

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

The Department of Taxation and Finance (“Department”) received a Petition for Advisory Opinion from [REDACTED] (“Petitioner”), who is the sole trustee of the [REDACTED] (“Trust”). Petitioner asks whether the income earned by the [REDACTED] Trust may be taxed by New York State.

We conclude that the [REDACTED] Trust is subject to fiduciary income tax as a New York State resident trust that has not met the three statutory conditions for exemption. Accordingly, New York will impose income tax on the total taxable income of the [REDACTED] Trust.

**Facts**

The [REDACTED] Trust is an irrevocable, non-grantor trust that was established by [REDACTED], (“Grantor”) for the benefit of the Grantor’s descendants, some of whom are currently domiciliaries of New York. The Grantor was a New York State domiciliary at the time the [REDACTED] Trust was created and funded on December 7, 2016. Petitioner is the sole trustee and is a domiciliary of the State of New Jersey. As an irrevocable non-grantor trust, the [REDACTED] Trust is treated as a separate taxpayer for federal income purposes.

The corpus of the [REDACTED] Trust includes two types of intangible investments. Approximately fifteen percent (15%) is invested in a Vanguard tax exempt municipal bond fund (“Bond Fund”). Approximately fifteen percent (15%) of the total income generated by the Bond Fund is from New York tax exempt bonds. The approximately eighty-five percent (85%) remaining corpus consists of a limited partnership interest in a publicly traded partnership (“Partnership”). Less than one percent of the Partnership's income is New York source income. Thus, in the aggregate, New York source income accounts for less than five percent (5%) of the [REDACTED] Trust's total income. All the income of the trust has been retained, and no distributions have been made to the trust beneficiaries.

**Analysis**

The tax base on which a trust is taxed by New York depends on whether it is a resident trust or a nonresident trust under Tax Law § 605(b). A resident trust is generally taxable in New York on its entire federal taxable income, with certain modifications. Tax Law § 618.

Tax Law § 605(b)(3)(C) defines a resident trust as a trust, or portion of a trust, consisting of 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.

Petitioner recognizes that the [REDACTED] Trust meets the definition of a resident trust under the Tax Law since the Grantor was domiciled in New York at the time the trust was funded and the trust was established as an irrevocable trust separate from the Grantor.

In Mercantile-Safe Deposit & Trust Co. v Murphy, 15 N.Y.2d 579 (1964), the New York Court of Appeals invalidated provisions of the Tax Law that imposed tax on the accumulated income of resident trusts because such taxation unconstitutionally extended the taxing power of the state beyond its borders. As a result of this case, New York amended the Tax Law to add Section 605(b)(3)(D) exempting certain resident trusts with insufficient contacts with the State. See Chapter 658 of the Laws of 2003.

In order for a resident trust to qualify for the exemption in Tax Law § 605(b)(3)(D), three conditions must be met: (1) all trustees must be domiciled outside of New York State; (2) the entire corpus of the trust must be located outside of New York State; and (3) all of the trust's income or gain must be sourced outside New York State. For the purpose of sourcing the trust corpus, intangible property shall be deemed "located in [New York] if one or more of the trustees are domiciled in the state of New York". Tax Law § 605(b)(3)(D)(ii)

Based on the facts herein, the [REDACTED] Trust is subject to New York taxation as a resident trust. While the trust meets the first two conditions for exemption, the [REDACTED] Trust does not meet the third condition in § 605(b)(3)(D)(i)(III). The [REDACTED] Trust's income includes New York source income. Therefore, all the income, regardless of source, earned by the [REDACTED] Trust is subject to New York income tax as a resident trust.

While Petitioner suggests that, notwithstanding the fact that the [REDACTED] Trust earned income that is sourced to New York, the imposition of tax on the Trust would violate due process guarantees of the United States Constitution, administrative agencies must presume statutes to be constitutional and therefore have no authority to avoid statutory requirements on constitutional grounds. See Trump v Chu, 65 N.Y.2d 20, 25, 489 N.Y.S.2d 455, 478 N.E.2d 971; TSB-A-94(1)C.

DATED: February 4, 2020

/S/  
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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning