

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

TSB-A-97(13)C
Corporation Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C961219A

On December 19, 1996, a Petition for Advisory Opinion was received from New Venture Gear, Inc., 1650 Research Drive, Troy, Michigan 48083.

The issue raised by Petitioner, New Venture Gear, Inc., is whether sales of products manufactured in New York by a corporation to a Michigan LLC, 99 percent directly owned and one percent indirectly owned by the corporation, are included in the numerator and denominator of the receipts factor where the LLC's profits would be added to the corporation's profits for purposes of Article 9-A of the Tax Law.

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

Taxpayer, a C corporation, intends to form a Michigan LLC which will be treated as a partnership for federal and state tax purposes. Taxpayer will own 99 percent of the LLC directly and one percent indirectly. When treated as a partnership, the LLC's profits and apportionment factors would flow up to the Taxpayer, a corporate member. All sales of products manufactured by the Taxpayer will be made to the LLC which, in turn, will sell the products to third parties. The LLC's operations will include selling of products to third parties, administrative support to the Taxpayer, as well as research and development activities benefiting the Taxpayer.

Section 2 of the Tax Law provides the definition of certain terms used in the Tax Law, and was amended by Chapter 576 of the Laws of 1994 which added the following:

5. The term "limited liability company" means a domestic limited liability company or a foreign limited liability company, as defined in section one hundred two of the limited liability company law.

6. "Partnership and partner," unless the context requires otherwise, shall include, but shall not be limited to, a limited liability company and a member thereof, respectively.

Section 208.1 of the Tax Law provides that the term "corporation" includes an association within the meaning of section 7701(a)(3) of the IRC, including an LLC.

Accordingly, an LLC that is treated as a corporation for federal income tax purposes is treated as a corporation for New York State tax purposes. An LLC that is treated as a partnership for federal income tax purposes, is treated as a partnership for New York State tax purposes. (See, Department of Taxation and Finance Memorandum, TSB-M-94(6)I and (8)C, October 25, 1994; FGIC CMRC Corp, Adv Op Comm T & F, April 1, 1996, TSB-A-96(11)C; and Bruce Nadell, Adv Op Comm T & F, May 2, 1996, TSB-A-96(12)C.)

Since an LLC that is treated as a partnership for federal income tax purposes is treated as a partnership for New York State tax purposes, it is consistent to treat a corporate member of an LLC like a corporate partner of a partnership. (Bruce Nadell, supra.)

Section 4-6.5 of the Business Corporation Franchise Tax Regulations ("Article 9-A Regulations") provides the rules relating to allocation by a corporate partner of a partnership or joint venture. Section 4-6.5(a)(2)(ii) of the Article 9-A Regulations provides that a taxpayer which is a partner of a partnership computes the receipts factor of the business allocation percentage and alternative business allocation percentage as follows:

the taxpayer's business receipts within New York State plus the taxpayer's proportionate part of the partnership's business receipts within New York State during the applicable partnership year divided by the taxpayer's total business receipts within and without New York State plus the taxpayer's proportionate part of the partnership's business receipts within and without New York State during the applicable partnership year (see Subpart 4-4 of this Part - Receipts Factor of Business Allocation Percentage);

For purposes of section 4-6.5 of the Article 9-A Regulations, the term *proportionate part* means the percentage which the partnership used to distribute to the partner, its distributive share of partnership ordinary income in an income year or partnership ordinary loss in a loss year.

In this case, Taxpayer will be a corporate member of an LLC. If the LLC is treated as a partnership for federal income tax purposes, the LLC will be treated as a partnership for New York State tax purposes and Taxpayer will be treated like a corporate partner of a partnership. In determining a corporation's "business receipts and proportionate part of the partnership's business receipts during the applicable partnership year" for purposes of the receipts factor, the portion of business receipts from sales by the corporation to the partnership that is, in effect, also reflected in the corporation's distributive share of the partnership's business receipts is not included in either the numerator or denominator of the factor. Therefore, under the circumstances presented, Taxpayer would exclude from the receipts factor a portion of its receipts from the sales to the LLC, which portion is determined by multiplying the receipts by the percentage that the LLC used to distribute to Taxpayer, its distributive share of the LLC's ordinary income or loss for the taxable year.

DATED: June 26, 1997

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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