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

TSB-A-04(7)I
Income Tax
November 12, 2004

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. I031015B

On October 15, 2003, a Petition for Advisory Opinion was received from JPMorgan Chase Bank, as Trustee of the 1934 Trusts, c/o John Powers, 345 Park Avenue, New York, NY 10154.

The issue raised by Petitioner, JPMorgan Chase Bank, as Trustee of the 1934 Trusts, is whether the trusts, described below, will be subject to New York State or New York City income tax if (a) the Committee, described below, replaces the trustee with a trustee not domiciled in New York State, and (b) the two Committee members who are currently domiciled in New York State are replaced by individuals who are not domiciled in New York State.

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

John D. Rockefeller, Jr., as grantor (the Grantor), and The Chase National Bank of the City of New York (now JPMorgan Chase Bank), as trustee (the Trustee), created five irrevocable trusts by written instruments (the Agreements of Trust), dated December 18, 1934, for the benefit of Abby Rockefeller Milton, John D. Rockefeller 3rd, Nelson A. Rockefeller, Laurance S. Rockefeller, and David Rockefeller, respectively (collectively, the Trusts). The Grantor was a domiciliary of New York, New York when the Trusts were created.

Under the terms of the Agreements of Trust, the Trustee is given broad powers over the Trusts' assets. The Agreements of Trust appoint a committee which is empowered to instruct the Trustee in the exercise of the Trustee's powers under the Agreements of Trust (the Committee). Specifically, the Agreements of Trust provide that the payment of income and principal to any beneficiary should be made in accordance with the Committee's instructions. Moreover, the Agreements of Trust provide that the Committee may direct the Trustee, and the Trustee must obey such direction, to take or refrain from taking any action which the Committee deems it advisable for the Trustee to take or refrain from taking.

Subject to the directions of the Committee, the Trustee is given certain powers and authority over the Trusts' assets pursuant to Section II of the Agreements of Trust. Specifically, the Trustee has the power to: (1) retain any stocks, bonds, securities or other property, real or personal, which at any time form part of any Trust; (2) consent to the reorganization, consolidation, or merger of any corporation or the sale or lease to any corporation or person of the property of any corporation, any of the stocks, bonds, notes or other securities which are held by the Trustee under the Agreements of Trust and do any act with respect to such stocks, bonds, notes or other securities; (3) exercise any option contained in any stocks, bonds, notes or other securities held by it for the conversion of the same to other securities and make any payments in

connection therewith and decide whether to make such payment from principal or income; (4) make advances for the protection or preservation of any of the securities held by it or for the foreclosure of any mortgage or otherwise and decide whether to make such payment from principal or income; (5) borrow money for any purposes connected with the protection or preservation of the principal of any Trust and mortgage or pledge any real estate or personal property forming a part of any Trust; (6) accept deeds of real property in satisfaction of bonds and mortgages and pay consideration in connection therewith; (7) pay and discharge any taxes, assessments or other charges levied or made upon any Trust; (8) determine whether or not to maintain a sinking fund; (9) incur and pay out of the income or principal any and all expenses in connection with the discharge of the Trustee's duties; (10) vote any shares of stock held in trust; and (11) in the case of a minor entitled to receive any property hereunder, to pay over the same to the parent of the minor.

Pursuant to Section III of the Agreements of Trust, the Trustee has full power and authority to: (1) sell, exchange or otherwise dispose of any Trust's assets; (2) invest and reinvest any Trust's funds in any stocks, bonds, securities, personal property or real estate as the Trustee deems advisable; (3) establish a trust fund and make distributions to any person entitled to any or all of the principal of any Trust fund in any securities or other property held by it; and (4) in making distributions in kind among two or more persons, to distribute the same or different property to such persons and to conclusively determine the value of the property distributed. However, the Agreements of Trust provide that the Trustee shall not take any action under and pursuant to Section III of the Agreements of Trust unless directed by the Committee or until it shall have notified the Committee in writing of the action it contemplates taking and shall have requested the Committee's approval thereof and it shall have received permission from the Committee to take such action. In the event that the Committee does not respond to the request from the Trustee for permission to take such action within ten days of the Trustee's mailing of such request, or if the Committee states that the Trustee may exercise its own discretion over such action, the Trustee has discretion over whether or not to take such action.

The Trustee is a corporation, incorporated under the laws of New York State. Pursuant to Section X of the Agreements of Trust, the Committee may, by unanimous vote of all of its members, remove the Trustee and appoint a bank or trust company organized under the laws of any state in the United States to act as trustee. The Committee proposes to remove the Trustee and appoint a successor trustee incorporated under the laws of Delaware (hereinafter sometimes referred to as the Successor Trustee). It expects to appoint J.P. Morgan Trust Company of Delaware, a Delaware limited purpose trust company (hereinafter sometimes referred to as the Proposed Successor Trustee). Both the Trustee and the Proposed Successor Trustee are indirectly wholly owned subsidiaries of J.P. Morgan Chase & Co., a Delaware corporation. Once the Proposed Successor Trustee has been appointed, it will take title to, and be the custodian of, all the Trusts' assets, which assets will be recorded on and become part of the Proposed Successor Trustee's books and records and fiduciary assets. As it does for all trusts for

which the Proposed Successor Trustee acts as a trustee, it will purchase certain administrative services in connection with the administration of the Trusts from its affiliate, Petitioner, a New York State banking corporation, pursuant to the terms of an existing agency agreement. These services will include tax preparation services for fiduciary income tax returns, client relationship support services and certain other processing and ministerial services. The Proposed Successor Trustee will be responsible for the monitoring and oversight of its agent in providing these services and will conduct a full review of the Trusts quarterly.

The Proposed Successor Trustee is a corporation of substantial significance. It has an annual revenue of $2.4 million, assets under management of $1.4 billion and capitalization of $30 million. Delaware law governs the Proposed Successor Trustee's capitalization, and the Proposed Successor Trustee is regulated and supervised by the Office of the State Bank Commissioner. The State of Delaware conducts annual examinations of the Proposed Successor Trustee's policies and procedures, accounts under administration, financial records and statements and the daily administration of the trust company. In addition, the Proposed Successor Trustee maintains over 900 fiduciary accounts from its Delaware headquarters, which is located at 500 Stanton Christiana Road, Newark, Delaware 19713.

Four of the Proposed Successor Trustee's seven directors are Delaware residents. Of the Proposed Successor Trustee's eighteen officers, fourteen, including the President and Chief Executive Officer, live and/or work in Delaware. Meetings of the Board of Directors are held in Delaware. The Board of Directors must approve the activities of the Proposed Successor Trustee's Trust and Investment Committee at its quarterly meetings. In addition to the fourteen fiduciary professionals who work out of offices in Delaware, an administrative staff maintains the Proposed Successor Trustee's records, including Board minutes, the corporate charter and license, the Trust and Investment Committee minutes, files for trust accounts and original agreements, in Delaware. The Board of Directors, therefore, makes major policy decisions from the Delaware headquarters, and the administrative staff carries out day-to-day operations in Delaware.

The Proposed Successor Trustee acts as Trustee of and administers trusts in many states, not just in Delaware. In that connection, it retains from time to time non-Delaware service providers such as accountants, investment managers, legal counsel, administrative support and others (including its corporate affiliates) in connection with managing trusts of which it is Trustee. However, it has no exclusive relationship with such service providers. Rather, the Proposed Successor Trustee uses in-state providers when convenient and is free to use various out-of-state service providers depending upon the differing needs of its clients.

The Committee directs the Trustee on all decisions regarding the investment of the Trusts' assets. For more than a decade, the Committee has retained advisors to make recommendations regarding the allocation of the Trusts' assets among various asset classes, such

as large cap equities and small cap equities, both domestic and international, bonds and alternative investments, such as venture capital and other private funds. Before the merger of Morgan Guaranty Trust Company of New York with and into The Chase Manhattan Bank, the Committee retained Morgan Guaranty Trust Company of New York to manage the investments of a portion of the equity portfolio and its affiliate, J.P. Morgan Investment Management, Inc., to provide asset allocation advice. The Committee also retained Cambridge Associates to provide related advice regarding the Trusts' investments. After the merger of Morgan Guaranty Trust Company of New York with and into The Chase Manhattan Bank, which resulted in the formation of Petitioner, the Committee continued to retain Petitioner for investment management services and its affiliate, J.P. Morgan Investment Management, Inc., for asset allocation advice and plans to continue to do so, subject to the Committee's right to replace any of the advisors it retains at any time.

The Committee is comprised of five individuals, two of whom are currently domiciled in New York State. The two members of the Committee who are currently domiciled in New York State are considering resigning from the Committee and it is expected that the three remaining members of the Committee will fill the vacancies created by the resignation of the two Committee members who are currently domiciled in New York State by appointing two individuals who are domiciled outside New York State as Committee members. If the said Committee members elect to resign from the Committee and two new Committee members, neither of whom is domiciled in New York State, are appointed to the Committee, the Committee will then comprise five individuals, none of whom is domiciled in New York (hereinafter sometimes referred to as the Proposed Committee). The Proposed Committee may, however, meet from time to time in New York State and will itself retain one or more advisors, selected by the Proposed Committee, some of whom may be domiciled in New York State. More specifically, the Proposed Committee will retain a New York law firm to provide it with ongoing legal advice and representation. Also, the Proposed Committee will retain one or more investment management firms domiciled in and outside of New York State to provide it with investment advice and management, including Petitioner and J.P. Morgan Investment Management, Inc., as more fully set forth above. Also, the two Committee members who are considering resigning from the Committee, should they decide to resign, will be retained as independent advisors (without vote) to provide the Proposed Committee with general advice on distributions and management of the Trusts' assets. The advisors of the Proposed Committee will not have any authority or power to direct or control in any manner any decision or action of the Proposed Committee.

None of the Trusts' assets includes real or tangible property located in New York State. None of the Trusts' assets are used in a trade or business carried on in New York State. All income and gains of the Trusts are derived from or connected to sources outside of New York State, determined as if the Trusts were nonresidents.

Applicable law and regulations

Section 605(b)(3) of the Tax Law defines a resident estate or trust, and provides, in part:

> Resident estate or trust. A resident estate or trust means:
>
> (A) the estate of a decedent who at his death was domiciled in this state,
>
> (B) a trust, or a portion of a trust, consisting of property transferred by will of a decedent who at his death was domiciled in this state, or
>
> (C) a trust, or portion of a trust, consisting of the property of:
>
> (i) a person domiciled in this state at the time such property was transferred to the trust, if such trust or portion of a trust was then irrevocable, or if it was then revocable and has not subsequently become irrevocable; or
>
> (ii) a person domiciled in this state at the time such trust, or portion of a trust, became irrevocable, if it was revocable when such property was transferred to the trust but has subsequently become irrevocable.
>
> For the purposes of the foregoing, a trust or portion of a trust is revocable if it is subject to a power, exercisable immediately or at any future time, to revest title in the person whose property constitutes such trust or portion of a trust, and a trust or portion of a trust becomes irrevocable when the possibility that such power may be exercised has been terminated.

Section 605(b)(3)(D) of the Tax Law, as added by Chapter 658 of the Laws of 2003, applicable to tax years beginning on or after January 1, 1996, provides as follows:

> (i) Provided, however, a resident trust is not subject to tax under this article if all of the following conditions are satisfied:
>
> (I) all the trustees are domiciled in a state other than New York;
>
> (II) the entire corpus of the trusts, including real and tangible property, is located outside the state of New York; and
>
> (III) all income and gains of the trust are derived from or connected with sources outside of the state of New York, determined as if the trust were a non-resident trust.

(ii) For purposes of item (II) of clause (i) of this subparagraph, intangible property shall be located in this state if one or more of the trustees are domiciled in the state of New York.

(iii) Provided further, that for the purposes of item (I) of clause (i) of this subparagraph, a trustee which is a banking corporation as defined in subsection (a) of section fourteen hundred fifty-two of this chapter and which is domiciled outside the state of New York at the time it becomes a trustee of the trust shall be deemed to continue to be a trustee domiciled outside the state of New York notwithstanding that it thereafter otherwise becomes a trustee domiciled in the state of New York by virtue of being acquired by, or becoming an office or branch of, a corporate trustee domiciled within the state of New York.

Section 605(b)(4) of the Tax Law defines a nonresident estate or trust, and provides:

Nonresident estate or trust. (A) A nonresident estate means an estate which is not a resident.

(B) A nonresident trust means a trust which is not a resident or part-year resident.

Section 105.20(d)(1) of the Personal Income Tax Regulations (Regulations) provides:

Domicile, in general, is the place which an individual intends to be such individual's permanent home - the place to which such individual intends to return whenever such individual may be absent.

Section 105.23(c) of the Regulations provides:

The determination of whether a trust is a resident trust is not dependent on the location of the trustee or the corpus of the trust or the source of income; provided, however, no New York State personal income tax may be imposed on such trust if all of the following conditions are met:

(1) all the trustees are domiciled in a state other than New York State;

(2) the entire corpus of the trust, including real and tangible property is located outside of New York State; and

(3) all income and gains of the trust are derived or connected from sources outside of New York State, determined as if the trust were a nonresident.

Opinion

The Trusts in this case consist of property of the Grantor who was domiciled in New York State at the time such property was transferred to the Trusts, and when the Trusts became irrevocable. Accordingly, the Trusts are resident trusts of New York pursuant to section 605(b)(3)(C) of the Tax Law. However, this fact does not, by itself, mean that they are subject to New York State personal income tax under Article 22 of the Tax Law.

In *Charles B. Moss Trust*, Adv Op Comm T & F, April 8, 1994, TSB-A-94(7)I, it was determined that where the three conditions of section 105.23(c) of the Regulations were met, no New York State personal income tax was imposed on the trust even though the trust was a New York resident trust pursuant to section 605(b)(3)(C) of the Tax Law. In that case, the sole trustee was domiciled in Colorado. The corpus of the trust consisted solely of intangibles (cash, securities and U.S. Government obligations) that were held by Fiduciary Trust Company located in New York State. These intangibles were deemed to be located at the domicile of the trustee in Colorado. (See *Safe Deposit & Trust Co. v Virginia*, 280 US 83; *Mercantile-Safe Deposit and Trust Company v Murphy*, 19 AD2d 765, *affd* 15 NY2d 579; *Taylor v State Tax Commission*, 85 AD2d 821, 822.) Also, none of the assets of the trust were employed in a business carried on in New York and all income and gains of the trust were derived from sources outside of New York, determined as if the trust were a nonresident. A similar conclusion was reached in *Harry J. Benton Trust*, Adv Op Comm T&F, October 25, 1996, TSB-A-96(4)I.

Section 605(b)(3)(D) of the Tax Law was added to codify section 105.23(c) of the Regulations which in turn was promulgated to codify the holding in *Mercantile-Safe Deposit and Trust Co. v. State Tax Commission*, *supra*. In that case, the grantor of an *inter vivos* trust was domiciled in New York at the time the trust was created. The trust consisted only of intangible assets, and the trustee, a Maryland corporation, managed the trust from its principal office in Maryland. New York State conceded that the Maryland corporation was domiciled in Maryland for purposes of the personal income tax rules relating to resident trusts. The court held that the New York taxation of the trust under these circumstances would extend New York's taxing power beyond its jurisdiction because the trust had no connection with New York other than the fact that the grantor of the trust was domiciled in New York at the time the trust was created, and thus conflicted with the due process clause of the Fourteenth Amendment of the Federal Constitution. However, since the issue of domicile was conceded, the court did not discuss whether the domicile determination was based on the fact that the trustee was incorporated in Maryland or on some other factors.

The term *domicile* as defined in section 105.20(d) of the Regulations pertains to an individual. The domicile of a trustee that is a corporation is not addressed in Article 22 of the Tax Law or the Regulations promulgated thereunder. Therefore, it must be determined what *domicile* means with respect to a corporation that is a trustee, within the context of section

605(b)(3)(D)(i)(I) of the Tax Law and sections 105.20(d)(1) and 105.23(c)(1) of the Regulations in light of the holding in *Mercantile, supra.*

It has been held that the domicile of a corporation is the state in which it is incorporated. (*Sease v Central Greyhound Lines, Inc.*, 306 NY 284.) However, under Article 22 of the Tax Law, the concept of domicile with respect to an individual is based on the intent of the individual. Once a domicile is established for an individual, it does not necessarily continue for the individual's lifetime. An individual's domicile may change from time to time as the individual's intentions change. Therefore, it would be inappropriate to define domicile for purposes of section 605(b)(3)(D)(i)(I) of the Tax Law and section 105.23(c)(1) of the Regulations with respect to a corporation that is a trustee as narrowly as in *Sease, supra*; that is, the state of incorporation. To set a rigid standard with respect to a corporation, under which a domicile could not be changed, would be contrary to the basic domicile concept of intent.

Therefore, for purposes of section 605(b)(3)(D)(i)(I) of the Tax Law and section 105.23(c)(1) of the Regulations, it is held that the domicile of a corporation is the principal place from which the trade or business of the corporation is directed or managed. A corporation's principal place of business is the location where the corporation manages, conducts, or directs its business. For example, a corporation manages, conducts or directs its business where the main office and regular meeting place of the board of directors is located, regardless of where the administrative departments and the physical property of the corporation are situated. A corporation's principal place of business may be established by the activity of the corporation within New York State and the absence of a trade or business conducted by the corporation elsewhere. A corporation having its principal place of business in New York State is considered to be domiciled in New York State for purposes of section 605(b)(3)(D)(i)(I) of the Tax Law and section 105.23(c)(1) of the Regulations regardless of the state of incorporation. This treatment is consistent with the holding in *Mercantile, supra.* This definition of a corporation's principal place of business for purposes of Article 22 of the Tax Law is consistent with federal diversity jurisdiction decisions of the United States District Court, Southern District of New York, in which the court addressed whether it has jurisdiction over a corporation that engages in activities in different states (see *Scot Typewriter Co. v Underwood Corp., 170 F Supp 862* (*SD NY 1959*); *Center for Radio Information, Inc. v Herbst, 876 F Supp 523* (*SD NY 1995*)).

Accordingly, for purposes of section 605(b)(3)(D) of the Tax Law and section 105.23(c) of the Regulations, the domicile of the Proposed Successor Trustee will be the state where its principal place of business is located, as set forth in the above guidelines for determining the domicile of a corporation. The determination of domicile is a factual matter that is not susceptible of determination in this Advisory Opinion. An Advisory Opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to "a specified set of facts." Tax Law, §171.Twenty-fourth; 20 NYCRR 2376.1(a).

A *trustee* is defined generally as a person in whom some estate, interest, or power in or affecting property is vested for the benefit of another (106 NY Jur 2d, Trusts, §6). *Trustee* is also used to denote a person to whom the management of the property of others is entrusted. *Id.* (See also *Re Eptein's Estate*, 278 NYS 260 [1935]).

An *advisor to a trustee* has been interpreted by the courts to include not only a person who has been designated by particular terminology in the trust instrument but also any other individual who, by the terms of the trust instrument, has been given power to direct or control a trustee in the performance of some part or all of that trustee's functions and duties, or who has been invested with a form of veto power over particular actions of a trustee through the medium or device of requiring that those actions be taken only with the consent and approval of such advisor (see 56 ALR 3d, *Wills; Trusts - Appointment of Advisor,* §1).

It is well settled under New York law that a grantor of a trust may limit a trustee's powers. In *Matter of Rubin*, 143 Misc 2d 303, *affd* 172 AD2d 841, the court addressed the status of advisors. The court held that the designation of an advisor is a valid limitation on a trustee's powers, and noted that the courts have generally considered an advisor to be a fiduciary, somewhat in the nature of a co-trustee. Another term that may be employed, said the court, is quasi-trustee or special trustee. The court's statement "since the relationship between the fiduciary and the advisor is that of a co-trustee, with the advisor having the controlling power, the fiduciary is justified in complying with the directives and will not generally be held liable for any losses," *Id.* 307, indicates a tacit acceptance of the characterization of the advisor as a trustee. However, an advisor that does not have any powers under the terms of the trust instrument to direct or control a trustee in the performance of some part or all of that trustee's functions and duties, and has not been invested with a form of veto power over particular actions of a trustee through the medium or device of requiring that those actions be taken only with the consent and approval of the advisor, will not be considered a co-trustee.

Under the facts in this case, the Committee has been granted broad powers over the assets of the Trusts. For example, the Committee may direct the Trustee to take or refrain from taking any action which the Committee deems it advisable for the Trustee to take or refrain from taking. All of the powers of the Trustee under the Trust Agreements are subject to the directions of the Committee. Since the Committee is an advisor having the controlling power over the Trustee, following *Rubin, supra*, the members of the Committee are considered to be co-trustees of the Trusts. Therefore, for purposes of the first condition under section 605(b)(3)(D)(i) of the Tax Law and section 105.23(c) of the Regulations, the individuals comprising the Committee are considered to be trustees of the Trusts.

However, the determination of whether Petitioner or any other investment management firms or former Committee members that may be retained by the Proposed Committee to provide investment advice or management services would also be treated as co-trustees of the Trusts for

purposes of section 605(b)(3)(D)(i) of the Tax Law and section 105.23(c) of the Regulations is a factual matter that is not susceptible of determination in this Advisory Opinion.

In conclusion, Petitioner states that all real and tangible property included in the corpus of the Trusts, is located outside New York and all the income and gains of the Trusts are derived or connected from sources outside of New York State, determined as if the Trusts were a nonresident. Pursuant to section 605(b)(3)(D)(ii) of the Tax Law, any intangible property included in the corpus of the Trusts is located in New York State if any of the trustees are domiciled in New York State. Therefore, the determination of whether the Trusts will be exempt from New York State personal income tax for purposes of section 605(b)(3)(D) of the Tax Law and section 105.23(c) of the Regulations will depend on whether the Proposed Successor Trustee, any member of the Proposed Committee or any other investment advisor or manager that is considered to be a co-trustee is domiciled in New York State. The Trusts will meet the three conditions of section 605(b)(3)(D)(i) of the Tax Law and section 105.23(c) of the Regulations only if all of the trustees are domiciled outside of New York State. In the case of the Proposed Successor Trustee, pursuant to the concept of domicile with respect to an individual, the domicile of the corporation is the principal place from which the trade or business of the corporation is directed or managed. In the case of any member of the Proposed Committee or any other investment advisor or manager that is considered to be a co-trustee, pursuant to section 105.20(d)(1) of the Regulations, the domicile of an individual is the place which such individual intends to be such individual's permanent home.

The New York City personal income tax is similar to the New York State personal income tax and is administered by New York State the same as Article 22 of the Tax Law. Accordingly, for the taxable years that the Trusts have not met the three conditions contained in section 605(b)(3)(D)(i) of the Tax Law and section 105.23(c) of the Regulations, New York State personal income tax is imposed on the Trusts, and if any of the trustees are domiciled in New York City, New York City personal income tax authorized under Article 30 of the Tax Law is imposed on the Trusts for those taxable years that a trustee is domiciled in New York City.

DATED: November 12, 2004

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