

**New York State Department of Taxation and Finance**  
**Office of Tax Policy Analysis**  
**Technical Services Division**

TSB-A-02(3)I  
Income Tax  
July 24, 2002

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I010920A

On September 20, 2001, a Petition for Advisory Opinion was received from 1350 Broadway Associates, c/o Wien & Malkin LLP, 60 East 42<sup>nd</sup> Street, NY, NY 10165.

The issue raised by Petitioner, 1350 Broadway Associates, is whether the annual filing fee of fifty dollars per member imposed on a limited liability company (“LLC”) pursuant to section 658(c)(3) of the Tax Law applies to investors who own a contractual non-voting economic interest in a portion of a member’s interest.

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

Petitioner, a New York general partnership organized in 1965, desires to convert to an LLC. Petitioner consists of two partners, each with a 50 percent interest (the “Partners”). Other investors (“Participants”) have acquired fractional contractual interests in a portion of the economic interest owned by each of the Partners through a Participating Contract. Petitioner states that these Participants are not partners. The Participants do not have a right to receive distributions from Petitioner, do not have the authority to vote in partnership matters, and do not have any power or authority to bind or act for Petitioner for any purpose.

Under a Participating Contract, each Partner acts as an agent for its Participants on the basis that the Partner has the sole right under the Partnership Agreement to receive distributions, to vote on all partnership matters, to exercise all legal rights of a Partner, and to conduct all partnership business and administration. Separately, each Partner has agreed with its Participants that, for certain major decisions, like the sale of partnership property, the Partner will vote only after a specified level of approval (majority or otherwise) is obtained from its Participants.

Upon conversion of Petitioner to an LLC, only each Partner will become an LLC member and will continue to have the same rights and obligations in relation to the LLC as the Partner had in Petitioner. The Participants will have no right to vote in LLC matters, have no right to receive distributions from the LLC, have no right to participate in the management of the LLC, will not be admitted as a member of the LLC, and will not be party to the LLC operating agreement.

**Applicable Law**

Section 658(c)(3) of Article 22 of the Tax Law provides:

Filing fees. Every subchapter K limited liability company, and every limited liability partnership under article eight-B of the partnership law and every foreign

limited liability partnership, which has any income derived from New York sources, determined in accordance with the applicable rules of section six hundred thirty-one as in the case of a nonresident individual, shall, at the prescribed time for making the return required under paragraph one of this subsection, make a payment of a filing fee. The amount of the filing fee shall be the product of (a) fifty dollars and (b) the number of members of such company or number of partners of such partnership, as the case may be, as of the last day of the taxable year, but in no event shall such fee be less than three hundred twenty-five dollars nor more than ten thousand dollars....

Section 102 (q) of the Limited Liability Company Law defines a “member” as:

a person who has been admitted as a member of a limited liability company in accordance with the terms and provisions of [the Limited Liability Company Law] and the operating agreement and has a membership interest in a limited liability company with the rights, obligations, preferences and limitations specified under [the Limited Liability Company Law] and the operating agreement.

Section 503 of the Limited Liability Company Law provides, in part:

The profits and losses of a limited liability company shall be allocated among the members, and among the classes of members, if any, in the manner provided in the operating agreement....

Section 602 of the Limited Liability Company Law provides, in part:

(a) A person becomes a member of a limited liability company on the later of:

(1) the effective date of the initial articles of organization; or

(2) the date as of which the person becomes a member pursuant to [section 602] or the operating agreement; provided, however, that if such date is not ascertainable, the date stated in the records of the limited liability company.

(b) After the effective date of a limited liability company’s initial articles of organization, a person may be admitted as a member:

(1) in the case of a person acquiring a membership interest directly from the limited liability company, upon compliance with the operating agreement or, if the operating agreement does not so provide, upon the vote or written consent of a majority in interest of the members;

(2) in the case of an assignee of a membership interest of a member who has the power, as provided in the operating agreement, to grant the assignee the right to become a member, upon the exercise of that power and compliance with any conditions limiting the grant or exercise of the power....

Section 603(a) of the Limited Liability Company Law provides, in part:

Except as provided in the operating agreement,

(1) a membership interest is assignable in whole or in part;

(2) an assignment of a membership interest does not dissolve a limited liability company or entitle the assignee to participate in the management and affairs of the limited liability company or to become or to exercise any rights or powers of a member;

(3) the only effect of an assignment of a membership interest is to entitle the assignee to receive, to the extent assigned, the distributions and allocations of profits and losses to which the assignor would be entitled....

Section 604(a) of the Limited Liability Company Law provides, in part:

Except as provided in the operating agreement, an assignee of a membership interest may not become a member without the vote or written consent of at least a majority in interest of the members....

### **Opinion**

In this case, the Partnership, 1350 Broadway Associates, consists of two Partners, each with a 50 percent interest in the Partnership. Each Partner has a contractual agreement (a Participating Contract) with Participants whereby the Participants acquire a portion of the Partner's economic interest in the Partnership. It is assumed, for purposes of this advisory opinion, that the agreement between a Partner and the applicable Participant will be treated as an assignment of a membership interest under section 603 of the Limited Liability Company Law. The Participants will not at any time be parties to the LLC operating agreement or be admitted as members of the LLC. Therefore, pursuant to sections 102(q) and 604 of the Limited Liability Company Law, upon conversion to an LLC, only the two Partners of the Partnership will become LLC members.

Accordingly, for purposes of section 658(c)(3) of the Tax Law, the Participants will not be considered members of the LLC. Therefore, the annual filing fee shall be imposed only with respect to the two existing Partners in the Partnership who will become the LLC members. Pursuant to

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section 658(c)(3) of the Tax Law, the minimum annual filing fee of \$325 would be imposed on the LLC.

DATED: July 24, 2002

/s/  
Jonathan Pessen  
Tax Regulations Specialist IV  
Technical Services Division

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