New York State Department of Taxation and Finance
Office of Counsel
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Corporation Tax
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STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C100226A

The petition asks whether [redacted] (Petitioner) could make the separate accounting election under 20 NYCRR former §3-13.1 for its 2005 taxable year with respect to its indirect interest in a limited liability company that is treated as a partnership and is doing business in New York State.[1]

We conclude that, because Petitioner is not subject to tax solely as a result of the application of limited partnership provisions at 20 NYCRR § 1-3.2(a)(6), it could not make the separate accounting election available to a foreign corporate limited partner under 20 NYCRR former §3-13.1.

Facts

Petitioner is a corporation that currently owns an 85.5% general partner interest in [redacted] (LTD). LTD holds a 6% member interest in [redacted]. (Channel LLC). Channel LLC is an operating entity with headquarters in New York that operates the [redacted] cable television station. Channel LLC is a New York limited liability company treated as a partnership for federal income tax and New York tax purposes.

Petitioner describes its business activities as limited to the holding of an interest in LTD. LTD's business activities consist of holding a membership interest in Channel LLC and managing and receiving trademark revenues. LTD licenses the use of the [redacted] trademark from a related entity and sub-licenses the use of the trademark to Channel LLC. LTD manages its investment in Channel LLC, collects trademark revenues, pays business expenses, and maintains books and records, all from its Utah location. LTD does not have an office or property, or directly employ anyone, within New York.

In 2005, LTD sold a 14% interest in Channel LLC to an unrelated third party. The gain related to this sale was passed through to the LTD partners, including Petitioner. In 2005, Petitioner made the foreign corporate limited partner election under 20 NYCRR former §3-13.1 and treated the gain related to this sale as non-New York allocable income under that regulation. All other income, capital gain, loss, or deduction passed through to Petitioner by Channel LLC (by way of LTD) was reported on Petitioner's 2005 New York Form CT-3-S.

[1] 20 NYCRR former § 3-13.1(a) was amended and renumbered to § 3-13-5(a)(1) on November 1, 2006. The amended and renumbered regulation was made applicable to taxable years beginning on or after January 1, 2007.

Analysis

The Department's regulation in effect in 2005 that allowed a foreign corporate limited partner to elect to separately account for the limited partnership interest in computing its tax liability stated as follows:

> (a) A foreign corporation which is a limited partner in one or more limited partnerships, which is subject to tax under article 9-A of the Tax Law *solely as a result of the application of section 1-3.2(a)(6) of this Title* and which does not file on a combined basis for Article 9-A purposes, may elect to compute its tax by taking into account only its distributive share of the income, capital, gain, loss or deduction of each such limited partnership which is doing business, employing capital, owning or leasing property or maintaining an office in New York State, whether or not such share is actually distributed . . . (emphasis added) 20 NYCRR former §3-13.1(a)

Therefore, for a corporate partner to make the foreign corporate limited partner election under 20 NYCRR former §3-13.1, it must have been a limited partner in the partnership that was doing business, employing capital, owning or leasing property, or maintain an office in New York, and it must have been subject to tax solely as a result of the application of 20 NYCRR § 1-3.2(a)(6).

According to the petition, in 2005 LTD owned an interest in Channel LLC, a limited liability company doing business in New York that was treated as a partnership. Petitioner, as a general partner in LTD, had an indirect interest in Channel LLC. For the foreign corporate limited partner election, 20 NYCRR former §3-13.1 required not only that the foreign corporation be a "limited partner in one or more limited partnerships," but also that the foreign corporation be subject to tax solely as a result of its ownership interest in a limited partnership pursuant to 20 NYCRR §1-3.2(a)(6). This latter regulation has been applied to ownership interests in limited liability companies treated as partnerships. Thus, if the entity that is doing business, employing capital, owning or leasing property, or maintaining an office in New York State is a limited liability company treated as a partnership for tax purposes, then the interest of the foreign corporation in that company must be analyzed to determine if it is more like a limited partnership or a general partnership interest. *See Stone Commodities Corp.*, Adv Opn Comm T & F, December 4, 1997, TSB-A-97(26)C.

Petitioner maintains that the application of the aggregate theory of partnerships under 20 NYCRR §1-3.2(a)(6) establishes New York nexus for it due to its indirect partnership interest in Channel LLC. According to Petitioner, the aggregate theory of partnerships should apply to elections under 20 NYCRR former §3-13.1 as well. The aggregate theory is described in the Department's current regulation at 20 NYCRR §3-13.1(b), which states that a partner is viewed as having an undivided interest in the partnership's assets, liabilities and items of receipts, income, gain, loss and deduction, and is treated as participating in the partnership's transactions and activities.

Contrary to Petitioner's claim, the application of the aggregate theory demonstrates that Petitioner does not qualify to make the separate accounting election in 20 NYCRR former §3-13.1. The regulation requires the foreign corporate limited partner to be subject to tax under Article 9-A "solely as a result of the application of" 20 NYCRR §1-3.2(a)(6). Petitioner does not satisfy this condition. Under the aggregate theory of partnerships, LTD owned its proportionate share of Channel LLC's assets and was involved in the activities of that company in 2005. Thus, LTD was considered to be doing business, employing capital, owning or leasing property, or maintaining an office in New York based on the attributes of Channel LLC. Under those circumstances, Petitioner would be subject to tax under 20 NYCRR §1-3.2(a)(5) as a general partner of a partnership, that is, LTD, which satisfied one or more of the Article 9-A jurisdictional requirements for taxation.

Accordingly, while Petitioner had an indirect ownership interest in Channel LLC, Petitioner was not subject to tax in New York in 2005 "solely as a result" of the limited partnership provision of 20 NYCRR §1.3.2(a)(6). Therefore, Petitioner was not eligible to make the election under 20 NYCRR former § 3-13.1 to separately account for the items that flowed through to it from LTD and were attributable to LTD's interest in Channel LLC.

DATED: February 22, 2011

/S/
DANIEL SMIRLOCK
Deputy Commissioner & Counsel

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