

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

TSB-A-97(24)C
Corporation Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C970627A

On June 27, 1997, a Petition for Advisory Opinion was received from Board of Managers Condominium X, c/o Michael A. Mammolito, CPA, 4 Clinton Square, Suite 104, Syracuse, New York 13202.

The issue raised by Petitioner, Board of Managers Condominium X, is whether it is subject to New York franchise tax under Article 9-A of the Tax Law.

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

Petitioner is an unincorporated entity formed under Article 9-B of the New York Real Property Law on May 16, 1991. Petitioner was established to facilitate the maintenance and sharing of the costs relative to the condominium. All of the condominium units are used for residential purposes. Petitioner does not own real or personal property. All of the real property is owned by the condominium owners. No stock or other evidence of ownership has been issued to the condominium owners relative to Petitioner.

Petitioner's revenues consist only of assessments to condominium owners for their pro-rata share of common costs. Petitioner states that no other revenue is received. There are no extra charges (i.e., use of fitness equipment or other facilities) assessed to the condominium owners. Each condominium owner is assessed based on his or her respective common interest. No profit motive exists. The individual condominium owners are receiving no benefits from Petitioner other than the ease of paying common expenses.

Any liability which arises from Petitioner (except from willful misconduct) is a liability of each condominium owner based on his or her pro-rata share of the common interest. The ultimate liability is with the condominium owners.

Before a condominium owner sells his or her condominium to a third party, the owner must first offer the condominium to all other owners as a group through Petitioner. Petitioner may purchase or lease units offered for sale or lease by the unit owner. Petitioner may not exercise this option without a majority vote from condominium owners (either present or by proxy.) Petitioner may sell, lease or sub-lease the units that it acquires. If Petitioner purchases a unit offered for sale, the purchase may be made from the working capital and common charges on hand, or if such funds are insufficient, Petitioner may levy an assessment against each unit owner as a common charge.

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 as membership dues, fees, and assessments received from member-owners of residential units in the particular condominium or subdivision involved.

In Rivercliffe Condominium, Adv Op Comm T & F, August 6, 1997, TSB-A-97(21)C, it was held that where a condominium association, consisting of only residential units, that did not issue membership certificates and did not have commercial units, garages, laundry room or other rental facilities or recreational facilities, and received revenues only from common charges and interest earned on the funds in a small reserve account, 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 and taxable as a corporation. The same conclusion was reached under similar circumstances in an advisory opinion issued to Board of Managers Plum Court, Adv Op Comm T & F, August 6, 1997, TSB-A-97(20)C.

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 advisory opinions 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's organization 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. Petitioner's organization must file annual franchise tax reports for all taxable years that it is subject to tax under Article 9-A. Petitioner's organization'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 or a residential real estate management 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's organization elects to file as a homeowners association pursuant to section 528 of the IRC, Petitioner's organization'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: September 30, 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.