

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

TSB-A-97(26)C
Corporation Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C970707A

On July 7, 1997, a Petition for Advisory Opinion was received from Stone Commodities Corp., 30 So. Wacker Drive - Suite 1300, Chicago, Illinois 60606.

The issue raised by Petitioner, Stone Commodities Corp, is whether an Illinois business corporation which is a member of an Illinois limited liability company which is authorized to and is conducting a portion of its business in New York City is subject to the New York State Business Corporation Franchise Tax under Article 9-A of the Tax Law and subject to the New York City General Corporation Tax.

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

Petitioner is an Illinois business corporation that was organized in 1970. For federal income tax purposes, the corporation has elected to be taxed under Subchapter S and reports its taxable income on a calendar year basis.

Petitioner is a member of Saul Stone and Company LLC (the "LLC"). The LLC was organized under the Illinois Limited Liability Company Act. The LLC acts as the clearing member for trades executed on commodities exchanges located both in Chicago, Illinois, and New York, New York. The LLC is authorized to do business in New York State. The LLC files a Partnership Return (Form 1065) for federal income tax purposes, and, correspondingly, files comparable state and local income tax returns with the appropriate authorities in Illinois and New York.

Section 2 of the Tax Law provides the definition of certain terms used in the Tax Law, and 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 IRC, including an LLC.

Accordingly, 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, Department of Taxation and Finance Memorandum, TSB-M-94(6)I and (8)C, October 25, 1994.)

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.

Section 208.1-A of the Tax Law provides that the term "New York S corporation" means, with respect to any taxable year, a corporation subject to tax under Article 9-A of the Tax Law for which an election is in effect pursuant to section 660(a) of the Tax Law for the year. A federal S corporation that is not a New York S corporation is subject to the same corporation franchise taxes that the corporation would incur if it were a general business corporation.

In this case, Petitioner is a federal S corporation that is a member of an LLC that is doing business in New York State. The LLC is treated as a partnership for federal income tax purposes. Since an LLC that is treated as a partnership for federal income tax purposes is treated as a partnership for New York State tax purposes, the corporate members of the LLC are treated as corporate partners of a partnership.

Section 1-3.2(a)(5) of the Business Corporation Franchise Tax Regulations ("Article 9-A Regulations") provides that if a partnership is exercising any of the privileges of section 209.1, then all of its corporate general partners are subject to the tax imposed by Article 9-A of the Tax Law. Therefore, if Petitioner's activities as a foreign corporate member of the LLC are like the activities of a general partner in a partnership, Petitioner is subject to tax under Article 9-A pursuant to section 1-3.2(a)(5) of the Article 9-A Regulations because the LLC is doing business in New York State.

Section 1-3.2(a)(6) of the Article 9-A Regulations provides that a foreign corporation is doing business, employing capital, owning or leasing property or maintaining an office in New York State if it is a limited partner of a partnership, other than a portfolio investment partnership, which is doing business, employing capital, owning or leasing property or maintaining an office in New York State and if it is engaged, directly or indirectly, in the participation in or the domination or control of all or any portion of the business activities or affairs of the partnership. Therefore, if Petitioner's activities as a foreign corporate member of the LLC are like the activities of a limited partner in a partnership, Petitioner may be subject to tax under Article 9-A if Petitioner meets the conditions of section 1-3.2(a)(6) of the Article 9-A Regulations. (FGIC CMRC Corp, Adv Op Comm T & F, April 1, 1996, TSB-A-96(11)C.)

If Petitioner is subject to tax under Article 9-A of the Tax Law, either pursuant to section 1-3.2(a)(5) or (6) of the Article 9-A Regulations, Petitioner would be treated as a C corporation for purposes of Article 9-A because Petitioner has not made the election under section 660(a) of the Tax Law to be

treated as an S corporation. (It should be noted that Chapter 389 of the Laws of 1997 added section 660(b)(5) of the Tax Law to enable the Commissioner of Taxation and Finance, upon a showing of reasonable cause, to recognize a late S election (or no election) as an election timely made for the taxable year. This provision applies with respect to elections for taxable years beginning after December 31, 1982. The determination of whether reasonable cause exists is not within the scope of this advisory opinion.)

The determination of whether Petitioner is more like a general partner or more like a limited partner is a factual determination that is not susceptible of determination in an Advisory Opinion. An Advisory Opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to "a specified set of facts." Tax Law, §171.24; 20 NYCRR 2376.1(a).

The New York City General Corporation Tax is not administered by the New York State Department of Taxation and Finance. Therefore, it is not within the scope of this Advisory Opinion to make any determinations with respect to such tax. Inquiries regarding the New York City General Corporation Tax should be submitted to the New York City Finance Department.

DATED: December 4, 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.