

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

TSB-A-97(7) I
Income Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I970513F

On May 13, 1997, a Petition for Advisory Opinion was received from Hirth Real Estate Entities, 210 West 70th Street, Suite 1003, New York, New York 10023.

The issues raised by Petitioner, Hirth Real Estate Entities, are (1) whether each LLC described herein will be treated as a single member LLC owned by the Partnership and the Partnership will include the income and loss items for all of the LLCs on its New York State partnership return, (2) whether the LLCs will be required to file separate New York State partnership returns, (3) whether the Partnership will be the sole member of each LLC and whether the partners will be considered members of any LLC owned by the Partnership, and (4) whether the Partnership or its partners will be liable for the New York State LLC annual member filing fee under section 658(c)(3) of the Tax Law.

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

A domestic general partnership ("Partnership") currently has approximately 90 partners. Each partner is an individual or a trust for the benefit of an individual. The Partnership currently owns approximately 25 separate commercial real estate properties ("real estate".)

The Partnership wants to create an LLC for each piece of real estate. Once each LLC is formed, the Partnership will contribute one real estate property to each LLC. After the proposed transactions have been completed, the Partnership will be the sole member of approximately twenty-five domestic LLCs. Each LLC will own one real estate property previously owned by the partnership.

None of the LLCs will elect to be treated as an association separate from the Partnership. Therefore, for federal income tax purposes, under section 301.7701-3(b) of the Treasury Regulations, each LLC will be disregarded as an entity separate from its owner, the Partnership.

Under section 301.7701-3(b)(1) of the Treasury Regulations, the default classification of an entity that has a single owner is that it is not an entity separate from its owner. If the entity wants to be classified as an association, it must make the election pursuant to section 301.7701-3(c) of the Treasury Regulations.

It has been established that the classification of an LLC for New York State tax purposes will follow the classification accorded the LLC for federal income tax purposes. (See, McDermott, Will & Emery, Adv Op Comm T & F, July 24, 1996, TSB-A-96(19)C; FGIC CMRC Corp, Adv Op Comm T & F, April 1, 1996, TSB-A-96(11)C; and Department of Taxation and Finance Memorandum, TSB-M-94(6)I and (8)C, October 25, 1994.) Therefore, New York State will follow the federal classification of a single member LLC under section 301.7701-3 of the Treasury Regulations.

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Following federal conformity with respect to classifying LLCs, a single member LLC which is a domestic eligible entity that does not make the election for federal income tax purposes pursuant to section 301.7701-3 of the Treasury Regulations to be classified as an association taxable as a corporation, the LLC will not be classified as an entity separate from its owner. If its owner is a partnership, the LLC will be considered a branch or division of the partnership.

Section 658(c) of the Tax Law provides that a partnership shall file its New York State partnership return for each taxable year setting forth all items of income, gain, loss and deduction and other pertinent information as required. This would include the income, gain, loss and deduction items of a single member LLC where the partnership is the single member and the LLC is not treated as a separate entity for federal and New York State tax purposes.

Section 658(c)(3) of the Tax Law provides that every domestic and foreign LLC that is treated as a partnership and has any income, gain, loss or deduction derived from New York sources, is subject to an annual filing fee. Since a single member LLC is not treated as a partnership, it would not be required to pay the annual filing fee under section 658(c)(3) of the Tax Law. (See, Department of Taxation and Finance Memorandum, TSB-M-94(6)I and (8)C, October 25, 1994.)

In this case, if the single member LLCs owned by the Partnership do not make the election to be classified as associations pursuant to section 301.7701-3 of the Treasury Regulations, each LLC will be treated as single member LLC owned solely by the Partnership for New York State income tax purposes. The partners of the Partnership will not be considered members of any of the LLCs. Pursuant to section 658(c) of the Tax Law, the Partnership will include the income, gain, loss and deduction items of all of the LLCs on its New York State partnership return. The LLC's will not be required to file separate New York State partnership returns. Neither the Partnership nor its partners will be liable for the LLC annual member filing fee under section 658(c)(3) of the Tax Law.

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.