

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-06(4)C
Corporation Tax
TSB-A-06(5)I
Income Tax
July 25, 2006

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z060530A

On May 30, 2006, a Petition for Advisory Opinion was received from Allapattah DFC Class Action Settlement Fund, c/o Morrison, Brown, Argiz & Farra, LLP, 1001 Brickell Bay Drive, 9th Floor, Miami, FL 33131.

The issues raised by Petitioner, Allapattah DFC Class Action Settlement Fund, are:

1. Whether Petitioner, as described below, is a corporation subject to taxation under Article 9-A of the Tax Law.
2. Whether Petitioner, as described below, is treated as a trust for purposes of Article 22 of the Tax Law.
3. Whether Petitioner, as described below, is subject to the New York City personal income tax authorized under Article 30 of the Tax Law.
4. Whether Petitioner, as described below, has any New York State franchise tax or New York State or City personal income tax filing or reporting obligations.

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

Petitioner was created by an order dated April 7, 2006, of the United States District Court ("Court"), Southern District of Florida in the case of *Allapattah Services, Inc. v Exxon Corporation* ("Exxon").

Petitioner was created as a result of a settlement agreement dated December 19, 2005, under which Exxon agreed to pay \$1.075 billion in settlement of claims made against it by a class of direct- served dealers. The Court, on April 5, 2006, verbally entered an Order of Final Approval of the Settlement Agreement. A written Final Order containing the Court's findings and conclusions approving the settlement was entered on April 7, 2006. The settlement agreement arose out of a breach of contract class action suit brought by Exxon direct-served dealers who sought recovery for alleged motor fuel overcharges.

On May 10, 2006, Exxon transferred the \$1.075 billion to an account in the depository institution of Petitioner. The depository institution is J.P Morgan Chase. All of the funds deposited into and the earnings of the J. P. Morgan Chase account are held for the benefit of Petitioner. Funds deposited into the account are to be invested or reinvested by J. P. Morgan

Chase in instruments, or in money market funds investing solely in instruments, secured by the full faith and credit of the United States, including Treasury Bills, Treasury Notes, and Treasury Bonds.

At the time that Exxon deposited the funds, it was released from further liability and participation in the claims process. The claims process, under which individual dealers will establish their entitlement to payment from the fund, continues before a Special Master appointed by and reporting to the Court. The claims process will continue until all valid claims are adjudicated and paid. The assets of Petitioner will be used to make payments to claimants, as well as other persons involved in the case, including Class Counsel. Petitioner is subject to the continuing jurisdiction of the Court.

The Garden City Group, Inc. ("GCG") was appointed by the Court as Claims Administrator. As Claims Administrator, among fulfilling other tasks, GCG processes approved claims and their payment.

By Court Order dated May 2, 2006, Petitioner was designated as a Qualified Settlement Fund ("QSF") pursuant to section 1.468B-1 of the Federal Treasury Regulations. The Order cites the following reasons that Petitioner qualifies as a QSF.

- 1) It was established pursuant to a court order and is subject to the Court's continuing jurisdiction.
- 2) It was established to resolve claims arising out of an alleged breach of contract.
- 3) The funds are segregated from the assets of Exxon, the transferor.

In addition, in compliance with section 1.468B-2 of the Federal Treasury Regulations, the Court Order appointed GCG as the Administrator of Petitioner responsible for Petitioner's tax reporting requirements. The Administrator will prepare and file federal Form 1120-SF, *U.S. Income Tax Return for Settlement Funds (Under Section 468B)*, for Petitioner.

Applicable law and regulations

Section 1.468B-1 of the Federal Treasury Regulations provides, in part:

(a) In general. A qualified settlement fund is a fund, account, or trust that satisfies the requirements of paragraph (c) of this section.

(b) Coordination with other entity classifications. If a fund, account, or trust that is a qualified settlement fund could be classified as a trust within the meaning of §301.7701-4 of this chapter, it is classified as a qualified settlement fund for all purposes of the Internal Revenue Code (Code)....

(c) Requirements. A fund, account, or trust satisfies the requirements of this paragraph (c) if —

(1) It is established pursuant to an order of, or is approved by, the United States, any state (including the District of Columbia), territory, possession, or political subdivision thereof, or any agency or instrumentality (including a court of law) of any of the foregoing and is subject to the continuing jurisdiction of that governmental authority;

(2) It is established to resolve or satisfy one or more contested or uncontested claims that have resulted or may result from an event (or related series of events) that has occurred and that has given rise to at least one claim asserting liability—

(i) Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (hereinafter referred to as CERCLA), as amended, 42 U.S.C. 9601 et seq.; or

(ii) Arising out of a tort, breach of contract, or violation of law; or

(iii) Designated by the Commissioner in a revenue ruling or revenue procedure;
and

(3) The fund, account, or trust is a trust under applicable state law, or its assets are otherwise segregated from other assets of the transferor (and related persons).

Section 1.468B-2(k) of the Treasury Regulations provides, in part:

Except as otherwise provided in §1.468B-5(b), for purposes of subtitle F of the Internal Revenue Code, a qualified settlement fund is treated as a corporation....

Section 208.1 of the Article 9-A of the Tax Law provides, in part:

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 ... (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 209.1 of Article 9-A of the Tax Law imposes an annual franchise tax as follows:

For the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity, or of maintaining an office in this state, for all or any part of each of its fiscal or calendar years, every domestic or foreign corporation, except corporations specified in subdivision four of this section, shall annually pay a franchise tax, upon the basis of its entire net income base, or upon such other basis [capital base, minimum taxable income bases or the fixed dollar minimum] as may be applicable as hereinafter provided, for such fiscal or calendar year or part thereof....

The term "corporation" is defined in section 1-2.5 of the Business Corporation Franchise Tax Regulations, which provides, in part:

(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.

Section 601 of Article 22 of the Tax Law provides, in part:

* * *

(c) ... There is hereby imposed for each taxable year on the New York taxable income of every resident ... trust a tax ...

* * *

(e)(1) ... There is hereby imposed for each taxable year on the taxable income which is derived from sources in this state of every nonresident and part-year resident ... trust ... a tax....

Section 607(a) of Article 22 of the Tax Law provides, in part:

General. 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....

Opinion

Issue 1

Petitioner in this case is a qualified settlement fund as defined in section 1.468B-1 of the Federal Treasury Regulations. Pursuant to section 1.468B-2(k) of the Treasury Regulations, a qualified settlement fund is treated as a corporation for federal tax administrative and procedural purposes.

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. See *D'Amato & Lynch, Reserve Escrow Agent*, Adv Op Comm T&F, June 3, 2002, TSB-A-02(8)C and (1)I.

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)).

The activities of Petitioner in the present case 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. See *D'Amato & Lynch, supra*. Accordingly, Petitioner 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 section 209.1 of such Article.

Issue 2

The New York State personal income tax under Article 22 of the Tax Law is imposed on resident trusts under section 601(c) and on nonresident trusts under section 601(e).

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For Federal income tax purposes, Petitioner 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 IRC. Accordingly, since Petitioner is not treated as a trust for federal income tax purposes, Petitioner, 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 *D'Amato & Lynch, supra.*) Therefore, Petitioner is not subject to the tax imposed under Article 22 of the Tax Law.

Issue 3

The New York City personal income tax under Article 30 of the Tax Law is similar to the New York State personal income tax under Article 22 of the Tax Law and is administered by New York State in the same manner as Article 22. Accordingly, Petitioner is not treated as a trust for New York City personal income tax purposes and is not subject to the New York City personal income tax authorized under Article 30 of the Tax Law.

Issue 4

Pursuant to the determination that Petitioner is not a taxable entity for New York State franchise tax, New York State personal income tax, or New York City personal income tax purposes, Petitioner has no New York State franchise tax or New York State or New York City personal income tax filing or reporting obligations.

DATED: July 25, 2006

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

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