

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

TSB-A-96 (11) C
Corporation Tax
April 1, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C950221A

On February 21, 1995, a Petition for Advisory Opinion was received from FGIC CMRC Corp., 115 Broadway, New York, New York 10006.

The issues raised by Petitioner, FGIC CMRC Corp., are (1) whether a limited liability company ("LLC") that is taxable as a partnership for Federal income tax purposes, will be treated as a "portfolio investment partnership" within the meaning of section 1-3.2(a)(6)(iii)(d) of the Business Corporation Franchise Tax Regulations ("Article 9-A Regulations"), and (2) whether a foreign corporation that is a member of an LLC that is taxable as a partnership for Federal income tax purposes, will be subject to tax under Article 9-A of the Tax Law by reason of being a member of the LLC that is doing business, employing capital, owning or leasing property or maintaining an office in New York State.

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

Petitioner will be a member of Trinity Funding Company, LLC (the "Company"), an LLC that will be organized pursuant to the New York Limited Liability Company Law. A wholly owned, special purpose subsidiary of JH Holdings, Inc. ("JH Holdings") will serve as managing member of the Company and will be primarily responsible for the management of the Company's affairs. Both Petitioner and the investing subsidiary of JH Holdings will be New York State and New York City taxpayers. Petitioner represents that the Company will be treated as a partnership for Federal income tax purposes.

The Company will issue common membership interests ("Common Membership Interests") and preferred membership interests ("Preferred Membership Interests"). The Common Membership Interests will be owned by Petitioner and the investing subsidiary of JH Holdings. The Preferred Membership Interests will be owned by certain foreign corporations (the "Preferred Members"). The Preferred Members will not participate in the management of the Company.

The Company will sell investment contracts ("Investment Contracts") to third party purchasers ("Investors"). The Investment Contracts will provide a fixed rate of return to the Investors. The Company will invest the proceeds of the Common Membership Interests, the Preferred Membership Interests and the Investment Contracts in a portfolio of fixed-income securities that will pay a return sufficient to allow the Company to satisfy its obligations with respect to the Preferred Membership Interests and the Investment Contracts. Petitioner represents that the Company will satisfy the gross income requirement of section 851(b)(2) of the Internal Revenue Code (the "IRC"). Petitioner further represents that the Company will not be a dealer (within the meaning of section 1236 of the IRC) in stocks or securities.

Section 2 of the Tax Law provides the definition of certain terms used in the Tax Law, and was amended by Chapter 576 of the Laws of 1994 which added the following:

5. 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.

6. "Partnership and partner," unless the context requires otherwise, shall include, but shall not be limited to, a limited liability company and a member thereof, respectively.

Section 208.1 of the Tax Law provides that the term "corporation" includes an association within the meaning of section 7701(a)(3) of the IRC, including an LLC.

Accordingly, an LLC that is treated as a corporation for Federal income tax purposes is treated as a corporation for New York State tax purposes. An LLC that is treated as a partnership for Federal income tax purposes, is treated as a partnership for New York State tax purposes. (See, Department of Taxation and Finance Memorandum, TSB-M-94(6)I and (8)C, October 25, 1994.)

Section 1-3.2(a)(6)(i) of the Article 9-A Regulations states:

[a] foreign corporation is doing business, employing capital, owning or leasing property or maintaining an office in New York State if it is a limited partner of a partnership, other than a portfolio investment partnership, which is doing business, employing capital, owning or leasing property or maintaining an office in New York State and if it is engaged, directly or indirectly, in the participation in or the domination or control of all or any portion of the business activities or affairs of the partnership

Section 1-3.2(a)(6)(iii)(d) of the Article 9-A Regulations states:

[t]he term "portfolio investment partnership" means a limited partnership which meets the gross income requirement of section 851(b)(2) of the Internal Revenue Code... The term portfolio investment partnership shall not include a dealer (within the meaning of section 1236 of the Internal Revenue Code) in stocks or securities.

An LLC that is treated as a partnership for Federal income tax purposes is treated as a partnership for New York State tax purposes. Therefore, it is consistent to treat an LLC that meets the gross income requirement of section 851(b)(2) of the IRC and is not a dealer (within the meaning of section 1236 of the IRC) in stocks or securities as a portfolio investment partnership for purposes of section 1-3.2(a)(6)(iii)(d) of the Article 9-A Regulations.

In this case, a Preferred Member, because it does not participate in the management or operations of the LLC, is substantially in the same position as a limited partner of a limited partnership. Therefore, the treatment provided in section 1-3.2(a)(6) of the Article 9-A Regulations to a foreign corporation that is a limited partner of a partnership should be extended to a foreign Preferred Member.

Accordingly, since the Company is treated as a partnership for Federal income tax purposes, it is treated as a partnership for New York State tax purposes. If the Company meets the gross income requirement of section 851(b)(2) of the IRC and the Company is not a dealer, within the meaning of section 1236 of the IRC, in stocks or securities, the Company will be treated as a "portfolio investment partnership" for purposes of section 1-3.2(a)(6)(iii)(d) of the Article 9-A Regulations.

Additionally, pursuant to section 1-3.2(a)(6)(i) of the Article 9-A Regulations, if the Company is treated as a portfolio investment partnership, a foreign corporation which is a Preferred Member of the Company is treated as a limited partner and will not be treated as doing business, employing capital, owning or leasing property or maintaining an office in New York State because of its membership in the Company.

However, if the Company is not treated as a portfolio investment partnership, a foreign corporation which is a Preferred Member of the Company is treated as a limited partner and the Preferred Member must apply the rules contained in section 1-3.2(a)(6) of the Article 9-A Regulations to determine if it is treated as doing business, employing capital, owning or leasing property or maintaining an office in New York State because of its membership in the Company.

DATED: April 1, 1996

/s/
DORIS S. BAUMAN
Director
Technical Services Bureau

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