

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M150810A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] “Petitioner”. Petitioner asks whether a membership interest in a single-member LLC (SMLLC) will be treated as “intangible property” for New York State estate tax purposes where the SMLLC initially elects to be disregarded for income tax purposes, but, immediately upon the single member’s death, retroactively elects to be treated as an association and concurrently elects to be taxed as an S Corporation.¹

We conclude that a membership interest in a SMLLC owning New York real property, which is disregarded for federal income tax purposes, should be treated as real property for New York State estate tax purposes. However, when a SMLLC makes an election to be treated as a corporation pursuant to Treasury Regulations § 301.7701-3(c), the membership interest in the entity would be treated as intangible property. We further conclude that the election that is in place at the date of death is the election that will be used to determine whether property owned by a SMLLC is treated as real property or intangible property for purposes of NYS estate taxes, without regard to any post mortem retroactive election to be treated as an association or an S-Corporation for income tax purposes.

Facts

Petitioner is an individual currently residing in New York State who plans to purchase a condominium in New York State and make that property his residence. At some point, Petitioner plans to retire and move to another state within the United States. At that time, he plans to transfer the condominium into a SMLLC, of which he will be the sole member. This SMLLC will not elect to be treated as an association for federal income tax purposes. As such, it would not be treated as a corporation pursuant to Treasury Regulations § 301.7701-3(c), but will be treated as a disregarded entity and taxed as an individual owner of the property.

Petitioner intends to remain as the sole owner of that LLC for the remainder of his life and to continue to have the SMLLC treated as a disregarded entity until his death. Upon his death, he states that his Will directs his executor to elect that the SMLLC be taxed as an association and to further elect that the association be taxed as an S-Corporation. These elections are to be made retroactive to at least one day prior to the date of Petitioner’s death.

Analysis

An estate tax is imposed on the transfer by the estate of a non-resident decedent of real property and tangible personal property where such property is physically located in New York

¹ Petitioner submitted a similar petition for an Advisory Opinion in 2014. In response, the Department issued TBA-A-15(1) M, dated May 29, 2015.

State. *N.Y. Tax Law § 960 (a)*. Condominiums constitute real property and as such generally are subject to New York State estate tax. *Real Property Law § 339-g*. However, where real property, including a condominium, is held by a corporation, partnership or trust, interest in such entity has been held to constitute intangible property. *See Estate of Havemeyer* 17 N.Y.2d 216, (1966) and *In the Matter of Finkelstein*, 40 Misc.2d 910, (Surr. Ct. Rockland County 1963). Similarly, Tax Law § 951-a(c) defines "tangible personal property" to exclude the following items: bank deposits, mortgages, debts receivables, shares of stock, bonds, notes, credits, evidences of an interest in property, evidences of debt, or legal claims generally, and, as such, those items are deemed intangible property.

The New York State Constitution prohibits the imposition of an estate tax on a nonresident's intangible property, even if such property is located in New York State. (*N.Y. Const. Art. 16*). Moneys, credits, securities and other intangible personal property within the state, that are not used in carrying on any business within the state by the owner, are considered to be located at the domicile of the owner for purposes of taxation. *N.Y. Const. Art. 16 § 3*. NY Tax Law § 960 likewise indicates that a NY taxable estate does not include the value of any intangible personal property otherwise includible in the deceased individual's NY gross estate.

Pursuant to 26 CFR §§ 301.7701-2, an entity that has a single owner is recognized as an entity or can be disregarded. "A business entity with only one owner is classified as a corporation or is disregarded; if the entity is disregarded, its activities are treated in the same manner as a sole proprietorship, branch, or division of the owner." 26 C.F.R. § 301.7701-2(a). As such, pursuant to 26 C.F.R. § 301.7701-3(a), an entity with a single owner, such as a SMLLC, is disregarded as an entity separate from its owner unless it elects to be classified as an association. A qualifying SMLLC can elect to be classified as an association and thus treated as a corporation by making an entity classification election with the IRS. 26 C.F.R. § 301.7701-3(c)(1)(i).

Where no election is filed, the default classification of the SMLLC is that the entity is disregarded and is not deemed to be an entity separate from its owner. 26 C.F.R. § 301.7701-3(b)(ii); *6611, Ltd. v. C.I.R., 2013, 2013 WL 560866*. "An entity whose classification is determined under the default classification retains that classification (regardless of any changes in the members' liability that occurs at any time during the time that the entity's classification is relevant)... until the entity makes an election to change that classification." 26 C.F.R. § 301.7701-3(a). "A membership interest in a SMLLC owning New York real property, which is disregarded for income tax purposes, is not treated as 'intangible property' for purposes of New York State estate tax purposes. However, where a SMLLC makes an election to be treated as a corporation pursuant to Treasury Regulations § 301.7701-3(c), rather than being treated as a disregarded entity, such ownership interest would be considered intangible property for New York State estate tax purposes." *TSB-A-15(1)M*

There is no provision in New York State law applicable to the estate tax that provides for retroactively changing an election to be treated as an S-Corporation post mortem. Consequently, any post mortem, retroactive election would be disregarded and not treated as a valid election for NYS Estate tax purposes.²

² Our opinion is limited to issues of NYS law. We cannot comment on the validity of a post-mortem, retroactive, election change for Federal or New York State income tax purposes.

Based on the above analysis, where a SMLLC is disregarded for Federal income tax purposes, it is treated as owned by the individual owner and the activities of the SMLLC are treated as activities of the owner without regard to any post mortem election directed by the Last Will and Testament of the single member. Therefore, under the circumstances described by the Petitioner, interest in the SMLLC owned by Petitioner would not be treated, for estate tax purposes, as an intangible asset. Instead, the condominium held by the SMLLC would be treated as real property held by the Petitioner for New York State estate tax purposes.

DATED: August 26, 2016

_____/S/_____
DEBORAH R. LIEBMAN
Deputy Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.