

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

TSB-A-97(21)C
Corporation Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C970606A

On June 6, 1997, a Petition for Advisory Opinion was received from Rivercliffe Condominium, c/o Stewart Schectman, 87 Main Street, Tarrytown, New York 10591.

The issue raised by Petitioner, Rivercliffe Condominium, is whether it is an association subject to tax under Article 9-A of the Tax Law for taxable years 1991 through 1995.

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

Petitioner is a condominium consisting of only 21 residential units. No membership certificates are issued to unit owners. There are no commercial units, garages, laundry rooms or other rental facilities or recreational facilities. Petitioner is not engaged in a business venture. The only revenues received by Petitioner consist of common charges and interest earned on funds, principally a small reserve account.

Liability for the debts of Petitioner is not limited to the property of Petitioner. The unit owners would be subject to personal liability in the event of a loss in excess of insurance.

There is no free transferability of interests. The Declaration of Rivercliffe Condominium and the By-Laws of Rivercliffe Condominium require a unit owner who receives a bona fide offer to sell his or her unit to notify the Board of Managers of such offer and give the Board of Managers the right of first refusal to acquire the unit.

Petitioner does have continuity of life (until such time as the requisite number of unit owners elect to terminate the condominium) and centralization of management.

It appears that, for federal income tax purposes, Petitioner files Form 1120-H, U.S. Income Tax Return for Homeowners Associations under section 528 of the Internal Revenue Code.

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

[f]or 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 such fiscal or calendar year or part thereof

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 Internal Revenue Code ("IRC").

For purposes of section 7701(a)(3) of the IRC, an association is an organization whose characteristics require it to be treated for purposes of taxation as a corporation rather than another type of organization such as a partnership or a trust. Generally, for federal income tax purposes, residential real estate management associations and condominium management associations are classified as associations taxable as corporations. If qualified, such associations may elect to be treated as homeowners associations under section 528 of the IRC by filing federal Form 1120-H. This election protects an association from tax only on its exempt function income, such a membership dues, fees, and assessments received from member-owners of residential units in the particular condominium or subdivision involved.

In Renaissance Condominium, Adv Op Comm T & F, October 1, 1996, TSB-A-96(24)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 assessments from unit holders for common charges and interest income, the condominium association was subject to tax under Article 9-A of the Tax Law. The condominium association was classified as an association, within the meaning of section 7701(a)(3) of the IRC, taxable as a corporation and it elected to be treated as a homeowners association under section 528 of the IRC. Since it was classified as an association under section 7701(a)(3) of the IRC, it met the definition of corporation pursuant to section 208.1 of the Tax Law. The same conclusion was reached under similar circumstances in an advisory opinion issued to 440 East 6 Condominium, Adv Op Comm T & F, December 23, 1993, TSB-A-93(22)C and The Larkfield Professional Center Condo Association, Adv Op Comm T & F, February 28, 1992, TSB-A-92(4)C.

Accordingly, in this case, Petitioner is a corporation pursuant to section 208.1 of the Tax Law and is subject to the franchise tax imposed under section 209.1 of the Tax Law for taxable years 1991 through 1995 and for all future years that it is an association taxable as a corporation for federal income tax purposes. Petitioner's tax liability is computed under section 210 of the Tax Law and is based on its entire net income base, or other basis as may be applicable.

Section 208.9 of the Tax law defines entire net income as "total net income from all sources ... which shall be presumably the same as the entire taxable income which the taxpayer is required to report to the United States treasury department ... except as hereinafter provided...." Therefore, the taxable income reported for federal income tax purposes is the starting point for computing entire net income. After determining federal taxable income, it must be adjusted as required by section 208.9 of the Tax Law.

If a condominium association elects to file as a homeowners association pursuant to section 528 of the IRC, the association's federal taxable income for purposes of section 208.9 of the Tax Law will be presumed to be the same as its taxable income as computed under section 528(d) of the IRC.

Accordingly, if Petitioner elects to file as a homeowners association pursuant to section 528 of the IRC, Petitioner's starting point for computing its entire net income pursuant to section 208.9 of the Tax Law will be its federal taxable income computed pursuant to section 528 of the IRC.

DATED: August 6, 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.