

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

TSB-A-93 (22) C
Corporation Tax
December 23, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C930907A

On September 7, 1993, a Petition for Advisory Opinion was received from 440 East 6 Condominium, c/o Mr. Grossman, P.O. Box 253, Knickerbocker Station, New York, New York 10002.

The issue raised by Petitioner, 440 East 6 Condominium, is whether Petitioner, a condominium association, is subject to the franchise tax on business corporations imposed under Article 9-A of the Tax Law.

The declaration of establishment of a plan for condominium operation under Article 9-B of the Real Property Law was recorded in New York County, Office of the City Register on March 31, 1993 on Reel 1959, at 0128. The condominium commenced operation as an unincorporated association on May 14, 1993 when the first closing of a unit occurred.

The condominium consists of two condominium units. One condominium Unit is known as the residential unit, and consists of all 26 residential apartments in the building, and said unit is owned by the "440 East 6 Corp." (a New York State Corporation), which is a housing cooperative and which portion of the building is managed by its unit owner, the "440 East 6 Corp." The other condominium unit, is known as the commercial unit and contains all commercial space in the building and is managed by its unit owner.

The condominium association was formed solely for the purpose of managing only the common elements of Petitioner. The common elements consist of all portions of the building not incorporated in either the residential unit or the commercial unit.

Petitioner's by-laws provide that "The Common Expenses may also include such amounts as the Board of Managers may deem proper for the operation and maintenance of the Property, including, without limitation, an amount for working capital of the Condominium, for a general operating reserve, for a reserve fund for replacement, and to make up any deficit in the Common Expenses for any prior year. The Common Expenses may also include such amounts as may be required for the purchase or lease by the Board of Managers or its designee, corporate or otherwise, on behalf of both Unit Owners, of any Unit whose owner has elected to sell or lease such Unit or of any Unit which is to be sold at a foreclosure or other judicial sale." Petitioner's income is derived solely from common charges assessed against the two unit owners and any income earned on bank accounts.

The condominium association owns no property and provides services only to the two condominium unit owners. The condominium does not provide any services to non-unit owners. The condominium is not engaged in any trade or business.

Each condominium unit is a separate tax lot for real estate tax purposes. Each unit owner, owns his own unit and an undivided interest in the common elements.

The condominium association does not issue any shares of stock or other evidence of ownership of a condominium unit. The condominium is operated as an unincorporated association consisting of only two units.

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 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

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.

In The Larkfield Professional Center Condo Association, Adv Op Comm T & F, February 28, 1992, TSB-A-92(4)C, it was held that where a condominium association organized pursuant to Article 9-B of the Real Property Law was unincorporated and its income consisted of only common charges and interest income from building reserve funds, such condominium association was subject

to tax under Article 9-A of the Tax Law because it was an association within the meaning of section 7701(a)(3) of the Internal Revenue Code and therefore met the definition of corporation pursuant to section 208.1 of the Tax Law as amended in 1989.

Herein, Petitioner is an association within the meaning of section 7701(a)(3) of the Internal Revenue Code and, therefore, meets the definition of corporation pursuant to section 208.1 of the Tax Law. Accordingly, Petitioner is subject to tax under Article 9-A of the Tax Law.

DATED: December 23, 1993

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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