

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

TSB-A-96 (4) I
Income Tax
October 25, 1996

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I960712B

On July 12, 1996, a Petition for Advisory Opinion was received from Manley P. Caldwell, Jr., and Carol Benton Peterson, Trustees u/a dtd 5/12/61 by Harry J. Benton, c/o Caldwell & Pacetti, 324 Royal Palm Way, Suite 300, Palm Beach, Florida 33480-4352.

The issue raised by Petitioner, Manley P. Caldwell, Jr., and Carol Benton Peterson, Trustees u/a dtd 5/12/61 by Harry J. Benton, is whether Petitioner is exempt from New York State and New York City personal income tax pursuant to section 105.23 of the Personal Income Tax Regulations.

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

Petitioner is an inter vivos trust (the "Trust") created on May 12, 1961 by Harry J. Benton (the "Grantor"), who at that time was a New York domiciliary. The Grantor is presently a domiciliary of Colorado. In relevant part, the Trust provides for the distribution of income and/or principal in the discretion of the Trustees among a class consisting of the Grantor's mother, the Grantor's wife and the Grantor's issue. Upon the death of the survivor of the Grantor's wife, his daughter, Carol Benton (now Carol Benton Peterson) and his mother, the Trust terminates and the principal is distributable to the Grantor's then living issue, per stirpes. Pursuant to Article 6 of the Trust, the Grantor retained the right to "modify, alter and amend" the Trust until July 31, 1961, at which time he released the right and the Trust became irrevocable. The Grantor never exercised this right to amend the Trust. No other person other than the Grantor has transferred property to the Trust.

The initial Trustees of the Trust were Frederick E. Winkler and Paul B. Benton, both of whom were domiciliaries of New York. Trustee Paul B. Benton died on March 9, 1983. Shortly thereafter, Margot M. Benton was appointed as a successor Trustee to Paul B. Benton. Margot Benton was a domiciliary of Florida at the time of her appointment. Margot Benton died on January 3, 1986, and Carol Benton Peterson was appointed as a successor Trustee to Margot Benton. Mrs. Peterson was a domiciliary of Minnesota at the time of her appointment. She subsequently became a domiciliary of Colorado, where she is presently domiciled.

Trustee Frederick E. Winkler died in 1988 and Manley P. Caldwell, Jr. was appointed as a successor Trustee to Mr. Winkler. Mr. Caldwell is a domiciliary of Florida. Since the appointment of Mr. Caldwell as Trustee in 1988, all of the Trustees of the Trust have been domiciled in a state other than New York State.

The corpus of the Trust consists of the following intangible assets:

1. Common and preferred stock interests in and notes of Quick Broadcasting, Inc. ("QBI"), a Delaware corporation which is authorized to do business in California. QBI, which has corporate offices in Vacaville, California, is a licensee of radio stations KUIC and KXBT, both of which are radio stations licensed and broadcasting in California.
2. A note secured by a mortgage on real property located in Colorado.
3. Cash in checking and money market accounts, U.S. Government obligations and marketable securities and notes. The cash, U.S. Government obligations and marketable securities and notes are held by Lazard Freres & Co., LLC, which is located in New York City.

None of the assets of the Trust are employed in a business carried on in New York, and all income and gains of the Trust are derived from sources outside of New York State, determined as if the Trust were a nonresident.

The Trustees propose to sell all or a portion of the Trust's stock interests in QBI. It is anticipated that the sale of these assets will result in the recognition of capital gains taxable to the Trust.

Section 605(b)(3)(C) of the Tax Law defines a resident trust as follows:

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 105.23(c) of the Personal Income Tax Regulations provides as follows:

[t]he 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.

Herein, the Trust is a trust consisting of property of a person domiciled in New York State at the time such property was transferred to the trust, and when the trust became irrevocable. Accordingly, the Trust is a resident trust of New York pursuant to section 605(b)(3)(C) of the Tax Law. However, this fact does not, by itself, mean that it is 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 held that the situs of intangible assets of a trust is deemed to be at the domicile of the trustee. (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.) Further, it was determined that where the three conditions of section 105.23(c) of the Personal Income Tax 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 and that cash, securities and U.S. Government obligations were held by Fiduciary Trust Company located in New York State. 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.

In this case, after 1988 the three conditions contained in section 105.23(c) of the Personal Income Tax Regulations have been met. First, after 1988 all of the trustees have been domiciled outside of New York State. Second, the corpus of the Trust consists of intangible assets some of which are held by Lazard Freres & Co. located in New York City. Third, none of the assets of the Trust were employed in a business carried on in New York State and all income and gains of the Trust were derived from sources outside of New York State, determined as if the Trust were a nonresident. With respect to the second condition, the situs of the intangible assets of a trust is deemed to be at the domicile of the trustee. Therefore, the situs of the corpus of the Trust is deemed to be outside of New York State.

Accordingly, the Trust is a New York resident trust. However, for the taxable years that the three conditions contained in section 105.23(c) of the Personal Income Tax Regulations have been met, no New York State personal income tax is imposed on such trust for those years.

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

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of the Tax Law. Accordingly, for the taxable years that the Trust has met the three conditions contained in section 105.23(c) of the New York State Personal Income Tax Regulations, no New York State personal income tax is imposed on the Trust, and no New York City personal income tax authorized under Article 30 of the Tax Law is imposed on the Trust for those taxable years.

DATED: October 25, 1996

s/John W. Bartlett
Deputy Director
Technical Services Bureau

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