



June 1, 2009

RE: Request for a Ruling
Real Property Tax Law §420-a Exemption
FLR-09-4890

Dear Mr. :

This is in response to your request dated December 29, 2008, on behalf of XXXXXXXXXXXX for a ruling regarding the application of §420-a of the Real Property Tax Law ("RPTL"), following a conveyance of a parcel owned by XXXXXX, to a single-member limited liability company ("LLC"). XXXXXX will be the sole member of the LLC. The parcel will then be leased by the LLC to XXXXXXXXXXXX a New York not-for-profit educational corporation. XXXXXXXXXXXX, a New York not-for-profit educational institution will also share space under the terms of the aforementioned lease. This office received additional information concerning this request on March, 18, 2009.

FACTS:

XXXXXX is a XXXXX not-for-profit corporation, formed in 1985 under the name XXXXXXXXXXX, and organized exclusively for charitable, scientific, and educational purposes. It changed its name to XXXXXXXXXXX in 1986. XXXXXXXXXXX activities include, but are not limited to, engaging in activities promoting education, from elementary school to graduate studies, and making grants to charitable and educational institutions for the building or remodeling of its facilities. In an Internal Revenue Service ("IRS") Determination Letter dated February 26, 1987, the IRS recognized XXXXXXXXXXX as a private foundation exempt from federal income taxation under §501(c)(3) of the Internal Revenue Code ("IRC").

XXXXXXXXX is a New York not-for-profit educational corporation and is the US arm of XXXXX Business School, a school of the University of XXXXXX, a private not-for-profit XXXXXXXXXXX university. XXXXXXXXXXX was formed to operate exclusively for charitable and educational purposes, more specifically to conduct research and disseminate information, and to provide education and training related to business and management. The IRS in a Determination Letter dated June 20, 2008 has recognized that XXXXXXXXXXX is exempt from taxation under §501(c)(3) of the IRC.

XXXXXX is a New York not-for-profit educational institution, which conducts research and offers graduate level instruction in business, focusing on the media and entertainment industries. XXXXX is a New York based operating partner of XXXXX. The IRS has recognized that XXXXX is exempt from taxation under §501(c)(3) as an education institution.

On September 5, 2007, the board of directors of XXXXX authorized XXXXXX to purchase real property located at XXXXXX Street. (block; XXXX lot XX) New York, New York. The board also authorized the

formation of a single member limited liability company with XXXXXXXX as the sole member, for the express purpose of taking title to the aforementioned property.¹ On or about November 15, 2007, XXXXXXXX purchased the parcel located at XXXXXXXX Street. On December 3, 2007, the board of directors of XXXXXXXX authorized XXXXXXXX to engage architects and other professionals, in consultation with XXXXXX and XXXXXX to prepare a design, as well as, solicit bids from suitable contractors for the necessary remodeling of the aforementioned premises.

The parcel is currently vacant. On January 15, 2008, XXXXXXXX was granted a §420-a exemption retroactive to November 15, 2007, based upon contemplated use.

On July 30, 2008, XXXXXXXX entered into a Grant Agreement (“the Agreement”) with XXXXXX whereby XXXXXXXX has agreed to provide a grant to XXXXXX in the form of:

- (a) the use of the building located at XXXXXXXXXX Street for a period of 20 years at favorable terms with below market rent and;
- (b) an annual operating grant equal to the amount charged for rent for the duration of the Agreement.²

The purpose of the Grant is to assist XXXXXX in carrying out its educational and charitable programs at the property including those of XXXXXX Business School and those of XXXXXX. While the Agreement contemplates that XXXXXX will use it best effort to obtain grants, loans and other financing to renovate the property, XXXXXXXX has nevertheless agreed that it is prepared to approve additional loans or grants to assist XXXXXX with renovating the property, to make it suitable for its intended use. Prior to the building being placed into service, XXXXXXXX and XXXXXX will enter into a formal Lease Agreement.

XXXXXXX Representations: XXXXXXXX represents that the transfer of the parcel to the LLC, will be subject to the following conditions:

1. The LLC will be organized exclusively for §420-a exemption purposes. The operating agreement establishing the LLC make it effectively a not-for-profit entity, organized and conducted solely for §420-a purposes
2. The operating agreement will provide that there will be no pecuniary profit and that the LLC will operate for not-for-profit purposes consistent with § 420-a.
3. There will be commonality between the management of the LLC and its single member.
4. XXXXXXXX will manage and maintain the property by means of a triple net lease.
5. No rent or other payments for occupancy shall exceed the carrying, maintenance and depreciation charges attributable to the premises occupied.
6. The organizing documents will provide that in the event of dissolution, the property of the LLC will revert to another not-for-profit entity organized for §420-a exempt purposes.

ISSUE:

Whether real property owned by a single-member LLC, that is leased to a not-for-profit organization and used exclusively for charitable and educational purposes will continue to be exempt pursuant to RPTL §420-a, after the property is transferred by XXXXXXXX to the LLC?

¹ The Articles of Organization and Operating Agreement are in draft form pending issuance of this letter ruling.

² The rent in the amount of \$324,000.00 per year is based on a calculation of applicable depreciation.

CONCLUSION:

Real property owned by a single-member LLC and then leased to a not-for-profit organization and used exclusively for charitable and educational purposes will continue to be exempt pursuant to RPTL §420-a after the transfer from XXXXXX to the LLC.

DISCUSSION:

RPTL §420-a provides a tax exemption for mandatory classes of nonprofit organizations, in pertinent part, as follows:

[r]eal property owned by a corporation or association organized or conducted exclusively for religious, charitable, hospital, educational, or moral or mental improvement of men, women or children purposes or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes either by the owning corporation or association as hereinafter provided shall be exempt from taxation as provided in this section.

As the statute specifically requires ownership by a corporation or association, the initial inquiry is whether a limited liability company is a “corporation or association organized or conducted exclusively for” an exempt purpose pursuant to RPTL §420-a.

A limited liability company is defined by section 102(m) of the New York State Limited Liability Company Law (“LLCL”) as “an unincorporated organization organized of one or more persons having limited liability for the contractual obligations and other liabilities of the business ..., other than a partnership or trust formed and existing under this chapter and the laws of this state.” In Mohonk Trust v. Board of Assessors of Town of Gardiner, 47 N.Y.2d 476, 418 N.Y.S. 2d 763 (1979), the Court of Appeals held that a trust was an association within the meaning of section 421 (predecessor to §420-a). The court then said that “[w]hatever the meaning of the term ‘corporation or association’ in another context, the phrase has long been understood in tax exemption statutes of this sort ... simply, to indicate that the particular organization granted the exemption need not be incorporated. Although the word ‘corporation’ is strictly defined in the law, the word ‘association’ is a broad term which may be used to include a wide assortment of differing organizational structures including trusts, depending on the context.” 47 N.Y.2d at 482-83. Therefore, the term ‘association’ appears broad enough to include a limited liability company.

IRS regulations permit a single-member LLC to be disregarded from its owner for federal income tax purposes, in which case the entity would be treated as a branch or division of the owner. Therefore, an owner that is exempt from taxation under §501 (a) of the IRC must include, as its own, information pertaining to the finances and operations of a disregarded entity in its annual information return (Form 990) IRS Announcement 99-102 (October 13, 1999).

Under federal “check-the box” regulations, a single member LLC is disregarded as a separate entity from the owner unless the owner affirmatively elects corporate tax treatment. Treas. Reg. §301.7701-3(b)(1)(ii) 2001. Hence a single member LLC is considered “invisible” for tax purposes. The information provided indicates that neither XXXXXX nor the LLC will make this election and for federal tax purposes, the real property will be treated as though XXXXXX owned it directly. Thus, for federal tax purposes, the single member LLC will have no tax status of its own and will be treated as a branch of an exempt institution.

Although treated as a branch of XXXXXX for federal tax purposes, after the transfer from XXXXXX to the LLC, the LLC will nevertheless own the parcel for real property tax purposes. The LLC will then lease the parcel to XXXXX, a New York not-for-profit corporation, to be used as an educational facility. XXXXXX had represented that no amount of rent or payment for occupancy will exceed the carrying, maintenance and depreciation charges attributable to the premise occupied. See, Sisters of St Joseph v. City of New York, 49 N.Y.2d 429, 426 N.Y.S. 2d 444 (1980) where the Court of Appeals ruled that realty rented by one not-for-profit to another not-for-profit may retain its exempt status, so long as the rental does not produce profit. Moreover, where a separate not-for-profit “operates solely to carry out a purpose of the exempt corporation” and the property is used exclusively to benefit a separate exempt organization, the courts have held that property may be exempt under §420-a even though title is held by a related not-for-profit organization, St. Joseph’s Health Center Properties v. Srogi, 51 N.Y. 2d 127, 129, 432 N.Y.S. 2d 865 (1980); In the Matter of Canton Human Services Initiatives, Inc. v. Town of Canton, 4 Misc. 3d 413, 780 N. Y. S. 2d 714 (2004). Although here the related organization is a single member LLC, not a not-for-profit corporation, the reasoning remains applicable. “While exemption statutes should be construed strictly against the taxpayer seeking the benefit of the exemption, an exemption so literal and narrow that it defeats the exemption’s settled purpose is to be avoided”. Symphony Space v. Tishelman, 60 N.Y.2d 33, 466 N.Y.S. 2d 677 (1983); In the Matter of Legion of Christ, Inc. v. Town of Mount Pleasant, 1 N Y 3d 406, 774 N. Y. S. 2d 860 (2004).

Notwithstanding the above, it must be taken into consideration that the LLC is not statutorily a not-for-profit entity. LLCL §201 states that “[a] limited liability company may be formed under this chapter for any lawful business purpose or purposes....” The term “business” is defined as “every trade, occupation, profession or commercial activity.” See LLCL §102(e). The Practice Commentary to the LLCL notes that “although the LLCL does not expressly prohibit the formation of not-for-profit LLCs, the definition of ‘Business’ in §102(e) ...suggests that the drafters intended that a LLC was to be formed for pecuniary profit,” LLCL Practice Commentary at 3 (McKinney 2007). Accordingly, to retain the exemption, the LLC’s articles of organization and/or operating agreement, as appropriate, should provide an organizational purpose consistent with §420-a and specify that the LLC could not receive pecuniary profit or otherwise operate in any manner inconsistent with a not-for-profit organization.

Therefore, property owned by a single-member LLC, where the single-member is a not-for-profit organization, may qualify for a RPTL §420-a exemption where the applicant establishes that it meets the following standards:

1. The LLC’s sole member qualifies for a §420-a exemption. The LLC must also show that it is effectively a not-for-profit entity, organized or conducted for §420-a purposes.
2. The articles of organization and /or operating agreement, as appropriate, must state there will be no pecuniary profit and the LLC will operate for not-for-profit purposes consistent with §420-a.
3. There must be commonality between management of the LLC and its single member.
4. The property must be managed and maintained by the single-member or, pursuant to a lease or occupancy agreement with the single member LLC, another not-for-profit entity, whose real property, if it owned any, would be exempt from taxation pursuant to sections §420-a.
5. Rent paid by the lessee may not exceed carrying, maintenance and depreciation charges as specified in §420-a.
6. Upon termination of the LLC, the property must revert to XXXXXX or another exempt entity. Also, transferring any interest in the LLC to a non-qualifying entity will result in loss of exemption.

7. Both the LLC and XXXXXX must annually file an affidavit stating that there has been no change in the LLC's beneficial ownership. This affidavit will be in addition to the certification of continuing use otherwise required by the Department of Finance.

Upon transfer of the property to a single-member LLC where the single-member is XXXXXX, a §420-a application must be filed with the Exemption Unit. If the facts, upon transfer of the property to the LLC, conform with the representations made by XXXXXX to the Legal Affairs Division and the conditions established pursuant to this letter ruling are satisfied, the property would qualify for exemption under the charitable and educational category of RPTL §420-a.

The Department of Finance nevertheless reserves the right to review the information submitted.

Very truly yours,

Dara Jaffee
Assistant Commissioner
Legal Affairs Division

HGT:hgt