

ADDENDUM TO INSTRUCTIONS TO FORMS NYC-204

1996 Changes to NYC General Corporation Tax Potential Impact on Homeowners Associations

For taxable years beginning on or after January 1, 1996, New York City has changed its definition of a "corporation" for purposes of the New York City General Corporation Tax ("GCT"). The new definition is identical to the definition under the New York State Franchise Tax on Business Corporations. Under the new definition, unincorporated associations, including unincorporated homeowners associations, will be treated as corporations subject to the GCT if they are taxable as corporations for federal income purposes under Internal Revenue Code ("IRC") section 7701. Thus, if an unincorporated homeowners association was considered an association taxable as a corporation under the federal regulations applicable to years prior to 1997, it will be subject to the GCT for its tax year beginning in 1996. For years beginning after 1996, if an unincorporated homeowners association elects to be treated as a corporation for federal tax purposes under the new federal "check the box" regulations, it will be treated as a corporation for GCT purposes under the new City law for its tax years beginning in 1997 and later years. *Please note that the changes in the City law and federal regulations only affect unincorporated associations. Homeowners associations that are corporations are unaffected by the changes in the City law and the federal regulations and will remain subject to the GCT.*

The new City law gives unincorporated entities a one-time opportunity to avoid the effects of the new City law through an election that must be made on a timely tax return filed for the tax year beginning in 1996. Under the prior City law, unincorporated homeowners associations were not taxable as corporations but were subject to the 4% NYC Unincorporated Business Tax ("UBT"). However, in any year that an unincorporated homeowners association made an election under IRC section 528 by filing a federal form 1120-H, it was exempt from the UBT. See 19 Rules of the City of New York §28-02(j). Any unincorporated entity that was subject to the UBT for its taxable year beginning in 1995 and that would be subject to the GCT under the new definition, may make a one-time election to continue to be subject to the UBT for its tax years beginning in 1996 and thereafter unless the election is revoked. Moreover, if an unincorporated homeowners association that was subject to the UBT law for its taxable year beginning in 1995 expects to be treated as a corporation for federal income tax purposes under the "check the box" rules for its taxable year beginning in 1997, it also may make the election on its return for its taxable year beginning in 1996 to continue to be subject to the UBT law. **That election must be made on a UBT return (NYC-204) filed on a timely basis (including extensions) for the association's tax year beginning in 1996.** The election cannot be made on a late or amended return and cannot be reinstated once revoked. Unincorporated homeowners associations formed after 1995 are not eligible to make the one-time election and will be subject to the GCT if they are taxable as corporations for federal tax purposes for tax years beginning in 1996 and thereafter either under the former regulations under IRC section 7701 or under the new "check the box" regulations.

Following are answers to some common questions that may be asked by potentially

affected entities:

Q. Can an unincorporated homeowners association that is exempt from the UBT for 1995 and prior years because it has made an election under IRC section 528, make the one time City election to continue to be subject to the UBT?

A. Yes. An unincorporated homeowners association that filed a federal form 1120-H for its tax year beginning in 1995 is considered to be "subject" to the UBT for purposes of the election. An unincorporated entity is considered to be "subject" to Chapter five of Title 11 of the Code for its taxable year beginning in 1995 provided it was engaged in any activity in the City during that year and was not subject to any other City income or gross receipts tax in that year¹, regardless of whether it actually incurred a UBT liability in that year. If the association does not make the one-time City election, and is or becomes taxable as a corporation for federal purposes and subject to the GCT for years beginning in 1996 and thereafter, a section 528 election will not exempt the association from the GCT.

Q. How much tax is an unincorporated homeowners association likely to pay if it is subject to the UBT and does not make an election under section 528 for federal income tax purposes?

A. The UBT is imposed at 4% of the allocated net income of the business as determined for federal income tax purposes with certain modifications. Generally, an unincorporated homeowners association having no net profit will have no tax liability. There is no minimum Unincorporated Business Tax. However, each association should consult with its tax advisor to determine its possible tax liability.

Q. How much tax is an unincorporated homeowners association likely to pay if it is subject to the GCT and does not make the one-time City election?

A. The GCT is imposed on one of four bases, whichever produces the highest tax. The net income based tax is imposed at 8.85% of the allocated net income of the business as determined for federal income tax purposes with certain modifications. Even if the homeowners association makes a federal election under section 528, it is not exempt from the GCT. The Department of Finance will not assess additional tax or penalties on any such homeowners association that files its GCT return in a manner consistent with New York State Department of Taxation and Finance Technical Services Bureau Advisory Opinion 96(24)C (October 1, 1996) so long as that opinion remains in effect. The other bases for the GCT are an alternative tax of 8.85% of 30% of allocated net income without deductions for certain compensation paid, a .15% tax on allocated capital, and a minimum tax of \$300. Each association should consult with its tax advisor to determine its possible tax liability.

Inquiries may be directed to the Department of Finance Taxpayer Assistance Division at (718) 935-6000.

¹ Other than the Utility Tax as a vendor of utility services.