

**New York State Department of Taxation and Finance Advisory Opinion on the
New York estate taxation of non-resident owned S Corporations and single
member LLCs which own New York Real Estate**

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The New York State Department of Taxation and Finance issued an advisory opinion on whether a non-resident decedent's interest in either an S corporation or a single member LLC owning real property in the State of New York is considered an intangible asset and therefore not included in the non-resident decedent's estate for New York estate tax purposes, or whether the entities are considered New York property included in the non-resident decedent's New York Estate, TSB-A-08-(1)M, Estate Tax, October 24, 2008.

http://www.tax.state.ny.us/pdf/advisory_opinions/estate_&_gift/a08_1m.pdf

A non-New York domiciliary petitioned the state concerning the proposed purchase of a condominium apartment. The petitioner was considering the purchase of a condominium apartment either by a Florida S corporation or by a single member LLC. Under Section 960(a) of the New York State Tax Law, the gross estate of a non-resident includes real and tangible personal property having an actual situs in New York State, but does not include intangible property.

The New York State counsel assumed that the petitioner's S corporation referred to a non-New York corporation that qualifies for and makes the election to be treated as an S corporation under IRC section 1362(a). The opinion concluded that since "stock in an S corporation is an intangible, that interest in property is not subject to the estate tax imposed on the estate of a non-resident decedent under Tax Law section 960(a)." In so concluding it was assumed that the S corporation is entitled to be recognized as a corporation for tax purposes. For the S corporation to be so recognized, its purpose had to be the equivalent of business activity or

followed by the carrying on of business by the corporation. So, in holding that the interest in the S corporation was an intangible, New York State determined that the corporation's owning and maintaining of the condominium is the required "equivalent of business activity."

The Internal Revenue Code does not define a single member LLC. Usually, a single member LLC is a disregarded entity. It is possible, however, to elect treatment as an association under the "check-the-box" regulations. If this is elected, a single member LLC will be treated as an association taxable as a corporation and therefore as a C corporation for income tax purposes.

If a single member LLC is taxed as a C corporation, it will be recognized as a corporation for the purposes of New York estate tax. Therefore, a condominium apartment in New York owned by a non-resident decedent in a single member LLC which is treated as a C corporation will be intangible property under the New York estate tax law and excluded from the New York estate.

In sum, a non-resident decedent owning an S corporation which owns a condominium will be deemed to be intangible property in the State of New York unless the S corporation fails the business activity or carrying on of business test. A single member LLC that has elected to be treated as an association under the check-the-box regulations also will be treated as an intangible and, therefore, not subject to New York estate tax. A single member LLC that has not so elected will be "disregarded" and subject to New York estate tax.