New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

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Estate Tax
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STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. M080421A

The issue raised in this Advisory Opinion is whether a non-resident decedent's interest in either a corporation that makes an election to be taxed under subchapter S Corporation of the Internal Revenue Code (IRC) or a single member limited liability company (SMLLC) owning real property in the state of New York is subject to New York State estate tax. We conclude that: (1) an interest in a S corporation owning New York real property is considered an intangible and is not included in a non-resident decedent's New York gross estate unless the S corporation is not entitled to recognition under the Moline Properties test (Moline Props. v. Commissioner of Internal Revenue, 319 U.S. 436, 438-439 [1943]); and (2) an interest in an SMLLC owning New York real property is also considered an intangible and is not included in the non-resident decedent's New York gross estate as long as the SMLLC is to be treated as a corporation under the "check-the-box" regulations (Treas. Reg. §§301.7701-1 through 301.7701-3).

Petitioner, Nilda S. Martinez-Catinchi, is domiciled in a state other than New York and is considering the purchase of a condominium in New York State. She wants to know the estate tax consequences for the estate of a non-resident decedent of forming an SMLLC or an S Corporation under Florida law and having that entity purchase the condominium instead.

Section 960(a) of the Tax Law provides, as applicable here, that a tax is imposed on the transfer, from any deceased individual who at his or her death was not a resident (domiciliary) of New York State, of real and tangible personal property having an actual situs in New York State and includible in his or her federal gross estate.[1] The measure of the tax is the maximum allowable Federal state death tax credit in effect in 1998, because the New York State estate tax is conformed to the IRC with all amendments only through July 22, 1998 (Tax Law section 951[a]). Whether an interest in an LLC or an S Corporation owning real property in New York is includible in a non-resident decedent's New York gross estate depends on whether that interest is considered to be the ownership of real property, tangible personal property or intangible personal property, for purposes of the estate tax. The analysis of this issue differs depending on whether the vehicle used to purchase the condominium is an S Corporation or an SMLLC.

By an "S Corporation [organized] under Florida law," we assume that you are referring to a corporation organized under Florida law that qualifies for and makes the election to be treated as an S corporation under IRC section 1362(a). An interest in a corporation is considered intangible personal property (Estate of Fred W. Fuhrmann, 80 Misc.2d 751 [Surrogate's Court, Nassau County 1975]; see also Tamagni v. Tax Appeals Tribunal, 91 N.Y.2d 530, 533 [1998][referring to income from stock dividends as "income from intangible personal property"]). Because stock in an S corporation is an intangible, that interest in property is not subject to the estate tax imposed on the estate of a non-resident decedent under Tax Law section 960(a).

The above conclusion assumes that the S Corporation holding the condominium is entitled to recognition for tax purposes. In making that determination, the Department would apply the Moline Properties test (Moline Props. v. Commissioner of Internal Revenue, 319 U.S. 436, 438-439 [1943] [a corporation's separate existence must be recognized for tax purposes "so long as [its] purpose is the equivalent of business activity or is followed by the carrying on of

[1] "Resident" for purposes of New York's estate tax refers to domiciliary (Estate of John Edward Mullins, 189 Misc 438 [Surrogate's Court, Kings County, 1947]).

business by the corporation."]). If the S corporation does not qualify for recognition under that standard, the value of the condominium would be included in the non-resident decedent's New York gross estate under Tax Law section 960(a).

The IRC does not define "single member limited liability company" (see 26 U.S.C. section 7701, providing definitions applicable to the entire IRC) or the tax treatment of such a company. The tax treatment of LLC's is the subject of the "check-the-box" regulations, Treas. Reg. sections 301.7701-1 through 301.7701-3 ("the CB Regulations"). Under those rules, an SMLLC can elect to be treated as an association and hence a corporation (Treas. Reg. section 301.7701-3[c]). If the SMLLC does not make that election, it is to be treated as a disregarded entity (Treas. Reg. section 301.7701-3[b][1][ii]). "[I]f the entity is disregarded, its activities are treated in the same manner as a sole proprietorship, branch, or division of the owner" (Treas. Reg. section 301.7701-2[a]). The CB regulations appear to apply to all the taxes imposed by the IRC (L & L Holding Co., L.L.C. v. U.S., Slip Copy, 2008 WL 1908840 [W.D.La.,2008]). This conclusion is supported by the titling to those regulations, which indicate that the CB Regulations apply for all "federal tax purposes" (Treas. Reg. §301.7701-1[a]), and by the fact that the regulations explicate IRC section 7701, which supplies definitions applicable to the entire Code.[2]

Accordingly, the CB Regulations apply to the Federal estate tax and, by virtue of Tax Law section 951(a), to New York's estate tax. Therefore, an interest in a SMLLC for which there is an election, applicable to the date of death, to be treated as a corporation pursuant to Treas. Reg. section 301.7701-3(c) would be recognized as an interest in a corporation for purposes of Tax Law section 960. As discussed above with regard to the S Corporation, that property would not be included in a non-resident's New York gross estate under section 960. In contrast, if there is no election, applicable to the date of death, to treat the SMLLC as if it were a corporation, the SMLLC would be disregarded for New York estate tax purposes, and the value of the condominium would be included in the non-resident decedent's New York gross estate under Tax Law section 960.

The CB Regulations permit an owner of an LLC to file an election changing the LLC's classification (Treas. Reg. section 301.7701-3[g]). Those regulations provide further that if a disregarded entity elects to be classified as an association and hence a corporation, the owner of the entity is deemed to have contributed "all of the assets and liabilities of the entity to the association in exchange for stock of the association" (Treas. Reg. section 301.7701-3[g][1][iv]). In determining what effect to give to a change of classification, the Department would consider the above rule as well as "all relevant provisions of the [IRC] and general principles of tax law, including the step transaction doctrines" (Treas. Reg. section 301.7701-3[g][2][i]).

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/S/
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[2] The rules as to when an SMLLC will be disregarded differ for employment taxes and excise taxes as a result of a 2005 amendment to the CB Regulations (see Treas. Reg. section 301.7701-2[c][2][iv], [v]).