New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-05(12)C
Corporation Tax
TSB-A-05(6)I
Income Tax
September 27, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. Z040916A

On September 16, 2004, a Petition for Advisory Opinion was received from Conway Member Corporation, 1818 Australian Avenue South, Ste. 450, West Palm Beach, Florida 33409.

The issues raised by Petitioner, Conway Member Corporation, are:

(1) Whether it becomes subject to franchise tax under Article 9-A of the Tax Law when it acquires the rights to receive future New York lottery prize annuity payments from the original winners.

(2) Whether it is entitled to a credit for New York income tax withheld from lottery prize annuity payments made to related partnerships in the amount of $1,447 for taxable year 2003.

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

Petitioner maintains its sole place of business in West Palm Beach, Florida, from which all the accounting, administration and management of Petitioner's investments are conducted. All of Petitioner's business, investment and management decisions take place in Florida. Petitioner does not have any employees or officers within New York, does not have an office in New York, and does not own or lease any real or tangible personal property within New York. Petitioner does not have a telephone listing, building directory listing or any other form of address within New York. Petitioner does not conduct any business activities in New York. Petitioner's sole contact with New York State consists of the annual receipt of less than 20 installment payments of the New York lottery annuity payment streams as described below.

The nature of Petitioner's business is that of an independent broker. Petitioner creates trusts and LLCs which receive from individual lottery winners the right to receive future lottery prize annuity payment streams in exchange for a lump sum payment equal to the present value of those future payments. Petitioner subsequently resells the rights to receive the future lottery prize annuity payments to an institutional investor for an amount equal to the present value of the lottery prize annuity payments at a rate that will provide Petitioner with a profit. The assignments from the lottery winners are made pursuant to *appropriate judicial orders* and with the knowledge of the awarding lottery agency. The awarding lottery agency will change its

records to reflect the new owner's tax identification number, for the purpose of proper crediting of income tax withholdings and mailing payments.

Petitioner currently owns, directly and indirectly, the lottery payment annuity streams it acquired through the trusts and LLCs it created (collectively referred to as the Titling Entities.) The Titling Entities became the owners of the annuity payment streams through the acquisition of the rights to those payment streams from the original winners on various dates. The purchases of the rights to receive future New York lottery prize annuity payments were completed pursuant to court orders issued on various dates as required under the Tax Law and acknowledged in writing by the New York State Division of the Lottery (Lottery Division).

Petitioner has a 99.99% ownership interest in Conway Acceptance LLC (Conway Acceptance), a two member LLC. The other .01% ownership interest is held by a related entity. Conway Acceptance has a 99.99% ownership interest in each of the Titling Entities and the other .01 % ownership interest is held by Petitioner. The Titling Entities are:

Singer Collateral Trust IV (SCT4);
Singer Collateral Trust V (SCT5);
Lottery Receivables Company One LLC (LRC1);
LR Company II, LLC (LRC2); and
LR Company III, LLC (LRC3).

The Titling Entities are New York common law trusts and LLCs, and qualify as *business entities* pursuant to Treasury Regulation section 301.7701-3 and 4. Conway Acceptance, LRC1, LRC2, LRC3, SCT4, and SCT5 have all elected to be taxed as partnerships for federal income tax purposes.

Petitioner states that Conway Acceptance is a holding company and neither Conway Acceptance nor the Titling Entities have an office within New York. Conway Acceptance and the Titling Entities do not have any employees or officers within New York, and they do not own or lease any real or tangible personal property within New York. Conway Acceptance and the Titling Entities do not have a telephone listing, building directory listing or any other form of address within New York. Conway Acceptance and the Titling Entities do not conduct any business activities in New York.

Petitioner, Conway Acceptance and the Titling Entities did not purchase any of the original winning lottery tickets, either directly or indirectly, and did not redeem the winning ticket or claim the lottery prize. Petitioner, Conway Acceptance and the Titling Entities did not solicit or execute any purchases of lottery prize annuities within New York. Petitioner, Conway Acceptance and the Titling Entities solicit the purchase of lottery prize annuities by telephone or correspondence from Petitioner's offices in West Palm Beach, Florida.

When an original lottery prize annuitant decides to sell his or her future lottery prize annuity payments, typically he or she retains counsel. This is a fairly standard requirement by the states for an assignment to be valid. Petitioner will send a purchase agreement, a fairly standardized document, to the annuitant and his or her counsel. Counsel typically reviews the documents and, if satisfied with the terms and purchase price, the annuitant signs them and sends them back to the purchaser for final review and approval. With respect to Petitioner's acquisition of the rights to receive the future New York lottery prize annuity payments at issue, these documents were sent back to the West Palm Beach, Florida office of Petitioner for final review and approval.

Petitioner and the Titling Entities may purchase the right to receive future New York lottery prize annuity payments from third party brokers, as well as from individual lottery winners. Petitioner does not do business with any brokers within New York State. The third party brokers most often dealt with by Petitioner are located in Illinois and Maryland. Subsequent assignment by the broker to Petitioner, Conway Acceptance or the Titling Entities, is executed either at the broker's office or at Petitioner's offices in West Palm Beach, Florida. However, these assignments are also typically conducted via correspondence.

The Lottery Division has withheld New York personal income tax from the lottery prize annuity payments paid to LRC1, the Titling Entity which has the right to receive certain New York lottery prize annuity payments, and remitted such income tax withholding to the New York State Department of Taxation and Finance (Department) in the name of the Titling Entity, using its federal employer identification number to identify it. The Lottery Division prepared and submitted form W-2G's to the Internal Revenue Service and the Department, reporting the payment of the lottery prize annuity and related income tax withholdings on behalf of LRC1.

Applicable law and regulations

Section 209.1 of the Tax Law imposes an annual franchise tax as follows:

> For 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 [capital base, minimum taxable income bases or the fixed dollar minimum] as may be applicable as hereinafter provided, for such fiscal or calendar year or part thereof....

Section 1-3.2 of the Business Corporation Franchise Tax Regulations ("Article 9-A Regulations") provides, in part:

> (a)(5) If a partnership is doing business, employing capital, owning or leasing property or maintaining an office in New York State, then all of its corporate general partners are subject to the tax imposed by article 9-A of the Tax Law.
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> (b) *Foreign corporation – doing business.* (1) The term doing business is used in a comprehensive sense and includes all activities which occupy the time or labor of people for profit. Regardless of the nature of its activities, every corporation organized for profit and carrying out any of the purposes of its organization is deemed to be doing business for the purposes of the tax. In determining whether a corporation is doing business, it is immaterial whether its activities actually result in a profit or a loss.
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> (2) Whether a corporation is doing business in New York State is determined by the facts in each case. Consideration is given to such factors as:
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> (i) the nature, continuity, frequency, and regularity of the activities of the corporation in New York State;
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> (ii) the purposes for which the corporation was organized;
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> (iii) the location of its offices and other places of business;
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> (iv) the employment in New York State of agents, officers and employees; and
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> (v) the location of the actual seat of management or control of the corporation.
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> (c) *Foreign corporation – employing capital.* The term employing capital is used in a comprehensive sense. Any of a large variety of uses, which may overlap other activities, may give rise to taxable status. In general, the use of assets in maintaining or aiding the corporate enterprise or activity in New York State will make the corporation subject to tax. Employing capital includes such activities as:
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> (1) maintaining stockpiles of raw materials or inventories; or
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> (2) owning materials and equipment assembled for construction.

(d) *Foreign corporation – owning or leasing property.* The owning or leasing of real or personal property within New York State constitutes an activity which subjects a foreign corporation to tax. Property owned by or held for the taxpayer in New York State, whether or not used in the taxpayer's business, is sufficient to make the corporation subject to tax. Property held, stored or warehoused in New York State creates taxable status. Property held as a nominee for the benefit of others creates taxable status. Also, consigning property to New York State may create taxable status if the consignor retains title to the consigned property.

(e) *Foreign corporation – maintaining an office.* A foreign corporation which maintains an office in New York State is engaged in an activity which makes it subject to tax. An office is any area, enclosure or facility which is used in the regular course of the corporate business. A salesperson's home, a hotel room, or a trailer used on a construction job site may constitute an office.

Section 3-13.2 of the Article 9-A Regulations provides:

Each partnership item of income, capital, gain, loss or deduction has the same source and character in the hands of a partner for article 9-A purposes as it has in its hands for Federal income tax purposes. Where an item is not characterized for Federal income tax purposes or is not required to be taken into account for Federal income tax purposes, the source and character of the item shall be determined as if such item were realized by the partner directly from the source from which realized by the partnership, or incurred by the partner in the same manner as incurred by the partnership.

Section 3-13.3 of the Article 9-A Regulations provides:

Where a partner is a member in a partnership, and such partnership (hereinafter referred to as the "upper tier partnership") is a partner in another partnership (hereinafter referred to as the "lower tier partnership"), the source and character of such member's distributive share of each partnership item of income, capital, gain, loss or deduction of the upper tier partnership which is attributable to the lower tier partnership retains the source and character determined at the level of the lower tier partnership using the provisions of section 3-13.2 of this Subpart. Such source and character are not changed by reason of the fact that such item flows through the upper tier partnership to such member.

Section 601(f) of the Tax Law provides:

Partners and partnerships. A partnership as such shall not be subject to tax under this article. Persons carrying on business as partners shall be liable for tax under this

article only in their separate or individual capacities. As used in this article, the term "partnership" shall include, unless a different meaning is clearly required, a subchapter K limited liability company. The term "subchapter K limited liability company" shall mean a limited liability company classified as a partnership for federal income tax purposes. 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, a limited liability investment company formed pursuant to section five hundred seven of the banking law, or a limited liability trust company formed pursuant to section one hundred two-a of the banking law.

Section 617(b) of the Tax Law provides, in part:

> Character of items. Each item of partnership . . . income, gain, loss, or deduction shall have the same character for a partner . . . under this article as for federal income tax purposes. Where an item is not characterized for federal income tax purposes, it shall have the same character for a partner . . . as if realized directly from the source from which realized by the partnership . . . or incurred in the same manner as incurred by the partnership. . . .

Section 631(b) of the Tax Law provides, in part:

> (1) Items of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to:
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> (D) winnings from a wager placed in a lottery conducted by the division of the lottery, if the proceeds from such wager exceed five thousand dollars;
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> (2) Income from intangible personal property, including annuities, dividends, interest, and gains from the disposition of intangible personal property, shall constitute income derived from New York sources only to the extent that such income is from property employed in a business, trade, profession, or occupation carried on in this state or from winnings from a wager placed in a lottery conducted by the division of the lottery, if the proceeds from such wager exceed five thousand dollars..

Section 651 of the Tax Law provides rules for personal income tax returns and liabilities, and provides, in part:

(a) General. On or before the fifteenth day of the fourth month following the close of the taxable year, an income tax return under this article shall be made and filed by or for:

(1) every resident individual.;.

(2) every resident estate or trust.;.

(3) every nonresident or part-year resident.;and

(4) every nonresident estate or trust or part-year resident trust having New York source income..

* * *

(i) Cross reference. For provisions as to information returns by partnerships, employers and other persons, see section six hundred fifty-eight.

Section 658 of the Tax Law contains requirements concerning returns, notices, records and statements, and provides, in part:

(a) General. The [Commissioner of Taxation and Finance] may prescribe regulations as to the keeping of records, the content and form of returns and statements, and the filing of copies of federal income tax returns and determinations. The [Commissioner of Taxation and Finance] may require any person, by regulation or notice served upon such person, to make such returns, render such statements, or keep such records, as the [Commissioner] may deem sufficient to show whether or not such person is liable under this article for tax or for collection of tax..

* * *

(c) Partnerships, limited liability companies and S corporations. (1) Partnerships. Every partnership having a resident partner or having any income derived from New York sources, determined in accordance with the applicable rules of section six hundred thirty-one as in the case of a nonresident individual, shall make a return for the taxable year setting forth all items of income, gain, loss and deduction and such other pertinent information as the commissioner may by regulations and instructions prescribe..

* * *

(3) [Eff. until Jan. 1, 2005, pursuant to L. 2003, c. 62, pt.J3, § 2.] Filing fees.

Every subchapter K limited liability company, every single member limited liability company which is a disregarded entity for federal income tax purposes and every limited liability partnership under article eight-B of the partnership law and every foreign limited liability partnership, which has any income derived from New York sources, determined in accordance with the applicable rules of section six hundred thirty-one as in the case of a nonresident individual, shall, within thirty days after the last day of the taxable year, make a payment of a filing fee. The amount of the filing fee shall be the product of (a) one hundred dollars and (b) the number of members of such company or number of partners of such partnership, as the case may be, as of the last day of the taxable year, but in no event shall such fee be less than five hundred dollars nor more than twenty-five thousand dollars. . .Where such fee is not timely paid, it shall be paid upon notice and demand and shall be assessed, collected and paid in the same manner as taxes, and for such purposes any reference in this article to tax imposed by this article shall be deemed also to refer to the fee prescribed herein.

Section 671 of the Tax Law contains the requirements for withholding personal income tax from wages, and provides, in part:

(a) General. (1) Every employer maintaining an office or transacting business within this state and making payment of any wages taxable under this article shall deduct and withhold from such wages for each payroll period a tax computed in such manner as to result, so far as practicable, in withholding from the employee's wages during each calendar year an amount substantially equivalent to the tax reasonably estimated to be due under this article resulting from the inclusion in the employee's New York adjusted gross income or New York source income of his wages received during such calendar year...

* * *

(b) Extension of withholding to certain periodic payments and gambling winnings.

(1) For purposes of this article, any payment subject to withholding, within the meaning of paragraph two of this subsection, shall be treated as if it were wages paid by an employer to an employee.

(2) Payments subject to withholding. For purposes of paragraph one of this subsection, a payment subject to withholding means:

* * *

(D) Any payment of winnings from a wager placed in a lottery conducted by the

division of the lottery, if the proceeds from such wager exceed five thousand dollars.

Section 673 of the Tax Law provides, in part:

> Wages upon which tax is required to be withheld shall be taxable under this article as if no withholding were required, but any amount of tax actually deducted and withheld under this article in any calendar year shall be deemed to have been paid to the [Commissioner of Taxation and Finance] on behalf of the person from whom withheld, and such person shall be credited with having paid that amount of tax for the taxable year beginning in such calendar year…

Section 137.6 of the Personal Income Tax Regulations provides:

> Where a nonresident partner is a member in a partnership, and such partnership (hereinafter referred to as the "upper tier partnership") is a partner in another partnership (hereinafter referred to as the "lower tier partnership"), the source and character of such nonresident partner's distributive share of each partnership item of the upper tier partnership which is attributable to the lower tier partnership retains the source and character determined at the level of the lower tier partnership . . . Such source and character are not changed by reason of the fact that such item flows through the upper tier partnership to such nonresident partner.

Section 1086 of the Tax Law, provides, in part:

> (a) General. – The commissioner of taxation and finance, within the applicable period of limitations, may credit an overpayment of tax and interest on such overpayment against any liability in respect of any tax imposed by the tax law on the taxpayer who made the overpayment, or against any liability for a past-due legally enforceable debt of which he is notified pursuant to section seventy-one-f of this chapter, or against any city of New York tax warrant judgment debt of which he is notified pursuant to section one hundred seventy-one-l of this chapter, and the balance shall be refunded by the comptroller…
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> (c) Rule where no tax liability.–If there is no tax liability for a period in respect of which an amount is paid as tax, such amount shall be considered an overpayment.

Section 1613(a) of Article 34 of the Tax Law, with respect to the New York State Lottery, provides, in part:

> Payment of prizes shall be made by the division [of the Lottery] to holders of the tickets to which prizes are awarded, except that payment of any prize drawn may be paid to the estate of a deceased prize winner, and except that any person pursuant to an appropriate judicial order may be paid the prize to which the winner is entitled. The division [of the Lottery] shall be discharged of all further liability upon payment of a prize pursuant to this subdivision.

Opinion

Issue 1

The classification of an LLC as a partnership for federal income tax purposes will be followed pursuant to section 601(f) of the Tax Law for purposes of Article 22 of the Tax Law and will also be followed for purposes of Article 9-A of the Tax Law. (See *McDermott, Will & Emery*, Adv Op Comm T&F, July 24, 1996, TSB-A-96(19)C; *FGIC CMRC Corp*, Adv Op Comm T&F, April 1, 1996, TSB-A-96(11)C; and Technical Services Bureau Memorandum, October 25, 1994, TSB-M-94(6)I, (8)C and Treasury Regulation section 301.7701-3.)

Based on the facts presented, it appears that Petitioner, itself, does not do business, employ capital, own or lease property or maintain an office in New York as contemplated under section 209.1 of the Tax Law. However, Petitioner is a 99.99% member of Conway Acceptance, an LLC that is treated as a partnership for federal income tax purposes and New York tax purposes under Articles 9-A and 22 of the Tax Law. Also, Petitioner is a .01% member of the Titling Entities (Conway Acceptance is the other member with a 99.99% ownership interest in the Titling Entities). At least one of the Titling Entities, LRC1, receives annuity payments attributable to lottery prize winnings from a lottery conducted by the Lottery Division. LRC1 is an LLC that is treated as a partnership for federal income tax purposes and New York tax purposes under Articles 9-A and 22 of the Tax Law. Accordingly, pursuant to section 209.1 of the Tax Law and section 1-3.2(a)(5) of the Article 9-A Regulations, Petitioner will be subject to tax under Article 9-A if Conway Acceptance or LRC1 (or any of the other Titling Entities) is doing business, employing capital, owning or leasing property or maintaining an office in New York State, as described in section 1-3.2(b) of the Article 9-A Regulations.

Petitioner states that Conway Acceptance is a holding company and that the Titling Entities, including LRC1, were established for the purpose of legally securing and holding the rights to receive lottery prize annuity payment streams. LRC1 has acquired the right to receive future New York lottery prize annuity payment streams in exchange for a lump sum payment equal to the present value of those future payments. This assignment of income to LRC1 was made pursuant to appropriate judicial orders and section 1613(a) of the Tax Law, and LRC1 has the right to receive the New York lottery prize annuity payments. However, Petitioner states that LRC1's activities related to the solicitation and execution of any purchases of the New York

lottery prize annuity payments are conducted outside of New York. Therefore, this activity of LRC1 does not constitute *doing business* in New York. Petitioner also states that Conway Acceptance and LRC1, as well as other Titling Entities, do not otherwise do business, employ capital, own or lease property or maintain an office in New York. Therefore, where LRC1, a lower tier partnership, and the other Titling Entities are not doing business in New York, and Conway Acceptance, the upper tier partnership, is not doing business in New York, Petitioner through its ownership interest in those entities is not doing business in New York pursuant to sections 1-3.2(a)(5) and 3-13.3 of the Article 9-A Regulations. Under these circumstances, Petitioner is not subject to franchise tax pursuant to section 209.1 of the Tax Law.

Issue 2

Section 671(a)(1) of the Tax Law provides that every employer maintaining an office or transacting business in New York who makes payments of wages taxable under Article 22 of the Tax Law, shall deduct and withhold from such wages an amount substantially equivalent to the tax reasonably estimated to be due under Article 22 of the Tax Law resulting from the inclusion of such wages in the employee's New York adjusted gross income or New York source income for the calendar year. Section 671(b) of the Tax Law extends the withholding provisions of section 671(a)(1) of the Tax Law to gambling winnings from a wager placed in a lottery conducted by the Lottery Division if the proceeds from such wager exceed $5,000. Section 671(b) provides that such winnings shall be treated as if they were wages paid by an employer to an employee.

Pursuant to section 671(b) of the Tax Law, the Lottery Division is required to withhold tax from the lottery prize annuity payments made to LRC1. Since LRC1 is an LLC that is treated as a partnership, pursuant to section 601(f) of the Tax Law, LRC1 is not subject to the income tax imposed under Article 22 of the Tax Law. However, under section 3-13.3 of the Article 9-A Regulations the source and character of the payments made to LRC1 pass through to Petitioner and Petitioner is deemed to have received such payments to the extent of Petitioner's distributive share of such income.

Pursuant to section 673 of the Tax Law, any amount of tax actually deducted and withheld under Article 22 of the Tax Law from payments made to LRC1 by the Lottery Division in calendar year 2003 shall be deemed to have been paid to the Commissioner of Taxation and Finance on behalf of LRC1, and LRC1 shall be credited with having paid that amount of tax for calendar year 2003. However, under section 671(b) of the Tax Law, which extended the withholding provisions to certain gambling winnings, the amount of tax deducted and withheld from payments made to LRC1 by the Division in calendar year 2003 passed through to Petitioner and Petitioner is deemed to be credited with having paid the amount of tax for calendar year 2003 to the same extent that Petitioner had distributive share income consisting of the annuity payment from which the tax was withheld. Accordingly, Petitioner is entitled to a credit for the

tax withheld from New York lottery prize annuity payments made to LRC1 by the Lottery Division.

Pursuant to section 1086(c) of the Tax Law, if there is no tax liability under Article 9-A of the Tax Law for a period in respect of which an amount is paid as tax, such amount shall be considered an overpayment. As determined in Issue 1, Petitioner was not subject to franchise tax under Article 9-A of the Tax Law for taxable year 2003. Therefore, since Petitioner is credited for its distributive share of the tax withheld from the New York lottery prize annuity payments made to LRC1 during taxable year 2003 by the Lottery Division, Petitioner has made an overpayment of tax under Article 9-A.

Pursuant to section 1086(a) of the Tax Law, the Commissioner of Taxation and Finance, within the applicable period of limitations, may credit an overpayment of tax and interest on such overpayment against any liability in respect of any tax imposed by the Tax Law on the taxpayer who made the overpayment, or against any liability for a past-due legally enforceable debt or any city of New York tax warrant judgment debt of which it is notified pursuant to section 171-1 of the Tax Law, and the balance shall be refunded. Since Petitioner is not subject to the tax imposed by Article 9-A, it does not owe any tax under Article 9-A, including the fixed dollar minimum tax set forth in section 210.1(d) of the Tax Law. Accordingly, Petitioner is entitled to a refund for taxable year 2003 of its overpayment of tax under Article 9-A.

It should be noted that pursuant to section 658(c)(1) of the Tax Law, every partnership having any income derived from New York sources, as determined in accordance with the applicable rules of section 631 of the Tax Law, shall make a return for the taxable year setting forth all items of income, gain, loss and deduction and such other pertinent information as the Commissioner of Taxation and Finance may prescribe. Section 658(c)(3) of the Tax Law provides for an annual filing fee to be imposed on an LLC that is treated as a partnership for federal income tax purposes that had any income derived from New York sources. Section 631(b)(1)(D) of the Tax Law provides that items of income, gain, loss or deduction from New York sources include winnings from a wager placed in a lottery conducted by the Lottery Division, if the proceeds from such wager exceed $5,000.

In this case, LRC1 received lottery prize annuity payments during 2003 that consisted of winnings from one or more wagers placed in a lottery conducted by the Lottery Division. Under these circumstances, assuming the proceeds from any of the wagers exceeded $5,000, LRC1 had income derived from New York sources in 2003. Accordingly, pursuant to section 658(c)(1) of the Tax Law, LRC1, which is an LLC treated as a partnership, must file a return (Form IT-204 *Partnership Return*) for taxable year 2003, and set forth the information required. In addition, pursuant to section 658(c)(3), LRC1 is subject to an annual filing fee for taxable year 2003 (to be remitted with Form IT-204-LL *Limited Liability Company / Limited Liability Partnership Filing Fee Payment Form*). Where such fee is not timely paid, it shall be assessed, collected and paid

in the same manner as taxes, and any reference in Article 22 of the Tax Law to tax imposed by such Article shall be deemed also to refer to the filing fee imposed under section 658(c)(3). Conway Acceptance must also file a partnership return and pay the annual filing fee for taxable year 2003, since New York source income of LRC1 flowed through to Conway Acceptance. See section 3-13.3 of the Article 9-A Regulations and section 137.6 of the Personal Income Tax Regulations.

DATED: September 27, 2005

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

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