

MEMO# 3502

February 10, 1992

MASSACHUSETTS LETTER RULING THAT DELAWARE TRUST IS A "FOREIGN CORPORATION" BUT LACKS NEXUS TO BE TAXED

February 10, 1992 TO: TAX COMMITTEE NO. 6-92 RE: MASSACHUSETTS LETTER RULING THAT DELAWARE TRUST IS A "FOREIGN CORPORATION" BUT LACKS NEXUS TO BE TAXED

Attached Massachusetts Department of Revenue Letter Ruling 91-2 concludes that regulated investment companies ("RICs") organized as statutory Delaware limited liability business trusts are taxed in Massachusetts as "foreign corporations" under General Laws, chapter 63, rather than under G.L. c. 62 as "corporate trusts". This result is important because a RIC which is taxed under c. 62 can be completely exempted from entity-level tax, while under c. 63 the RIC would have no such exemption. However, the ruling also concluded that, despite the presence in Massachusetts of the trusts' investment advisor and other service providers, the trusts lacked sufficient nexus to Massachusetts to be subject to corporate tax there. Massachusetts G.L. c. 62 taxes corporate trusts, which are defined to include any partnership, trust or association whose beneficial interests are represented by transferable shares. Corporate trusts which are RICs generally are not subject to state tax at the entity level. According to the ruling, RICs organized as common law Massachusetts business trusts are considered to be corporate trusts. G.L. c. 63 taxes domestic and foreign corporations, defining foreign corporations to include every corporation, association or organization established under other-than-Massachusetts law for the purposes for which a Massachusetts corporation could be organized and which has powers not possessed by individuals or partnerships. There is no exception from entity level tax under G.L. c. 63 for RICs, however. Massachusetts' attempts to impose a corporate tax upon associations, partnerships and trusts organized in Massachusetts whose interests are represented by transferable shares have been struck down as violating the Massachusetts constitution, because such entities were merely exercising common law powers and were not benefiting from any franchise bestowed by Massachusetts. The ruling, however, found that the Delaware trusts were exercising powers granted by Delaware which were in the nature of corporate powers and were not available to individuals or partnerships - 1 - (specifically, limited liability). The trusts could not, therefore, qualify as corporate trusts, but were foreign corporations. The ruling appears to reflect Massachusetts' intent to prevent any entity with limited liability from escaping corporate tax unless it complies with all other applicable corporate law provisions. The ruling concludes, however, that because the only connection the trusts have with Massachusetts is the retention of independent contractors to provide services (i.e., the investment advisor, transfer agent and distributor), there was

insufficient nexus with Massachusetts to subject the trusts to the corporate income tax (also know as the "corporate excise"). We will keep you informed of further developments.
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