

- A condominium is considered real property (unlike a cooperative apartment).
- An Advisory Opinion from the New York State Department of Taxation and Finance is issued at the request of the taxpayer who requested advice about the New York state tax consequences of a proposed transaction or set of facts. Like a private letter ruling from the IRS, the opinion's holding only applies to the taxpayer who requested it. Although it is based on an analysis of the law, regulations and current Department policies, the opinion will not necessarily be upheld if a taxpayer litigates the issue.

Enter several Advisory Opinions dealing with non-residents, intangible property and New York estate tax:

- **TSB-A-15(1)M** (May 29, 2015). Taxpayer (T), a New York resident, inquires about the following: T is thinking about forming a single member LLC under Delaware law for the "sole purpose" of contributing his New York condominium to the LLC and then moving to another state. T would be the sole owner of the LLC for the rest of his life and would reside outside of New York State until his death. The LLC would be a "disregarded entity" for income tax purposes. Would it be considered "intangible property" for New York estate tax purposes?

What the opinion said. The analysis noted the following: a) where a corporation, partnership or trust owns New York real property (including condominiums), cases have held that interests in such an entity constitute intangible property; b) the New York State Constitution prohibits New York estate tax on a nonresident's intangible property, "even if such property is located in New York State"; and c) a single member LLC that is a disregarded entity for income tax purposes is not deemed to be separate from its owner. Based on this analysis, T's interest in the single member LLC "would not be treated for estate tax purposes as an intangible asset," and the condominium owned by the LLC would be treated as real property held by T for New York estate tax purposes.

- **TSB-A-08(1)M** (October 24, 2008). Here, T had a similar query. She was a Florida resident who wanted to buy a New York condominium through an entity she would create. Which one would be treated as intangible property for purposes of the New York estate tax: a Florida S Corporation, or a single member LLC?

What the opinion said. The upshot of the opinion was that if there were a business purpose for the S Corporation and it was "entitled to recognition for tax purposes," then, yes, T's holding in the S Corporation could be considered intangible property that would not be subject to New York estate tax; if the S Corporation were not entitled to recognition under that standard, then the condo would be included in T's New York gross estate. The same analysis would apply to a single member LLC.

What does this mean? In a nutshell, New York is well aware of why a non-resident might want to "convert" New York real property into intangible property that would not be subject to New York estate tax at that non-resident's death. What is clear from these two opinions is that a single member LLC will not suffice: does that mean that a multi-member LLC will work? Suppose, for example, that non-resident Mom and Dad are the two members of the LLC that owns a New York condo; will this structure insulate the condo from New York estate tax when the first of them dies? Arguably yes, although the New York tax could be moot at that point if the deceased spouse's LLC interest simply passes to the surviving spouse and qualifies for the marital deduction. The dangling issue is what happens when the surviving spouse is now the sole member of the LLC, which presumably becomes a disregarded entity.

A final note. It is worth contrasting the holdings of these two opinions with the actual language of New York's estate tax law and its constitution. As noted above, the tax law (§ 960 of Article 26) says that estate tax applies to a non-resident decedent's transfer of "real and tangible personal property having an actual situs in New York state." § 3 of Article XVI of New York's constitution, dealing with the taxation of intangible