

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

TSB-A-05(5.1)I  
Income Tax  
August 8, 2006

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

MODIFIED ADVISORY OPINION     PETITION NO. I050225B

On February 25, 2005, a Petition for an Advisory Opinion was received from James Rhein, 52-07 Overbrook Street, Douglaston, New York 11362.

The issues raised by Petitioner, James Rhein, are:

1. Whether the receipt by a nonresident individual of rental income from leasing a membership or memberships in a New York stock or commodity exchange constitutes New York source income for New York state income tax purposes.
2. Whether any gain on a subsequent sale of such membership or memberships would constitute New York source income.

On September 27, 2005, an Advisory Opinion in response to the Petition was issued. Upon further review of the matter, the aforementioned Advisory Opinion is modified as hereinafter set forth.

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

Petitioner is currently a resident of New York State and considering purchasing one or more memberships (seats) in a New York stock or commodity exchange and leasing the seat or seats to produce a stream of income. It is anticipated that at some point in time after acquiring one or more seats, Petitioner will move out of New York State while retaining ownership of the seat or seats. The seat or seats will not be connected to any other activity of Petitioner in New York.

**Applicable law and regulations**

Section 601(e) of the Tax Law imposes a personal income tax on nonresidents of New York State who have New York source income and provides, in part:

Nonresidents and part-year residents. (1) General. 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 individual . . . a tax which shall be equal to the tax base multiplied by the New York source fraction.

(2) Tax base. The tax base is the tax computed under subsections (a) through (d) of this section, as the case may be, reduced by the credits permitted under subsections (b),

(c), (d) and (m) of section six hundred six, as if such nonresident or part-year resident individual . . . were a resident subject to the provisions of part II of this article.

(3) New York source fraction. The New York source fraction is a fraction the numerator of which is such individual's . . . New York source income determined in accordance with part III of this article and the denominator of which is such individual's New York adjusted gross income determined in accordance with part II of this article. . . .

Section 631 of the Tax Law provides, in part:

(a) General. The New York source income of a nonresident individual shall be the sum of the following: (1) The net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources, . . . and

(2) The portion of the modifications described in subsections (b) and (c) of section six hundred twelve which relate to income derived from New York sources. . . .

(b) Income and deductions from New York sources.

(1) Items of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to:

(A) the ownership of any interest in real or tangible personal property in this state;  
or

(B) a business, trade, profession or occupation carried on in this state; . . .

(2) Income from intangible personal property, including annuities, dividends, interest, and gains from the disposition of intangible personal property, shall constitute income derived from New York sources only to the extent that such income is from property employed in a business, trade, profession, or occupation carried on in this state. . .

Section 132.4(a)(2) of the Personal Income Tax Regulations (Regulations) provides, in part:

A business, trade, profession or occupation (as distinguished from personal services as an employee) is carried on within New York by a nonresident when such nonresident occupies, has, maintains or operates desk space, an office, a shop, a store, a warehouse, a factory, an agency or other place where such nonresident's affairs are systematically and regularly carried on, notwithstanding the occasional consummation of isolated transactions without New York State. This definition is not exclusive. Business

is carried on within New York State if activities within New York State in connection with the business are conducted in New York State with a fair measure of permanency and continuity. A taxpayer may enter into transactions for profit within New York State and yet not be engaged in a trade or business within New York State. If a taxpayer pursues an undertaking continuously as one relying on the profit therefrom for such taxpayer's income or part thereof, such taxpayer is carrying on a business or occupation. However, see section 132.10 of this Part with regard to the effect of the purchase and sale of property by a nonresident for such nonresident's own account.

### **Opinion**

Section 601(e) of the Tax Law imposes a personal income tax on the taxable income derived from New York sources of a nonresident individual. The tax is equal to the tax computed as if the nonresident individual were a New York State resident for the entire year, reduced by certain credits, and then multiplied by the income percentage (i.e., New York source fraction). The numerator of the fraction used to compute the income percentage is the nonresident individual's New York source income; the denominator of the fraction is the nonresident individual's New York adjusted gross income from all sources for the entire year.

Section 631(a) of the Tax Law provides that the New York source income of a nonresident individual is the sum of the items of income, gain, loss and deduction entering into federal adjusted gross income derived from or connected with New York sources and any New York addition and subtraction modifications under section 612(b) and (c) of the Tax Law that relate to income derived from New York sources.

Section 631(b)(1) of the Tax Law provides that income, gain, loss and deduction derived from or connected with New York sources include those items attributable to a business, trade, profession or occupation carried on in New York State. Section 631(b)(2) of the Tax Law provides that income from intangible property, including annuities, dividends, interest, and gains from the disposition of intangible personal property, shall constitute income derived from New York sources only to the extent that such income is from property employed in a business, trade, profession, or occupation carried on in this State.

Section 132.4(a)(2) of the Regulations provides that a business is carried on within New York State if activities within New York State in connection with the business are conducted in New York State with a fair measure of permanency and continuity. If a nonresident individual pursues an undertaking continuously in New York and relies on the profit from the undertaking for all or part of his or her income, the nonresident individual is carrying on a business or occupation in New York.

New York Stock Exchange seats have been characterized by the United States Supreme Court as intangible property with a business situs in New York State. See *New York ex rel Whitney v Graves*, 299 US 366(1937). The Court noted that:

[w]hen we speak of a "business situs" of intangible property in the taxing State we are indulging in a metaphor. We express the idea of localization by virtue of the attributes of the intangible right in relation to the conduct of affairs at a particular place... [T]he right may be identified with a particular place because the exercise of the right is fixed exclusively or dominantly at that place... [T]he localization for the purpose of transacting business may constitute a business situs quite as clearly as the conduct of the business itself. Here, we are dealing with an intangible right of a peculiar nature. It embraces the privilege of a member to transact business on the Exchange as well as a valuable right of property which is the subject of transfer with the approval of the Exchange and may survive resignation, expulsion or death... Its very nature localizes it at the Exchange. It is a privilege which can be exercised nowhere else. The nature of that right is not altered by the failure to exercise it. . . .

As determined by the United States Supreme Court in *Whitney, supra*, a New York Stock Exchange seat has a business situs in New York and it is at such site that a nonresident individual maintains a membership and from which his or her business affairs are systematically and regularly carried on.

New York source income of a nonresident individual includes those items attributable to (1) a business, trade, profession or occupation carried on in New York; and (2) income from intangible personal property to the extent that such income is from property employed in a business, trade, profession, or occupation carried on in New York. A business is carried on within New York State if activities within New York in connection with the business are conducted in New York with a fair measure of permanency and continuity. The nature of the activity must have frequency, continuity, and regularity so as to constitute a regular business activity carried on in New York.

Rental income received by a nonresident individual from entering into a single lease of one or more seats is generally not considered income from a business, trade, profession, or occupation carried on in this State. The activity connected with a single lease will usually lack the requisite continuity and regularity to constitute a trade or business. However, entering into several leases during the tax year, whether for several seats or just one seat, usually constitutes a trade or business for purposes of section 631(b) of the Tax Law since the activity would not be a casual or incidental activity.

In addition, any gain (or loss) from selling one or more seats pursuant to one contract of sale is generally not New York source income under section 631(b)(2) of the Tax Law unless the seat or seats are used in a trade or business in New York State at the time of the sale. However, selling seats pursuant to several contracts of sale usually constitutes a trade or business in New York State.

The determination of whether Petitioner's activity connected with entering into one or more leases of a stock exchange seat, or seats, or selling seats pursuant to one or more contracts

TSB-A-05(5.1)I  
Income Tax  
August 8, 2006

of sale has the requisite continuity and regularity to constitute a trade or business is a question of fact that must be answered on a case-by-case basis following a careful review of the relevant facts and circumstances of each case. Inasmuch as any such review of the relevant facts and circumstances must be conducted in the context of an audit, such determination is not within the scope of an Advisory Opinion. An Advisory Opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to "a specific set of facts." Tax Law, §171. Twenty-fourth; 20 NYCRR 2376.1(a).

DATED: August 8, 2006

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