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

TSB-A-96 (19) C
Corporation Tax
July 24, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C960402B

On April 2, 1996, a Petition for Advisory Opinion was received from McDermott, Will & Emery, 1211 Avenue of the Americas, New York, New York 10036.

The issues raised by Petitioner, McDermott, Will & Emery, are (1) whether a New York single-member limited liability company ("LLC") is subject to New York tax, and (2) whether a foreign corporation that is not subject to the franchise tax imposed under Article 9-A of the Tax Law will become subject to tax because it is the sole member of a New York LLC.

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

A foreign C corporation ("C Corp") currently does not have a taxable presence in New York. It is considering establishing an LLC under the New York LLC law. The C Corp will be the only member of the LLC. The LLC will be used solely to hold various interests in C Corp's foreign affiliates. These foreign affiliates operate entirely abroad and have no property, employees, or other activities in the United States. The LLC will function merely as a passive holding company.

The LLC will not have any property, payroll or other activities in New York. All of the LLC's books and records will be maintained outside of New York by either an LLC employee or another party (perhaps C Corp) for a fee. Similarly, the management of its activities will occur outside New York. The LLC will not engage in any business in New York. The LLC's exclusive New York contact will be its creation under New York law and its designation of a registered agent in New York to accept service of process as required in New York.

Petitioner states that it is anticipated that for Federal income tax purposes, the Internal Revenue Service will not treat the LLC as a partnership or an association but will treat it as a branch of C Corp because the LLC will only have one member and that member will be a corporation.

On May 13, 1996, the Internal Revenue Service proposed Treasury Regulations that would replace the existing regulations for classifying certain business organizations with an elective regime. Under proposed section 301.7701-3(a) of the Treasury Regulations, a business entity that is not required to be classified as a corporation is an eligible entity that can elect its classification for Federal income tax purposes. A domestic eligible entity that has a single member can elect to be classified as an association or elect to be disregarded as an entity separate from its owner. Under proposed section 301.7701-3(b)(1) of the Treasury Regulations, the default classification of an entity

that has a single owner will be 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 proposed section 301.7701-3(c) of the Treasury Regulations.

Section 2 of the Tax Law provides the definition of certain terms used in the Tax Law. This section was amended by Chapter 576 of the Laws of 1994 which added the following:

> 5. The term "limited liability company" means a domestic limited liability company or a foreign limited liability company, as defined in section one hundred two of the limited liability company law.
>
> 6. "Partnership and partner," unless the context requires otherwise, shall include, but shall not be limited to, a limited liability company and a member thereof, respectively.

Section 208.1 of the Tax Law provides that the term "corporation" includes an association within the meaning of section 7701(a)(3) of the Internal Revenue Code, including an LLC.

Section 209.1 of Article 9-A of the Tax Law imposes the business corporation franchise tax on every corporation, unless specifically exempt, for the privilege of exercising its franchise, or of doing business, or of employing capital, or of owning or leasing property in New York State in a corporate or organized capacity, or of maintaining an office in New York State.

An LLC that is treated as a corporation for Federal income tax purposes is treated as a corporation for New York State tax purposes. An LLC that is treated as a partnership for Federal income tax purposes, is treated as a partnership for New York State tax purposes. (See, FGIC CMRC Corp, Adv Op Comm T & F, April 1, 1996, TSB-A-96(ll)C; and Department of Taxation and Finance Memorandum, TSB-M-94(6)I and (8)C, October 25, 1994.)

Since 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, New York State would follow the Federal classification of an LLC under the proposed section 301.7701-3 of the Treasury Regulations.

Following Federal conformity with respect to classifying LLCs, a single member LLC which is a domestic eligible entity that makes the election pursuant to proposed section 301.7701-3(c) of the Treasury Regulations to be classified as an association for Federal income tax purposes would be treated as a corporation pursuant to section 208.1 of the Tax Law and would be subject to tax under Article 9-A of the Tax Law. Where the single member LLC does not make the election for Federal income tax purposes pursuant to proposed section 301.7701-3 of the Treasury Regulations, it would not be classified as an entity separate from its owner. If its owner is a corporation, it would be considered a branch or division of the owner corporation.

In this case, C Corp is a foreign corporation that does not have a taxable presence in New York State. C Corp will establish a single member LLC in New York State that will be used solely to hold various interests in C Corp's foreign affiliates. These foreign affiliates operate entirely abroad and have no property, employees or other activities in the United States. The LLC will function merely as a passive holding company and will not engage in any business in New York State, will not have any property, payroll or other activities in New York State and the management of its activities will occur outside of New York State.

Accordingly, if the LLC is not classified as a separate entity from C Corp for Federal income tax purposes, the LLC would not be considered a separate entity for New York tax purposes, and the LLC itself would not be subject to New York tax. Further, the creation of the LLC under New York Law would not create a taxable presence in New York State that makes C Corp subject to tax under Article 9-A of the Tax Law, because the LLC will not have any other contact with New York State.

However, if the LLC elects to be classified as an association for Federal income tax purposes, pursuant to section 208.1 of the Tax Law, the LLC would be treated as a corporation and would be subject to tax under Article 9-A of the Tax Law.

It should be noted that, if the proposed section 301.7701-3(a) of the Treasury Regulations is not adopted for Federal income tax purposes, the classification rules established under the proposed section would not be followed for New York State tax purposes. The New York State classification of the LLC would depend on the Federal classification of the LLC for Federal income tax purposes.

/s/

DATED: July 24, 1996

John W. Bartlett
Deputy Director
Technical Services Bureau

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