

Definition of Corporation

Chapter 61 of the Laws of 1989 amended several sections of New York State's corporation franchise tax laws to expand the definition of corporation to include certain associations within the meaning of IRC 7701(a)(3) and publicly traded partnerships treated as corporations (IRC 7704).

Sections amended include:

Article 9, Sections 183 and 183-a
Sections 184 and 184-a
Sections 186 and 186-b
Article 9A, Section 208.1
Article 32, Section 1462(f)(1)

Bill Section 365(k) set the effective date for this legislation for taxable years beginning on or after January 1, 1989, and ending after April 19, 1989.

Those sections not amended by Chapter 61 include Article 9, Sections 185 and 186-a, Article 13, Article 13-A, and Article 33.

The Internal Revenue Code suggests associations are unincorporated organizations whose characteristics are substantially similar to those of corporations. The term "association" refers to an organization whose characteristics require it to be classified for purposes of taxation as a corporation rather than as another type or organization such as partnership or trust. These characteristics include: (1) associates, (2) an objective to carry on business and divide the gains therefrom, (3) continuity of life, (4) centralization of management, (5) liability for corporate debts limited to corporate property, and (6) free transferability of interests. An organization will be treated as an association if the corporate characteristics are such that the organization more nearly resembles a corporation than a partnership or trust. In determining whether or not an association is a corporation for franchise tax purposes, strong emphasis will be placed on whether or not the association is taxable as a corporation for Federal tax purposes. Associations which would become taxable for franchise tax purposes would generally include those taxable for Federal tax purposes which are subject to the regular corporation income Tax (IRC Section 11) rather than those subject to some form of corporate excise tax (nuclear decommissioning fund, political organizations, or homeowners and condominium associations).

Examples of organizations that would become subject to tax include:

(1) An association formed to operate an oil and gas lease under an agreement providing for centralized management, for security from termination of the enterprise by death of any beneficial owner, for transfer of beneficial interests without affecting the continuance of the enterprise, and for limitation by contractual agreement with creditors of the members personal liability.

(2) A fund established and funded by franchised dealers, administered by the manufacturer of the product in which the dealers deal. The accumulated funds are spent exclusively on national advertising of the manufacturer's product for the dealers benefit.

(3) A business arrangement involving the investment by some 70 individuals in oil and gas leases, the development activities being conducted by a management team operating under powers of attorney.

(4) A group of 25 persons forms an organization for the purpose of engaging in real estate investment activities. Under their agreement, the organization is to have a life of 20 years, and under local law, no member has the power to dissolve the organization prior to the expiration of that period. The management of the organization is vested exclusively in an executive committee of five members elected by all the members, and no one acting without the authority of this committee has the power to bind the organization by his acts. Each member is personally liable for the obligations of the organization. Every member has the right to transfer his interest to a person who is not a member of the organization, but that member must first advise the organization of the proposed transfer and give it the opportunity on a vote of the majority to purchase the interest at its fair market value. The organization has associates and an objective to carry on business and divide the gains therefrom. While the organization does not have the corporate characteristic of limited liability, it does have continuity of life, centralized management, and a modified form of free transferability of interests. The organization will be classified as an association for all purposes of the Internal Revenue Code.

A publicly traded partnership shall be treated as a corporation. It is a partnership whose interests (or shares) are traded on an established securities market or are readily tradeable on a secondary market. It shall not be treated as a corporation if 90% or more of the gross income of the partnership for the taxable year consists of qualifying income.

Qualifying income includes interest, dividends, real property rents, gains from the sale or other disposition of real property, etc. Further information regarding qualifying income can be derived from Internal Revenue Code, Section 7704 (d)

Article 9A (Section 208.1) and Article 9, Sections 183 and 183-a define the term "corporation" as an association within the meaning of Internal Revenue Code, Section 7701(a)(3), a publicly traded partnership treated as a corporation for purposes of Internal Revenue Code, Section 7704, and any business conducted by a trustee or trustees wherein interest or ownership is evidenced by certificates or other written instruments.

Article 9, Sections 184, 184-a, 186 and 186-b, and Article 32, Section 1462(f)(1) do not include "any business conducted by a trustee or trustees wherein interest or ownership is evidenced by certificates or other written instruments" in the definition of corporation.