

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-10(1)M
Estate Tax
April 8, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M090929A

Petitioner, [REDACTED], asks whether a non-resident decedent's interest in a revocable trust owning interests in several limited liability companies that owned New York real property is subject to New York's estate tax. We conclude that the interest in the revocable trust is not subject to New York estate tax.

Facts

The decedent was domiciled in and a resident of Florida. Through his revocable trust, the Decedent owned various minority interests in several limited liability companies (LLCs) organized under the laws of New York State. The limited liability companies own commercial and residential property located within New York State. The business purpose of the LLCs is to rent the residential and commercial properties to tenants for a profit. The decedent never resided in or personally owned any of the commercial or residential properties in question. The decedent's extended family operated a management company that provides real estate management services to the LLCs for a fee.

The limited liability companies are classified as partnerships for federal tax purposes in accordance with Federal check-the-box regulations (Treas. Reg. sections 301.7701-1 through 301.7701-3). The decedent always reported his allocable share of the partnership income on his personal income tax returns. The decedent never participated in the management of the LLCs, nor did the decedent provide any type of services to the limited liability companies. The decedent was simply an investor in the LLCs and was considered a limited partner for federal income tax purposes.

Analysis

The Tax Law imposes an estate tax, the measure of which is the maximum allowable Federal state death tax credit under the Internal Revenue Code (IRC) as amended through July 22, 1998 (Tax Law sections 951, 952, 960[a]). In the case of a non-resident, the tax is calculated by multiplying the amount of the maximum state death tax credit by a fraction, the numerator of which is the decedent's New York gross estate and the denominator of which is the decedent's federal gross estate. A non-resident decedent's New York gross estate is equal to the personal and real property in the Federal gross estate that have an actual situs in New York (Tax Law section 960[a]). A nonresident decedent's intangible property is considered to have a situs outside New York State and is not includible in the decedent's New York gross estate even though it is part of the decedent's federal gross estate.

The Department has held that whether a nonresident decedent's interest in a revocable trust will be considered an intangible and thus includible in the decedent's New York gross estate depends on the nature of the property in the revocable trust (TSB-A-01[1]M, July 31, 2001). Here, the nonresident decedent's revocable trust holds interests in LLCs that in turn hold New York real property. Based on section 951(a)'s incorporation by reference provision, the Department looks to the IRC to determine the nature of a decedent's interests in LLCs (TSB-A-08(1)M, October 24, 2008). The IRC does not define LLC. The IRC's check-the-box regulations, however, specify that a multiple-member LLC can elect to be treated as an

association and hence a corporation or as a partnership (Treas. Reg. section 301.7701-3[a]). Here, the LLCs at issue are multiple-member LLCs that have chosen to be treated as partnerships under the check-the-box regulations. Assuming that IRC section 2036 or related economic substance doctrines do not apply, a partnership is considered to be separate from its owner (IRC section 7701[a][1]). Indeed, an estate may be entitled to a valuation discount if the decedent owned an asset indirectly through an interest in a partnership instead of owning the asset outright (e.g. *Estate of Kelley v. Comm'r.*, TC Memo. 2005-235, October 11, 2005). Accordingly, the revocable trust's interest in the LLCs constitutes an intangible and thus the estate's interest in the revocable trust constitutes an intangible asset and is not includible in the estate's New York gross estate.¹

DATED: April 8, 2010

/S/

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¹ This conclusion assumes that the "pull back" provision in IRC section 2036 doesn't apply to the transfer of the New York real property to the LLCs (*See, e.g., Estate of Theodore Thompson v. Comm'r of Internal Revenue*, 382 F3d 367 [3d Cir 2004]).