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

TSB-A-97(10.1)C
Corporation Tax
December 2, 1998

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

MODIFIED ADVISORY OPINION PETITION NO. C961007A

On May 9, 1997, an Advisory Opinion was issued to Patrick D. Martin, Nixon, Hargrave, Devans & Doyle, Clinton Square, Po Box 1051, Rochester, New York 14603. (TSB-A-97(10)C)

Subsequent to the issuance of the Advisory Opinion, a decision of the Supreme Court of the United States has caused the reexamination of the issues involved and such Advisory Opinion is modified by reversing the conclusion reached in issue "1" and modifying the conclusion in issue "3" with respect to the Plan in issue "1" as follows.

The basis for the conclusions in the Advisory Opinion was the holding of the New York Court of Appeals in Matter of Morgan Guaranty Trust Co. v Tax Appeals Tribunal, 80 NY2d 44 (June 9, 1992). The Court found that even though the New York Gains Tax was a neutral law of general application it was nevertheless preempted by ERISA because it impacted on the structure and administration of the employee benefit plan in question by reason of recordkeeping and reporting requirements involving asset disposition, and, even more significantly, the tax would influence investment strategy and directly deplete funds otherwise available for providing benefits.

In De Buono v NYSA-ILA Medical and Clinical Services Fund, 520 US __, 138 L Ed 2d 21, decided June 2, 1997, the issue before the United States Supreme Court was whether a New York tax on gross receipts for patient services at diagnostic and treatment centers (Public Health Law §2807-d), which was used to reduce the State's Medicaid deficit, was preempted by ERISA inasmuch as the medical centers were owned and operated by an ERISA-qualified plan. The Court held that, relying on its earlier decision Conference of Blue Cross & Blue Shield Plans v Travelers Ins. Co., 514 US 341, 131 L Ed 2d 695, the term "relate to" in ERISA cannot be read literally because doing so would provide no stopping point for the ERISA preemption. It directed that the objectives of ERISA must provide the basis for understanding the scope of Congress' intention and noted that since the tax was an exercise of the power in a field "traditionally occupied by the [s]tates," the [r]espondents therefore bear the considerable burden of overcoming 'the starting presumption that Congress does not intend to supplant state law.'" The Court said:

> This is not a case in which New York has forbidden a method of calculating pension benefits that federal law permits, or required employers to provide certain benefits. Nor is it a case in which the existence of a pension plan is a critical element of a state law cause of action, or one in which the state statute contains provisions that expressly refer to ERISA or ERISA plans.

> A consideration of the actual operation of the state statute leads us to the conclusion that the HFA [the NY gross receipts tax] is one of "myriad state laws" of general applicability that impose some burdens on the administration of ERISA plans but nevertheless do not "relate to" them within the meaning of the governing statute.

The Court also noted (in footnote 11 of the decision) that it did not believe, when considering state laws which could affect ERISA-qualified plans, a stricter standard of preemption applied because a tax law was involved.

The Supreme Court decided the New York tax on the respondents in De Buono, supra, was not preempted by ERISA.

Since the Supreme Court in its De Buono, supra, decision held that a New York State tax of general applicability affecting (and necessarily depleting) assets of an ERISA entity does not, on that basis alone, "relate" to a qualified employee benefit plan and is thus not federally preempted; it is concluded that the earlier advisory opinion should be modified.

In this case, the Plan described in issue "1" is a qualified plan under section 401(a) of the Internal Revenue Code ("IRC") and it is assumed that it is a plan covered by ERISA. Therefore, the Plan constitutes a trust described in section 511(b)(2) of the IRC. Based on the Supreme Court decision in De Buono, supra, the tax imposed under Article 13 of the Tax Law is not preempted by ERISA.

Section 290 of Article 13 of the Tax Law, provides that for every taxable year, or part thereof, every trust described in section 511(b)(2) of the IRC carrying on an unrelated trade or business in New York shall pay a tax at the rate of nine percent on its allocated unrelated business taxable income for such year, or $250, whichever is greater. Accordingly, the Plan is subject to the tax imposed by section 290 of Article 13 of the Tax Law on its unrelated business income, or the minimum tax of $250, whichever is higher, and must file New York tax returns as required by section 294 of Article 13 of the Tax Law.

With respect to issue "3", the answer is no. Section 292 of Article 13 of the Tax Law provides that the unrelated business taxable income is the taxpayer's federal unrelated business taxable income for the taxable year with certain modifications. Section 512(b)(12) of the IRC provides that when computing unrelated business taxable income there shall be allowed a specific deduction of $1,000.

Accordingly, if the gross amount of the Plan's unrelated business income for federal income tax purposes is less than $1,000, it appears that pursuant to section 512(b)(12) of the IRC, the Plan would not have any federal unrelated business taxable income, in which case, the Plan may or may not have any New York unrelated business taxable income depending on the modifications required by section 292 of Article 13 of the Tax Law. However, the Plan would be carrying on an unrelated

trade or business in New York, and pursuant to section 290 of Article 13 of the Tax Law would be subject to the minimum tax of $250.

DATED: December 2, 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.