

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

TSB-A-90(13)C
Corporation Tax
June 13, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITIONER NO. C900420B

On April 20, 1990, a Petition for Advisory Opinion was received from 103 Avenue A Condominium c/o Mr. Grossman, 168 Mott Street, New York, New York 10013.

The issued raised by Petitioner, 103 Avenue A Condominium, is whether an unincorporated association, organized pursuant to Article 9-B of the Real Property Law, is subject to the franchise tax on business corporations imposed under Article 9-A of the Tax Law.

Petitioner comprises the land and building located at 103-05 Avenue A, New York, New York. It includes 22 residential units and two commercial units. The condominium association was organized with Article 9-B of the New York Real Property Law. The association is not incorporated and it does not issue certificates or other written instruments evidencing ownership, nor does it issue stock.

The ownership of a residential condominium unit is similar in many respects to ownership of a private home. The owner of a residential unit owns title to his or her unit and is entitled to exclusive possession of it. Any one unit is not subject to mortgages on any other units and a unit owner will incur no liability if his or her neighbors fail to make payments on any mortgage affecting their units. Each unit owner has the right to vote in the election of a Board of Managers which will supervise the property and manage the affairs of the condominium. A unit owner may sell or lease his unit to anyone without restriction or limitation, subject to a right of first refusal by the Board of Managers. Each unit is assessed as a separate tax lot for real estate tax purposes.

In addition to ownership of title to his or her unit, a unit owner owns in common with all other unit owners, an undivided interest in all parts of the property other than the residential or commercial units themselves, the common elements. Petitioner, itself, owns no interest in real estate.

The revenues of Petitioner consist of assessments for common charges to unit owners and interest income. The association owns no property and provides maintenance services only to unit owners. The association does not render services to non-unit holders, nor does it otherwise engage in a trade or business.

Section 209.1 of the Tax Law imposes a franchise tax on business corporations, as follows:

For 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.

The meaning of the term "corporation", as amended by Chapter 61 of the Laws of 1989, is set forth in section 208.1 of the Tax Law, as follows:

The term "corporation" includes an association, within the meaning of paragraph three of subsection (a) of section seventy-seven hundred one of the internal revenue code, a joint-stock company or association, a publicly traded partnership treated as a corporation for purposes of the internal revenue code pursuant to seventy-seven hundred four thereof and any business conducted by a trustee or trustees wherein interest or ownership is evidenced by certificate or other written instrument.

For purposes of section 7701(a)(3) of the Internal Revenue Code, an association is an organization whose characteristics require it to be classified for purposes of taxation as a corporation rather than another type of organization such as a partnership or a trust. Section 301.7701-2(a) of the Treasury Regulations provides that the major characteristics ordinarily found in a pure corporation which, taken together, distinguish it from other organizations are (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 a trust.

Section 339-o of Article 9-B of the Real Property Law states that the deeds and leases of units must include "[t]he common interest appertaining to the unit. ." Section 339-e(5) of said law defines "common interest" as "the (i) -proportionate, undivided interest in fee simple absolute, or (ii) proportionate undivided leasehold interest in the common elements appertaining to each unit, as expressed in the declaration."

Section 339-m of said law states, in part, that "[t]he common profits of the property shall be distributed among, and the common expenses shall be charged to, the unit owners according to their respective common interests. . . Notwithstanding any provision of this article, profits and expenses may be specially allocated and apportioned by the board of managers in a manner different from common profits and expenses. . . ." Section 339-e(6) of such law defines "common profits" as "the excess of all receipts of the rents, profits and revenues from the common elements remaining after the deduction of the common expenses."

Accordingly Petitioner, which meets all of the tests set forth in Sections 339-o, 339-e(5), 339-e(6) and 339-m of the Real Property Law, is an association within the meaning of section 7701(a)(3) of the Internal Revenue Code and thus is a "corporation" as defined by Section 208.1 of the Tax Law. Therefore, for all taxable years since it was organized, Petitioner is subject to the franchise tax

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on business corporations imposed by Section 209.1 of Article 9-A of the Tax Law, and will be required to pay an annual franchise tax upon the basis of its entire net income base or upon such other basis as may be applicable.

DATED: June 13, 1990

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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