

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

TSB-A-92(2)I
Income Tax
June 4, 1992

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I920323A

On March 23, 1992, a Petition for Advisory Opinion was received from Paul E. Singer, c/o Kleinberg, Kaplan, Wolff & Cohen, P.C., 522 Fifth Avenue, 22nd Floor, New York, New York 10036.

The issue raised by Petitioner, Paul E. Singer, is whether New York nonresident general partners of a partnership trading for its own account, within the meaning of section 631(d) of the Tax Law, are subject to New York personal income tax on guaranteed payments (within the meaning of section 707(c) of the Internal Revenue Code) received from the partnership.

Petitioner is one of the general partners of a partnership (hereinafter referred to as "P"). P has its principal office in New York, including employees (a staff of approximately fifteen to forty), equipment, etc. P engages in thousands of trades each year involving millions of shares of stock, as well as bonds, option contracts, etc. having an aggregate value worth many million of dollars.

For federal income tax purposes, P is considered to be in a trade or business (as a trader in securities) but is not considered a dealer in securities. P's trading in securities are all for its own account. P does not have customers and does not "make a market" in any securities.

P has two general partners. Each general partner receives payments from P as a guaranteed payment under section 707(c) of the Internal Revenue Code. The guaranteed payments are for services rendered in New York. Petitioner is an individual who is a nonresident of New York. The other general partner of P is a New Jersey limited partnership (hereinafter referred to as "B"). Petitioner is a general partner of B. B's only activity in New York State (if any) is performing services for P for which it receives a guaranteed payment. Petitioner, as a general partner of B, receives a guaranteed payment and a distributive share from B. In addition to the guaranteed payment for services rendered, Petitioner and B will be entitled to a distributive share of profits or losses of P based on their respective equity interests in P.

Section 632(a) (1) of the Tax Law provides that the portion of a nonresident partner's items derived from or connected with New York sources shall be determined under regulations of the Commissioner consistent with the applicable rules of section 631 of the Tax Law. The New York source of partnership income under section 631 is, under the applicable regulations, determined at the partnership level. Therefore, as to a nonresident partner, the New York source of partnership income is determined by the activity of the partnership.

Section 631(d) of the Tax Law provides, in pertinent part, that "A nonresident, other than a dealer holding property primarily for sale to customers in the ordinary course of his trade or business, shall not be deemed to carry on

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a business, trade, profession or occupation in this state solely by reason of the purchase and sale of property or the purchase, sale or writing of stock option contracts, or both, for his own account."

Based on the facts presented herein stating that P is not a dealer in securities, etc., and is engaged in trading solely for its own account, P, as to nonresident partners, will not be deemed to be carrying on a business in New York State pursuant to section 631(d) of the Tax Law. Accordingly, any income attributable to P would not constitute income derived from or connected with New York State sources pursuant to section 631 of the Tax Law and the regulations thereunder.

This characterization of P's income as non-New York source will remain intact despite the existence of a tiered partnership arrangement, i.e., even though P's income is funnelled through B before its ultimate distribution (or deemed distribution) to Petitioner. In this regard, it is immaterial that these distributions are from B in the form of a guaranteed payment (within the meaning of section 707(c) of the Internal Revenue Code), since section 632(b)(1) of the Tax Law provides, in pertinent part, that "In determining the source of a nonresident partner's income, no effect shall be given to a provision in the partnership agreement which -

1. characterizes payments to the partner as being for services or for the use of capital ..."

Therefore, the income attributable to P will remain non-New York source income, regardless of whether the distributions (or deemed distributions) to Petitioner or to B and subsequently to Petitioner are in the form of a guaranteed payment (within the meaning of section 707(c) of the Internal Revenue Code), or proportionate interest in profits and losses since, pursuant to section 632(b)(1) of the Tax Law, such designations are to be ignored for New York purposes in determining the source of a nonresident partner's income.

Since the income of P does not constitute New York source income to a nonresident, and since Petitioner is a nonresident of New York, the distributive shares of P income would not constitute New York source income to Petitioner.

DATED: June 4, 1992

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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