

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-A-07(7)I
Income Tax
November 15, 2007

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I070815B

On August 15, 2007, a Petition for Advisory Opinion was received from Spencer Barback, 1025 Westchester Avenue, White Plains, New York 10604.

The issue raised by Petitioner, Spencer Barback, is whether a limited liability company (LLC) that is treated as a partnership for federal income tax purposes and formed for investment purposes is subject to a filing fee pursuant to section 658(c)(3) of the Tax Law.

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

Petitioner and others are forming an LLC in New York to invest in securities listed on a public stock exchange. The LLC will be treated as a partnership for federal income tax purposes. The LLC is being formed for purposes of trading for its own account and will not hold property for sale to customers. Its only income will be dividends, interest, and capital gains. The office of the LLC will be located in the city of New York.

Applicable law

Section 631 of the Tax Law provides, in part:

(a) General. The New York source income of a nonresident individual shall be the sum of the following: (1) The net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources, including: (A) his distributive share of partnership income, gain, loss and deduction, determined under section six hundred thirty-two, and

* * *

(2) The portion of the modifications described in subsections (b) and (c) of section six hundred twelve which relate to income derived from New York sources (including any modifications attributable to him as a partner. . .)

(b) Income and deductions from New York sources.

(1) Items of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to:

* * *

(B) a business, trade, profession or occupation carried on in this state; or

* * *

(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. . . .

* * *

(d) Purchase and sale for own account. A nonresident, other than a dealer holding property primarily for sale to customers in the ordinary course of his trade or business, shall not be deemed to carry on a business, trade, profession or occupation in this state solely by reason of the purchase and sale of property or the purchase, sale or writing of stock option contracts, or both, for his own account.

Section 658(c)(3) of the Tax Law imposes a filing fee on limited liability companies and limited liability partnerships that are treated as partnerships for federal income purposes. Such section 658(c)(3), effective January 1, 2007, provides, in part:

Filing fees. Every subchapter K limited liability company, 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) fifty 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 three hundred twenty-five dollars nor more than ten thousand dollars. . . .

Opinion

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 and has any income derived from New York sources pursuant to section 631 of the Tax Law as in the case of a nonresident individual.

Section 631 of the Tax Law provides, in general, that items of income, gain, loss, or deduction from New York sources include those items attributable to the ownership of any

interest in real or tangible personal property located in New York State or a business, trade, profession, or occupation carried on in the State.

Section 631(d) of the Tax Law provides that a nonresident is not engaged in a business, trade, profession, or occupation in this State solely by reason of the purchase and sale of property or the purchase, sale, or writing of stock option contracts, or both, for his or her own account.

A partnership whose sole activity is trading on its own account will not be deemed to carry on a business, trade, profession, or occupation in the State within the meaning of section 631(d) of the Tax Law. Therefore, any dividends, interest, and capital gains received by the partnership will not be New York source income.

Accordingly, since the LLC in the present case will not have any income derived from New York sources, the LLC is not subject to an annual filing fee imposed pursuant to section 658(c)(3) of the Tax Law.

DATED: November 15, 2007

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Taxpayer Guidance Division

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.