

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

TSB-A-97(20)C
Corporation Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C970602A

On June 2, 1997, a Petition for Advisory Opinion was received from Board of Managers Plum Court, c/o Highlander Associates Ltd., 340 East Brighton Avenue, Syracuse, New York 13210.

The issue raised by Petitioner, Board of Managers Plum Court, is whether the organization is a corporation under section 1-2.5(a) of the Franchise Tax on Business Corporation Regulations ("Article 9-A Regulations") that is taxable under Article 9-A and required to file franchise tax reports for taxable years 1991 through 1995 because it files a Form 1120-H for federal income tax purposes.

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

Petitioner states that the by-laws of the organization do not address the issues of associates, continuity of life or free transferability of interests. The unit owners elect the board but are also able to remove any one or more of them for just cause. There has never been any "stock" issued to the unit owners as would be in the case of traditional corporations. However, the by-laws do address the issues of "liability for corporate debts limited to corporate property" and "an objective to carry on business and divide the gains thereon". Each unit owner's share of any liability that arises is limited to such proportion of total liability as his/her interest in common elements bears to the interest of all unit owners in the common elements. Finally, there is no profit motive inherent in the operation of this organization. Both the operating expenses and capital improvements are funded by the owners, and no profits or surpluses are distributed to them.

This organization also does not state that the formation of the Board of Managers was intended to be a separate legal entity distinct from the individuals themselves. No corporate charter was ever established either.

For federal income tax purposes, the organization files Form 1120-H, U.S. Income Tax Return for Homeowners Associations under section 528 of Internal Revenue Code ("IRC").

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

[f]or 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, for such fiscal or calendar year or part thereof, on a report which shall be filed

Section 1-2.5(a) of the Article 9-A Regulations provides that:

[t]he 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.

Section 208.1 of the Tax Law and section 1-2.5(b) of the Article 9-A Regulations provides that the term *corporation* includes an association, within the meaning of section 7701(a)(3) of the IRC.

For purposes of section 7701(a)(3) of the IRC, an association is an organization whose characteristics require it to be treated for purposes of taxation as a corporation rather than another type of organization such as a partnership or a trust. Generally, for federal income tax purposes, residential real estate management associations and condominium management associations are classified as associations taxable as corporations. If qualified, such associations may elect to be treated as homeowners associations under section 528 of the IRC by filing federal Form 1120-H. This election protects an association from tax only on its exempt function income, such as membership dues, fees, and assessments received from member-owners of residential units in the particular condominium or subdivision involved.

In Renaissance Condominium, Adv Op Comm T & F, October 1, 1996, TSB-A-96(24)C, it was held that where a condominium association organized pursuant to Article 9-B of the Real Property Law was unincorporated and its income consisted of only assessments from unit holders for common charges and interest income, the condominium association was subject to tax under Article 9-A of the Tax Law. The condominium association was classified as an association, within the meaning of section 7701(a)(3) of the IRC, taxable as a corporation and it elected to be treated as a homeowners association under section 528 of the IRC. Since it was classified as an association under section 7701(a)(3) of the IRC, it met the definition of corporation pursuant to section 208.1 of the Tax Law and section 1-2.5(b) of the Article 9-A Regulations. The same conclusion was reached under similar circumstances in an advisory opinion issued to 440 East 6 Condominium, Adv Op Comm T & F, December 23, 1993, TSB-A-93(22)C and The Larkfield Professional Center Condo Association, Adv Op Comm T & F, February 28, 1992, TSB-A-92(4)C.

Accordingly, in this case, Petitioner's organization is a corporation pursuant to section 208.1 of the Tax Law and section 1-2.5(b) of the Article 9-A Regulations and is subject to the franchise tax imposed under section 209.1 of the Tax Law. Petitioner's organization must file annual franchise tax reports

for taxable years 1991 through 1995 and all future taxable years that it is subject to tax under Article 9-A. Petitioner's organization's tax liability is computed under section 210 of the Tax Law and is based on its entire net income base, or other basis as may be applicable.

Section 208.9 of the Tax law defines entire net income as "total net income from all sources ... which shall be presumably the same as the entire taxable income which the taxpayer is required to report to the United States treasury department ... except as hereinafter provided...." Therefore, the taxable income reported for federal income tax purposes is the starting point for computing entire net income. After determining federal taxable income, it must be adjusted as required by section 208.9 of the Tax Law.

If a condominium association or a residential real estate management association elects to file as a homeowners association pursuant to section 528 of the IRC, the association's federal taxable income for purposes of section 208.9 of the Tax Law will be presumed to be the same as its taxable income as computed under section 528(d) of the IRC.

Accordingly, since Petitioner's organization elects to file as a homeowners association pursuant to section 528 of the IRC, Petitioner's organization's starting point for computing its entire net income pursuant to section 208.9 of the Tax Law will be its federal taxable income computed pursuant to section 528 of the IRC.

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.