

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

TSB-A-04(9)I
Income Tax
December 13, 2004

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I040203B

On February 3, 2004, a Petition for Advisory Opinion was received from Richard Berman, CPA, Berman and Berman, LLP, One Penn Plaza, New York, New York 10119.

The issue raised by Petitioner, Richard Berman, CPA, is whether a limited liability company (LLC), that is treated as a partnership for federal income tax purposes, is subject to a filing fee pursuant to section 658(c)(3) of the Tax Law for taxable year 2003.

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

In taxable year 2002, an LLC, that is treated as a partnership for federal income tax purposes, owned and managed a piece of real property located in New York State. During the year, the LLC sold the property and realized a gain from the sale.

In taxable year 2003, the members of the LLC maintained the proceeds from the sale of the property in a bank account. The LLC did not engage in a trade or business during the year. It did not hold property out for rental, manage property, own real property, or seek to purchase another parcel of real property with the funds held in the bank account. The only income that the LLC generated in taxable year 2003 was interest income earned on the bank account. The LLC was not terminated or dissolved in 2003.

Applicable law and regulations

Section 631 of the Tax Law provides, in part:

(a) General. The New York source income of a nonresident individual shall be the sum of the following: (1) The net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources, . . . :

* * *

(2) The portion of the modifications described in subsections (b) and (c) of section six hundred twelve which relate to income derived from New York sources (including any modifications attributable to him as a partner

(b) Income and deductions from New York sources.

(1) Items of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to:

(A) the ownership of any interest in real or tangible personal property in this state;
or

(B) a business, trade, profession or occupation carried on in this state; or

* * *

(2) Income from intangible personal property, including annuities, dividends, interest, and gains from the disposition of intangible personal property, shall constitute income derived from New York sources only to the extent that such income is from property employed in a business, trade, profession, or occupation carried on in this state. . . .

Section 658(c)(3) of the Tax Law imposes a filing fee on limited liability companies and limited liability partnerships that are treated as partnerships for federal income purposes. Such section 658(c)(3), as amended by Chapter 62 of the Laws of 2003, effective for taxable years beginning in 2003 and 2004, provides, in part:

(3) 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, within thirty days after the last day of the taxable year, make a payment of a filing fee. The amount of the filing fee shall be the product of (a) one hundred 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 five hundred dollars nor more than twenty-five thousand dollars. . . . Where such fee is not timely paid, it shall be paid upon notice and demand and shall be assessed, collected and paid in the same manner as taxes, and for such purposes any reference in this article to tax imposed by this article shall be deemed also to refer to the fee prescribed herein.

Opinion

Section 658(c)(3) of the Tax Law provides for an annual filing fee to be imposed on an LLC that is treated as a partnership for federal income tax purposes that had any income derived from New York sources. Section 631 of the Tax Law provides, in general, that items of income, gain, loss or deduction from New York sources include those items attributable to the ownership of any interest in real or tangible personal property located in New York State or a business, trade, profession or occupation carried on in the State. Income from intangible property, including interest income from a bank account, shall constitute income derived from New York

sources only to the extent that such income is from property employed in a business, trade, profession, or occupation carried on in this State.

In this case, the interest income received by the LLC in taxable year 2003 was attributable only to money in a bank account and the money was not employed in a business, trade, profession, or occupation in New York. Under these circumstances, the LLC did not have any income derived from New York sources in taxable year 2003. Therefore, pursuant to section 658(c)(3) of the Tax Law, the LLC is not subject to an annual filing fee for 2003.

DATED: December 13, 2004

/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.