident means his or her federal gross estate as defined in the IRC (whether or not a federal estate tax return is required to be filed) with certain modifications.

Section 960 of the Tax Law imposes a tax on transfer, from any deceased individual who at his or her death was not a resident of New York State, of real and tangible personal property having an actual situs in New York, and either (i) includible in his or her federal gross estate or (ii) which would be includible in his or her New York gross estate pursuant to section 957 of the Tax Law (relating to certain limited powers of appointment) if he or she were a resident of New York State.

Question 18. Will the amounts deposited in the Program and any earnings thereon be treated in the same manner for New York estate tax purposes as for federal estate tax purposes in the case of New York residents?

Answer. The New York estate tax was amended by Chapter 56, Laws of 1998 (section 33) to incorporate the IRC as of August 5, 1997. Accordingly, in the case of New York residents, account contributions, earnings and withdrawals will be treated in the same manner for New York estate tax purposes as for federal estate tax purposes. (Section 954(a) of the Tax Law.)

Question 19. Will nonresidents include amounts in family tuition accounts in their New York taxable estates?

Answer. If a nonresident of New York is subject to the New York estate tax (because such individual has real or tangible personal property located in New York), amounts in family tuition accounts are included in the New York taxable estate determined as if he or she were a resident (to the extent includible in the federal gross estate), but are not included in the New York gross estate for purposes of apportioning the tax to New York. (Section 960(b) of the Tax Law.)

Gift Tax

Applicable Law

Section 1001 of the Tax Law imposes a tax on the transfer of property by gift during the calendar year by any individual, resident or nonresident. Section 1000(a) of the Tax Law provides that for purposes of the gift tax, any reference to the IRC means the IRC of 1986, with all amendments enacted on or before November 5, 1990.

Section 1003(a)(1) of the Tax Law provides that the New York gifts of a New York resident are the total amount of gifts made in any calendar year within the meaning of section 2503 of the IRC, less the amount of any gifts included therein of real or tangible personal property having an actual situs outside New York State, less the amount of any gifts included therein by reason of section 2519 of the IRC (unless such gifts have already been excluded therefrom by reason of having an actual situs outside New York State) and increased as provided in section 1003(a)(3)and (4) of the Tax Law.

Question 20. Will contributions to, and qualified withdrawals from, a family tuition account be treated, for New York gift tax purposes, in the same manner as for federal gift tax purposes in the case of New York residents? Also, will nonresidents treat contributions to, and qualified withdrawals from, a family tuition account as New York taxable gifts?

Answer. The New York gift tax has been repealed effective for gifts made on or after January 1, 2000. (Chapter 389, Laws of 1997, § 7.) Accordingly, there is no New York gift tax on contributions made on or after that date. For contributions made before then, it is the Department's position that there is likewise no New York gift tax, as discussed below.

Unlike the estate tax (Question 18), the New York gift tax was not amended to incorporate the IRC as of August 5, 1997, and incorporates the IRC only through November 5, 1990. (Section 1000(a) of the Tax Law.) Accordingly, the New York gift tax does not incorporate the federal gift tax treatment provided in section 529 of the IRC, since that section was not enacted until 1996. Prior to the enactment of section 529, the federal gift tax treatment of contributions to an account in the nature of a family tuition account was unclear. However, it is the Department's position that a contribution to such an account would have been treated under the pre-1996 IRC as not a completed gift.

There is no completed gift because the account remains at all times in the nature of a revocable trust under the control of the owner. Only the owner can make contributions to the account. Likewise, only the owner can direct withdrawals from the account, which, in the case of qualified withdrawals, are paid upon instruction of the owner directly to an educational institution, and in the case of withdrawals other than qualified withdrawals, are paid directly to the owner. Accordingly, such contribution would not constitute a federal, nor therefore a New York, taxable gift. (Section 1003(a)(1) of the Tax Law.)

It is also the Department's position that, since a completed gift does not occur at the point of contribution, a completed gift, if any, will occur only at the point of withdrawal. For a withdrawal to constitute a completed gift, it must be one payable to or for the benefit of the beneficiary. Only a qualified withdrawal meets this criterion, since withdrawals other than qualified withdrawals are paid to the owner. Since a qualified withdrawal cannot occur until the account has been in existence for 36 months, it cannot occur before the expiration of the New York gift tax.

Accordingly, it is the Department's position that there is no New York gift tax applicable to either contributions or withdrawals from accounts.

On the other hand, while a withdrawal, as such, cannot come within the New York gift tax under this reasoning, the proceeds of the withdrawal may be paid over by the owner to or for the benefit of the beneficiary in a transaction constituting a completed gift. Such payments generally are not within the scope of this opinion. However, in the case of a withdrawal which is not a qualified withdrawal because of the 36 month account requirement, where the proceeds of the withdrawal are paid by the owner on behalf of the beneficiary for tuition to an educational organization, if such payment would have qualified for the tuition exclusion from federal taxable gifts under the pre-1996 section 2503(e)(2)(A) of

the IRC, it would also be excluded from New York taxable gifts. (Section 1003(a)(1) of the Tax Law.)

Reporting Requirements for the Program

Question 21. Can the reporting responsibilities for the Program or those involved in its operation or management be made before the final federal reporting requirements have been evaluated by the Department?

Answer. No determination of reporting responsibilities for New York tax purposes by the Program or those involved in its operation or management can be made until the final federal reporting requirements have been evaluated by the Department.

DATED: October 7, 1998

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

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