

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

TSB-A-91(13)C
Corporation Tax
May 10, 1991

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C910307A

On March 7, 1991, a Petition for Advisory Opinion was received from Bayside Mews Condominium, c/o Concerned Management Company, 33-01, Francis Lewis Blvd., Flushing, New York 11358.

The issue raised by Petitioner, Bayside Mews Condominium, an unincorporated condominium association, is whether it is subject to the franchise tax imposed under Article 9-A of the Tax Law.

Petitioner, an unincorporated condominium association was organized in 1982 under Article 9-B of the New York Real Property Law. The condominium comprises the land and buildings located at 209-21, 209-33, 209-45 and 210-19 26th Avenue in Bayside, Queens, New York 11360. It is comprised of 142 residential units. Petitioner does not issue certificates or other written instruments evidencing ownership, nor does it issue stock. Petitioner owns the residential unit used by the superintendent. The revenues of Petitioner consist of assessments for common charges to unit owners, interest income and miscellaneous income from late charges. In addition, Petitioner may receive revenue from the rental of 20 parking spaces and the lease of units. The condominium provides services to unit owners only, and it does not engage in a trade or business.

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 units themselves, the common elements.

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 the Laws of 1989 (ch 61), 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...

The term "corporation" is defined in section 1-2.3 of the Business Corporation Franchise Tax Regulations, which provides, in part, that:

(a) The term 'corporation' means an entity created as such under the laws of the United States, any state, territory or possession thereof, the District of Columbia, or any foreign country, or any political subdivision of any of the foregoing, which provides a medium for the conducting of business and the sharing of its gains.

. . .

(b) The term 'corporation' includes a joint stock company or association and any business conducted by a trustee or trustees wherein interest or ownership is evidenced by certificate or other written instrument. An entity conducted as a corporation is deemed to be a corporation. 20 NYCRR §1-2.3

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..." 49 NYCRR § 339-o. Section 339-e(5) of such 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" 49 NYCRR § 339-e(5). Thus, each homeowner's interest is evidenced by a written instrument.

Section 339-m of such 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

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expenses may be specially allocated and apportioned by the board of managers in a manner different from common profits and expenses " 49 NYCRR § 339-m. 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." 49 NYCRR § 339-e(6).

In Astor Terrace Condominium, Adv Op Comm T & F, March 1, 1990, TSB-A-90(7)C, it was held that where a condominium association, organized under Article 9-B of the Real Property Law, may lease portions of the common elements and does receive income from a laundry room concession and storage charges such association had demonstrated that it provided a medium for the conducting of business and the sharing of its gains. Therefore, such condominium association presented itself as a corporation to conduct business and was subject to tax under Article 9-A of the Tax Law. See also, Garen & Company, Adv Op St Tax Comm, March 12, 1986, TSB-A-86(6)C.

Herein, Petitioner, a condominium association organized pursuant to Article 9-B of the Real Property Law, rents parking spaces and may purchase and lease residential units. Thus, Petitioner has demonstrated that it provides a medium for the conducting of business and the sharing of its gains. Therefore, Petitioner presents itself as a corporation to conduct business.

This conclusion is supported by People ex rel West Side Tennis Club v Browne, 270 App Div 1061, wherein the court found a tennis club taxable because "it embarked upon business activities for profit and also.., was engaged in carrying on a business during the tax years." Similarly, in Rye Country Day School v Lynch, 239 App Div 614, it was determined that since the corporation was financially successful and had accumulated profits it was subject to the franchise tax.

Accordingly, Petitioner meets the definition of a corporation for purposes of Article 9-A of the Tax Law. In addition, for purposes of section 208.1 of the Tax Law for taxable years beginning on or after January 1, 1989, Petitioner is an association within the meaning of section 7701(a)(3) of the Internal Revenue Code. Therefore, for all taxable years since it was organized, Petitioner is subject to the franchise tax under Article 9-A of the Tax Law. Accordingly, Petitioner 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: May 10, 1991

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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