

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

TSB-A-92 (4) C
Corporation Tax
February 28, 1992

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C911125B

On November 25, 1991, a Petition for Advisory Opinion was received from The Larkfield Professional Center Condo Association, 554 Larkfield Road, East Northport, New York 11731.

The issue raised by Petitioner, The Larkfield Professional Center Condo Association, is whether it is subject to tax under Article 9-A of the Tax Law for taxable years 1986 through 1989.

Petitioner comprises the land and building located at 554 Larkfield Road, East Northport, New York 11731. It includes 19 commercial units. Petitioner was organized in accordance with Article 9-B of the New York State Real Property Law and is not incorporated.

The owner of a commercial unit owns title to its unit and is entitled to exclusive possession of it. Each unit owner has the right to vote in the election of the Condominium Board which will supervise the property and manage the affairs of the condominium. A unit owner may sell or lease its unit to anyone without restriction or limitation, subject to a right of first refusal by the Condominium Board. In addition to ownership of title to its unit, a unit owner owns in common with all other unit owners, an undivided interest in the common elements. Petitioner, itself, owns no interest in real estate.

For the taxable years at issue, the revenues of Petitioner consist of assessments for common charges to unit owners and interest income on building reserve funds. The association owns no property and provides maintenance services only to unit owners. The association does not render services to non unit holders, nor does it otherwise engage in a trade or business.

Section 209.1 of the Tax Law imposes a franchise tax on business corporations, as follows:

For the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity, or of maintaining an office in this state, for all or any part of each of its fiscal or calendar years, every domestic or foreign corporation, except corporations specified in subdivision four of this section, shall annually pay a franchise tax, upon the basis of its entire net income base, or upon such other basis as may be applicable as hereinafter provided.

For taxable years 1986, 1987 and 1988, section 208.1 of the Tax Law provided that "the term 'corporation' includes a joint-stock company or association and any business conducted by a trustee or trustees wherein interest or ownership is evidenced by certificate or other written instrument."

For taxable years beginning on or after January 1, 1989 and ending after April 19, 1989, section 208.1 of the Tax Law is amended by the Laws of 1989 (ch 61) as follows:

The term "corporation" includes an association, within the meaning of paragraph three of subsection (a) of section seventy-seven hundred one of the internal revenue code, a joint-stock company or association, a publicly traded partnership treated as a corporation for purposes of the internal revenue code pursuant to seventy-seven hundred four thereof and any business conducted by a trustee or trustees wherein interest or ownership is evidenced by certificate or other written instrument.

The term "corporation" is elucidated in section 1-2.3 of the Business Corporation Franchise Tax Regulations, which provides, in part, that:

(a) The term 'corporation' means an entity created as such under the laws of the United States, any state, territory or possession thereof, the District of Columbia, or any foreign country, or any political subdivision of any of the foregoing, which provides a medium for the conducting of business and the sharing of its gains.

(b) The term 'corporation' includes a joint stock company or association and any business conducted by a trustee or trustees wherein interest or ownership is evidenced by certificate or other written instrument. An entity conducted as a corporation is deemed to be a corporation. . . 20 NYCRR § 1-2.3

For purposes of section 7701(a)(3) of the Internal Revenue Code, an association is an organization whose characteristics require it to be classified for purposes of taxation as a corporation rather than another type of organization such as a partnership or a trust. Section 301.7701-2(a) of the Treasury Regulations provides that the major characteristics ordinarily found in a pure corporation which, taken together, distinguish it from other organizations are (1) associates, (2) an objective to carry on business and divide the gains therefrom, (3) continuity of life, (4) centralization of management, (5) liability for corporate debts limited to corporate property, and (6) free transferability of interest. An organization will be treated as an association if the corporate characteristics are such that the organization more nearly resembles a corporation than a partnership or a trust.

Section 339-0 of Article 9-B of the Real Property Law states that the deeds and leases of units must include "[t]he common interest appertaining to the unit. . ." 49 NYCRR § 339-o. Section 339-e(5) of such law defines "common interest" as "the (i) proportionate, undivided interest in fee simple absolute, or (ii) proportionate undivided leasehold interest in the common elements appertaining to each unit, as expressed in the declaration" 49 NYCRR § 339-e(5). Thus, each unit owner's interest is evidence by a written instrument.

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In Galen & Company, Adv Op St Tax Comm, March 12, 1986, TSB-A-86(6)C, it was held that where a condominium association, organized under Article 9-B of the Real Property Law, generated income from rentals of a garage, parking spaces, laundry areas and commercial space owned by the condominium association, such association had demonstrated that it provided a medium for the conducting of business and the sharing of its gains. Therefore, such condominium association presented itself as a corporation to conduct business and was subject to tax under Article 9-A of the Tax Law.

In Astor Terrace Condominium, Adv Op Comm T & F, March 1, 1990, TSB-A-90(7)C it was held that where a condominium association organized pursuant to Article 9-B of the Real Property Law may lease portions of the common elements and does receive income from a laundry room concession and storage charges, the association has demonstrated that it provides a medium for the conducting of business and the sharing of its gains. Therefore, such condominium association presents itself as a corporation to conduct business and is subject to tax under Article 9-A of the Tax Law.

However, herein for taxable years 1986 through 1988, Petitioner's income consisted of only common charges and interest income from building reserve funds. Unlike, Galen & Company, *supra*, and Astor Terrace Condominium, *supra*, Petitioner did not provide a medium for the conducting of business and the sharing of its gains. Petitioner has not presented itself as a corporation to conduct business and, therefore, for taxable years 1986 through 1988, Petitioner is not considered a corporation and is not subject to tax under Article 9-A of the Tax Law.

However, pursuant to section 208.1 of the Tax Law as amended by the Laws of 1989 (ch 61) and applicable to taxable years beginning on or after January 1, 1989 and ending after April 19, 1989, the term corporation includes an association within the meaning of 7701(a)(3) of the Internal Revenue Code and therefore for taxable year 1989 Petitioner is subject to tax under Article 9-A of the Tax Law.

DATED: February 28, 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.