



**FINANCE**  
**NEW • YORK**  
THE CITY OF NEW YORK  
DEPARTMENT OF FINANCE

May 21, 2003

**Re: Exemption Request**  
**General Corporation Tax**

FLR #034800-006

Dear Mr.           :

This letter is in response to your request dated March 27, 2003, for a ruling that (the "Taxpayer") is exempt from New York City General Corporation Tax (the "GCT").

**FACTS**

The Taxpayer is a nonstock corporation formed under section 402 of the New York Not-For-Profit Corporation Law on           . The members of the Taxpayer are the unit owners of the            Condominium.

The Taxpayer's Certificate of Incorporation indicates that the Taxpayer was formed for the purpose of conducting "all activities relating to operation and management of condominium units and common areas located at           , for the betterment and promotion of the welfare of the homeowner's association." The Certificate of Incorporation states that the Taxpayer is a type A corporation under section 201(b) of the Not-For-Profit Corporation Law. That section authorizes the formation of a not-for-profit corporation "for any lawful non-business purpose or purposes including, but not limited to, any one of the following non-pecuniary purposes: civic, patriotic, political, social, fraternal, athletic ... and for a professional, commercial, industrial, trade or service association."

The Taxpayer represents that its only source of income is the condominium common charges received from unit owners, and that any net income derived from these common charges “is credited to surplus and does not inure to any individual.” For the 2002 tax period, the Taxpayer filed form 1120-H, U.S. Income Tax Return for Homeowner’s Associations.

## ISSUE

You have requested a ruling that the Taxpayer is exempt from GCT.

## CONCLUSION

Based on the facts and presented and the representations and documents submitted, we have determined that the Taxpayer is not exempt from GCT.

## DISCUSSION

Generally, the GCT is imposed on corporations that do business, employ capital, own or lease property, or maintain an office in New York City. Administrative Code of the City of New York (“Administrative Code”) § 11-603(1). Under section 11-04(b)(8) of Title 19 of the Rules of the City of New York (“RCNY”), a corporation will be exempt from the GCT if it meets the requirements of that section (discussed below).

### Presumptions Under Section 11-04(b)(8)

RCNY Section 11-04(b)(8)(i) provides that if the Internal Revenue Service (the “IRS”) determines that a nonstock corporation is exempt from federal tax under section 501(a) of the Internal Revenue Code (“IRC”), the corporation is presumed to be exempt from GCT. Under RCNY section 11-04(b)(8)(ii), if the IRS has denied an exemption under IRC section 501, the corporation is presumed not to be organized and operated for non-profit purposes.

The Taxpayer has not applied for an exemption under section 501(a) of the IRC. Rather, the Taxpayer has chosen to be taxed as a homeowners association under IRC section 528. Under that section, a homeowners association can elect to be treated as a tax-exempt organization, and its exempt function income (i.e. income from membership dues, fees and assessments received from homeowners as members of the association) is not taxable. The income of a homeowners association that is not exempt function income is taxed under IRC section 528. An organization may elect IRC section 528 tax treatment, if: 1) it is substantially formed by and composed of owners of condominium units or residences; 2) it is organized to provide for the acquisition, construction, management, maintenance and care of association property; 3) 60 percent or more of its gross income is exempt function income; 4) 90 percent or more of its expenditures are for the acquisition, construction, management, maintenance and care of association property, and 5) no part of the net earnings can inure (other than by acquiring, constructing, or providing management, maintenance and care of association property, or other than by rebate of excess dues, fees or assessments) to the benefit of any private shareholder or individual.

The presumptions provided in RCNY sections 11-04(b)(8)(i) and 11-04(b)(8)(ii) are inapplicable here because they only apply when the IRS has made a determination that an organization is either exempt or non-exempt under IRC section 501(a). They do not apply where a taxpayer is taxed under IRC section 528. However, a corporation will be exempt from the GCT under 19 RCNY section 11-04(b)(8) if (i) it is a nonstock corporation; (ii) it is organized and operated for nonprofit purposes; (iii) it does not engage in substantial commercial activities and (iv) “no part of its net earnings inures to the benefit of any officer, director or *member*” (emphasis added).

#### Inurement of Net Earnings

IRC section 528(c)(1)(D) requires that no part of a homeowners association’s net earnings inure to the benefit of any private shareholder or individual *other than by acquiring, constructing, or providing management, maintenance and care of association property, or other than by rebate of excess dues, fees or assessments*. Consequently, IRC section 528(c)(1)(D) allows a limited amount of private inurement to the extent that homeowners, including condominium owners, benefit from the usual operations of the homeowners association. In contrast, 19 RCNY section 11-04(b)(8) does not contain any similar exception. It is our position that the provision of management, maintenance and care of association property constitutes an inurement of net earnings of the homeowners association to the benefit of its members.

The New York State Tax Appeals Tribunal has recently determined that a homeowners association that provides “management and the maintenance and care of association property” does not qualify for a tax exemption under the comparable provision of the New York Code of Rules and Regulations for the New York State Franchise Tax on Business Corporations, because the provision of those services is for the benefit of the homeowners and therefore “constitute an ‘inurement of net earnings’ of the [homeowners] [a]ssociation to the benefit of its members.” *Weatherfield Park III Homeowners’ Association, Inc.*, Docket No. 817614 (DTA), ALJ Determination, February 1, 2001 *aff’d* TAT Decision February 21, 2002.

Based on the facts presented, we have determined that the Taxpayer has not established that no part of its earnings inures to the benefit of any member within the meaning of 19 RCNY section 11-04(b)(8). Accordingly, the Taxpayer does not qualify for an exemption under that section and is subject to GCT.

The Department reserves the right to verify the information submitted.

Sincerely,

Devora B. Cohn  
Associate Commissioner  
For Legal Affairs