

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

TSB-A-86 (15) C  
Corporation Tax  
August 1, 1986

STATE OF NEW YORK  
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. C850904A

On September 4, 1985, a Petition for Advisory Opinion was received from George & Elizabeth F. Frankel Foundation, Inc., 60 East 42nd Street, New York, New York 10017.

The issue raised is whether Petitioner is carrying on an unrelated trade or business in New York State and is, thereby, subject to the tax on unrelated business income imposed pursuant to Article 13 of the Tax Law. In the event that it is determined that Petitioner is subject to taxation under Article 13 of the Tax Law, Petitioner raises two additional issues. Petitioner inquires whether it is entitled to subtract 50% of dividends from non-subsidiary corporations from federal unrelated business taxable income in determining unrelated business taxable income for purposes of Article 13 of the Tax Law. Petitioner also requests to be allowed to characterize interest, dividends, and capital gains as investment income and to allocate such income by the use of an investment allocation percentage computed with regard to the securities held by Petitioner.

Petitioner is a not-for-profit corporation, organized under the laws of New York State, that qualifies for federal income tax purposes as a private charitable foundation. In accordance with Section 514 of the Internal Revenue Code of 1954 (hereinafter IRC), Petitioner is required to report certain unrelated debt-financed income as unrelated business income. The debt-financed income at issue consists of interest, dividends, and capital gains. Petitioner also contends that for federal income tax purposes although such income is included in unrelated business taxable income, it is not specifically defined as constituting an unrelated trade or business. Petitioner contends that although it has unrelated business taxable income for federal income tax purposes, it is not carrying on an unrelated trade or business in New York State and thus should not be subject to the tax imposed under Article 13 of the Tax Law.

Section 290(a) of the Tax Law, in part, imposes a tax on the unrelated business income of the following:

"...every organization described in section 511(a)(2) of the Internal Revenue Code...  
carrying on an unrelated trade or business in New York..."

Article 13 of the Tax Law does not contain a definition of the term "unrelated trade or business." However, the legislative history of Chapter 1005 of the Laws of 1970, which enacted Article 13 of the Tax Law, makes clear that the Legislature intended to treat income from unrelated debt financed property as income from an unrelated trade or business. (see: Report of the Ways and Means Committee on Suggested 1970 Tax Reform Legislation). Accordingly, it must be concluded that Petitioner is engaged in an unrelated trade or business in New York State within the meaning of section 290 of the Tax Law and is subject to tax under Article 13 of the Tax Law.

As it has been determined that Petitioner is subject to Article 13 of the Tax Law, Petitioner requests an opinion as to whether it may be entitled subtract 50% of dividends from non-subsubsidiary corporations from federal unrelated business taxable income in determining unrelated business taxable income for purposes of Article 13 of the Tax Law. Petitioner also requests that it be allowed to classify interest, dividends, and capital gains as investment income to be allocated at an investment allocation percentage to be computed with regard to the securities held. Petitioner refers to section 293(b) of the Tax Law which, in part, provides:

"If it shall appear to the tax commission that the allocation percentage determined in subdivision (a) of this section does not properly reflect the activity, business or income of a taxpayer's unrelated trade or business within the state, the tax commission shall be authorized, in its discretion, to adjust it by (1) excluding one or more of the factors therein, (2) including one or more other factors,... (3) excluding one or more assets in computing such allocation percentage, provided the income therefrom is also excluded in determining unrelated business taxable income or (4) any other similar or different method calculated to effect a fair and proper allocation of the income reasonably attributable to this state..."

It is Petitioner's contention that only by the use of the requested methods would the activity, business or income of Petitioner be properly reflected within New York State.

Section 292(a)(1) through (3) of Article 13 of the Tax Law provides for the modifications to be made to federal unrelated business taxable income in the computation of unrelated business taxable income. However, there is no modification to allow a deduction for 50% of dividends from non-subsubsidiary corporations. Accordingly, Petitioner is not entitled to deduct 50% of dividends from non-subsubsidiary corporations from federal unrelated business taxable income in the computation of unrelated business taxable income for purposes of Article 13 of the Tax Law.

Article 13 of the Tax Law does not provide for the classification of unrelated business taxable income as business and investment income. The total unrelated business taxable income is allocated within New York State in accordance with section 293(a) of the Tax Law. The allocation percentage required to be used is determined by a three-factor formula consisting of property, receipts, and payroll.

However, section 293(b) of the Tax Law authorizes the Tax Commission to make a discretionary adjustment to the allocation percentage computed in accordance with section 293(a) of the Tax Law if it appears that such percentage does not properly reflect the activity, business, or

TSB-A-86 (15) C  
Corporation Tax  
August 1, 1986

income of a taxpayer's unrelated trade or business in New York State. In light of the fact that Petitioner's unrelated business taxable income consists entirely of unrelated debt-financed income, the Tax Commission, pursuant to the provisions of section 293(b) of the Tax Law, hereby determines that the allocation percentage determined in section 293(a) of the Tax Law does not properly reflect the activity, business or income of Petitioner's unrelated trade or business within the state and authorizes the Petitioner to allocate its unrelated business taxable income by use of an investment allocation percentage to be computed in a manner consistent with the provisions of franchise tax regulation sections 4-8.3 and 4-7.2.

This authorization is not intended to apply to any other taxpayer and will apply to Petitioner only so long as its facts and circumstances do not materially change.

DATED: August 1, 1986

s/FRANK J. PUCCIA  
Director  
Technical Services Bureau

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