

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

TSB-A-91(23)C
Corporation Tax
November 8, 1991

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C910820A

On August 19, 1991, a Petition for Advisory Opinion was received from Chesin and Company, 100 Merrick Road, Suite 404E, Rockville Center, New York 11570.

The issue raised by Petitioner, Chesin and Company, is whether an unincorporated residential condominium is subject to tax under Article 9-A of the Tax Law for taxable years beginning before January 1, 1989.

An unincorporated nonstock condominium organized under Article 9-B of the New York State Real Property Law is operated exclusively for nonprofit purposes and derives no revenue from third party payors. The condominium's sources of revenues are from assessments for common charges, interest income on reserve funds, common laundry and garage receipts as specifically used by unit homeowners. The condominium development is completely residential and there is no space available for commercial purposes. The condominium is headed by unit homeowners. Income is used to pay for the maintenance of common areas, fuel used to heat individual units of homeowners and insurance on common areas. Any excess income is held in reserve for future improvements.

Section 209.1 of the Tax Law, as amended by Chapter 817 of the Laws of 1987, imposes a franchise tax on business corporations, 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 as may be applicable as hereinafter provided

Prior to the amendment contained in Chapter 61 of the Laws of 1989, the meaning of the term "corporation" as set forth in section 208.1 of the Tax Law, provided that, "[t]he term 'corporation' includes a joint-stock company or association and any business conducted by a trustee or trustees wherein interest or ownership is evidenced by certificate or other written instrument..."

The term "corporation" is elucidated in section 1-2.3 of the Business Corporation Franchise Tax Regulations, which provides, in part, that:

- (a) The term 'corporation' means an entity created as such under the laws of the United States, any state, territory or possession thereof, the District of Columbia, or any foreign country, or any political subdivision of any of the foregoing,

which provides a medium for the conducting of business and the sharing of its gains.

. . .

(b) The term 'corporation' includes a joint stock company or association and any business conducted by trustee or trustees wherein interest or ownership is evidenced by certificate or other written instrument. An entity conducted as a corporation is deemed to be a corporation.. 20 NYCRR § 1-2.3

Section 339-o of Article 9-B of the Real Property Law states that the deeds and leases of units must include "[t]ithe common interest appertaining to the unit..." 49 NYCRR § 339-o. Section 339-e(5) of such law defines "common interest" as "the (i) proportionate, undivided interest in fee simple absolute, or (ii) proportionate undivided leasehold interest in the common elements appertaining to each unit, as expressed in the declaration" 49 NYCRR § 339-e(5). Thus, each homeowners's interest is evidenced by a written instrument.

Section 339-m of such law states, in part, that "[t]he common profits of the property shall be distributed among, and the common expenses shall be charged to, the unit owners according to their respective common interests. . . Notwithstanding any provision of this article, profits and expenses may be specially allocated and apportioned by the board of managers in a manner different from common profits and expenses. . ." 49 NYCRR § 339-m. Section 339-e(6) of such law defines "common profits" as "the excess of all receipts of the rents, profits and revenues from the common elements remaining after the deduction of the common expenses." 49 NYCRR § 339-e(6).

In Garen & Company, Adv Op St Tax Comm, March 12, 1986, TSB-A-86(6)C, it was held that where a condominium association, organized under Article 9-B of the Real Property Law, generated income from rentals of a garage, parking spaces, laundry areas and commercial space owned by the condominium association, such association had demonstrated that it provided a medium for the conducting of business and the sharing of its gains. Therefore, such condominium association presented itself as a corporation to conduct business and was subject to tax under Article 9-A of the Tax Law.

In Astor Terrace Condominium, Adv Op Comm T & F, March 1, 1990, TSB-A-90(7)C, it was held that where a condominium association organized pursuant to Article 9-B of the Real Property Law, may lease portions of the common elements and does receive income from a laundry room concession and storage charges. Thus, Petitioner has demonstrated that it provides a medium for the conducting of business and the sharing of its gains. Therefore, such condominium association presented itself as a corporation to conduct business and was subject to tax under Article 9-A of the Tax Law.

Herein, the unincorporated condominium organized pursuant to Article 9-B of the Real Property Law receives income from common laundry charges and garage receipts. As in Garen & Company, *supra*, and Astor Terrace Condominium, *supra*, such unincorporated condominium provides a medium for the conducting of business and the sharing of its gains. Therefore, such unincorporated condominium presents itself as a corporation to conduct business.

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This conclusion is supported by People ex rel West Side Tennis Club v Browne, 270 App Div 1061, wherein the court found a tennis club taxable because "it embarked upon business activities for profit and also. . . was engaged in carrying on a business during the tax years." Similarly, in Rye Country Day School v Lynch, 239 App Div 614, it was determined that since the corporation was financially successful and had accumulated profits it was subject to the franchise tax.

Accordingly, the unincorporated condominium meets the definition of a corporation for purposes of Article 9-A of the Tax Law. Therefore, for all taxable years beginning before January 1, 1989, the unincorporated condominium is subject to the franchise tax on business corporations imposed under Article 9-A of the Tax Law, and is required to pay an annual franchise tax upon the basis of its entire net income base or upon such other basis as may be applicable.

DATED: November 8, 1991

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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