

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

TSB-A-88 (15) I
Income Tax
September 16, 1988

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I880617B

June 17, 1988, a Petition for Advisory Opinion was received from Gompers & Blau, 160 Broadway, New York, New York 10038.

The issue raised is whether income from trading activities is exempt from personal income tax pursuant to section 631(d) of the Tax Law, where a nonresident individual trades a security account under an arrangement with a partnership that does nothing but trade securities for its own account.

A partnership that does nothing but trade securities for its own account entered into an agreement with an individual who is a nonresident of New York State. The agreement allows the individual to trade securities in an account over which the individual has complete authority. The title of the account bears both the name of the partnership and the name of the responsible individual. The agreement states that the individual's share of net trading profits generated by the trading in the account is initially 50%, and increases as the total earned increases. The individual's share of the profits is reported to him at the end of each year on a Form 1099.

Petitioner feels that the arrangement between the partnership and the individual is a joint venture for the following reasons:

- (a) Each party contributes something to the venture; the partnership, capital, and the individual, time and skill.
- (b) The fruits of the venture are to be shared in a determinable manner with the individual receiving at least 50% of the profits initially, and more as his success continues.
- (c) According to the agreement, as profits are generated, neither the partnership nor the individual may withdraw all of the profits allocable to it/him; but, rather, the profits accumulate in the account. This unwithdrawn equity is at risk, and can be lost at any time.

Petitioner also feels that since the arrangement is in the nature of a joint account, it follows that the individual has an ownership interest in the account:

- (a) He shares directly in his trading success.
- (b) He receives his share of earnings directly from the account.
- (c) He is at risk to the extent that profits earned and not withdrawn can be lost at any time.

Petitioner contends that all of the foregoing indicates that the nonresident individual is

trading for his own account, and is therefore not subject to New York State personal income tax per section 631(d) of the Tax Law.

Section 631(d) of the Tax Law provides that:

[a] nonresident, other than a dealer holding property primarily for sale to customers in the ordinary course of his trade or business, shall not be deemed to carry on a business, trade, profession or occupation in this state solely by reason of the purchase and sale of property or the purchase, sale or writing of stock option contracts, or both, for his own account.

A similar provision was contained in section 703(d) of Article 23 (Unincorporated Business Income Tax) of the Tax Law, prior to the repeal of Article 23 effective December 31, 1982. In an interpretation of former section 703(d), Matter of Swid-Pearlman Management v. Tully (67 A.D.2d 1022), it was determined that when the petitioner, a general partnership, traded the securities of limited partnerships such trading did not constitute the purchase and sale of property for its own account and the general partnership was not exempt from the unincorporated business tax. Therein, the general partnership was formed to serve as the general partner for two limited partnerships. The two limited partnerships were private investment partnerships in which the limited partners pooled their capital to be invested for their benefit by the general partner. The general partnership's activities consisted solely of investing and trading in securities for the benefit of the respective partners. The general partnership did not buy and sell securities for third parties. It did not earn any commission or fee income nor did it receive any salary for services. It did receive a percentage of the net capital gains. The court determined that managing investments or property of others is considered the conduct of a business and taxable. Further, the general partnership was not investing its own funds in securities, but rather the capital funds of the limited partners. Since the general partnership was created to "engage in general investment activities" and serve as general partner of the two limited partnerships, it is evident that the trading of securities was part and parcel of the regular conduct of the partnership's "investment management" business. Therefore, the general partnership's income was derived principally from services rendered for the limited partnerships, and such trading did not constitute the purchase and sale of property for its own account. (See also Matter of Wohlreich v. Tully (72 A.D.2d 825))

Clearly, the instant case is substantially similar to Swid-Pearlman. Herein, the nonresident individual has an agreement with a partnership that the individual will trade a security account funded by the partnership and the net profits of the account. The general partnership in Swid-Pearlman was a general partner for two limited partnerships whereby the general partnership traded an account funded by the limited partnership. The income of the individual, like the general partnership in Swid-Pearlman is derived from the managing of the trading account. Like the general partnership in Swid-Pearlman, the individual's income is a percentage of the profits of the account.

Since the circumstances of the instant case are substantially similar to Swid-Pearlman, and the provisions of section 631(d) and section 703(d) are almost identical,

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September 16, 1988

the precedent set in Swid-Pearlman and Wohlreich should control for purposes of the determination made herein as well. Therefore, the income the nonresident individual receives from the trading account is income from the managing of investments on property of others and constitutes income from services rendered for the benefit of the partnership.

Accordingly, it is determined that the income the nonresident individual receives from the trading account is not income from trading for the individual's own account and therefore such income is not exempt from personal income tax under section 631(d) of the Tax Law.

DATED: September 16, 1988

FRANK J. PUCCIA
Director
Technical Services Bureau

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