



HENRY McMASTER
ATTORNEY GENERAL

February 26, 2009

The Honorable James E. Smith, Jr.
Member, House of Representatives
Post Office Box 11867
Columbia, South Carolina 29211

Dear Representative Smith:

We understand you desire an opinion of this Office as to “whether a single member limited liability company can qualify for the 4% legal residence assessment ration for property tax purposes.”

Law/Analysis

Section 12-43-220 of the South Carolina Code (Supp. 2008), pertaining to the classification of property for purposes of imposing property taxes, provides a special assessment ratio for legal residences of no more than five acres. This provision states:

The legal residence and not more than five acres contiguous thereto, when owned totally or in part in fee or by life estate and occupied by the owner of the interest, and additional dwellings located on the same property and occupied by immediate family members of the owner of the interest, are taxed on an assessment equal to four percent of the fair market value of the property . . . For purposes of the assessment ratio allowed pursuant to this item, a residence does not qualify as a legal residence unless the residence is determined to be the domicile of the owner-applicant.

S.C. Code Ann. § 12-43-220(c)(1). In addition, this section provides:

(2)(i) To qualify for the special property tax assessment ratio allowed by this item, the owner-occupant must have actually owned and occupied the residence as his legal residence and been domiciled at that address for some period during the applicable tax year. A

residence which has been qualified as a legal residence for any part of the year is entitled to the four percent assessment ratio provided in this item for the entire year, for the exemption from property taxes levied for school operations pursuant to Section 12-37-251 for the entire year, and for the homestead exemption under Section 12-37-250, if otherwise eligible, for the entire year.

(ii) This item does not apply unless the owner of the property or the owner's agent applies for the four percent assessment ratio before the first penalty date for the payment of taxes for the tax year for which the owner first claims eligibility for this assessment ratio. In the application the owner or his agent must certify to the following statement:

"Under penalty of perjury I certify that:

(A) the residence which is the subject of this application is my legal residence and where I am domiciled at the time of this application and that I do not claim to be a legal resident of a jurisdiction other than South Carolina for any purpose; and

(B) that neither I nor any other member of my household is residing in or occupying any other residence which I or any member of my immediate family has qualified for the special assessment ratio allowed by this section."

(iii) For purposes of subitem (ii)(B) of this item, "a member of my household" means:

(A) the owner-occupant's spouse, except when that spouse is legally separated from the owner-occupant; and

(B) any child of the owner-occupant claimed or eligible to be claimed as a dependent on the owner-occupant's federal income tax return.

(iv) In addition to the certification, the burden of proof for eligibility for the four percent assessment ratio is on the owner-occupant and the

applicant must provide proof the assessor requires including, but not limited to:

(A) a copy of the owner-occupant's most recently filed South Carolina individual income tax return;

(B) copies of South Carolina motor vehicle registrations for all motor vehicles registered in the name of the owner-occupant;

(C) other proof required by the assessor necessary to determine eligibility for the assessment ratio allowed by this item.

If the assessor determines the owner-occupant ineligible, the six percent property tax assessment ratio applies and the owner-occupant may appeal the classification as provided in Chapter 60 of this title.

Id. § 12-43-220(c)(1).

As you mentioned in your letter, this Office issued an opinion on this matter in 2003. Op. S.C. Atty. Gen., September 23, 2003. In that opinion, we considered the language used in section 12-43-220, as well as, previous opinions of this Office finding a shareholder of a corporation or a partner in a partnership do not qualify for the four percent assessment ratio pursuant to section 12-43-220. In addition, we cited section 33-44-501 of the South Carolina Code, contained in the provision pertaining to LLCs, as support. This provision states "A member is not a co-owner of, and has no transferable interest in, property of a limited liability company." S.C. Code Ann. 33-44-501(a) (2006). Based on this authority, we determined that despite the fact that the LLC's only member occupied the property in question and treated it as his primary residence, the property cannot be classified as a legal residence for purposes of receiving the four percent assessment ratio under section 12-43-220. Id.

"This Office recognizes a long-standing rule that we will not overrule a prior opinion unless it is clearly erroneous or a change occurred in the applicable law." Op. S.C. Atty. Gen., September 29, 2006. We know of no change in the law since our 2003 opinion. Thus, we must only consider whether our 2003 opinion is clearly erroneous. In determining whether or not a single member LLC may establish a legal residence for purposes of section 12-43-220, we must consider the intent of the Legislature with regard to this provision. Auto Owners Ins. Co. v. Rollison, 378 S.C. 600, 609, 663

S.E.2d 484, 488 (2008) (“The cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature.”). The best evidence of the Legislature’s intent is found in the plain language of the statute. State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007) (“Whenever possible, legislative intent should be found in the plain language of the statute itself.”). Furthermore, “[w]hen construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect.” Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 363, 660 S.E.2d 264, 268 (2008).

From our reading of section 12-43-220(c), we believe the Legislature intended to provide a tax benefit to homeowners by allowing their property to be assessed at a lower rate than other types real property. To that aim, the Legislature provided for certain situations in which the property owner may not own a fee simple interest in the property upon which he or she resides, but is nonetheless entitled to receive the four percent assessment ratio. Moreover, the Legislature was careful to disallow the application of this special assessment ratio when the owner is using the property for a purpose other than his or her legal residence. Thus, we are of the opinion that the Legislature intended for natural persons to receive the benefit of this legislation, not business entities such as partnerships, LLCs, and corporations.

We gain further support for our understanding of the Legislature’s intent by reading section 12-43-220(c) as a whole. As quoted above, subsection (2)(ii) of this provision requires the homeowner, under the penalty of perjury, to certify that the property is used as their legal residence. S.C. Code Ann. § 12-43-220(c)(2)(ii). We do not believe an LLC, even acting through its member, can properly comply with this provision. As such, we do not believe that the Legislature, in enacting this provision, intended to allow business entities the ability to take advantage of a lower assessment ratio, even if the entity is a single member LLC. As the Alabama Attorney General concluded in an opinion on a similar issue:

Like a partnership, another intangible entity such as an LLC or corporation cannot occupy and use property as a single-family residence. Only a natural person can do so. Therefore, when property is owned by an intangible legal entity such as a partnership, corporation, or an LLC, the property does not qualify as . . . residential property.

Op. Ala. Atty. Gen., February 9, 2007.

In your request, you specifically asked us to consider section 12-2-25 in reviewing our prior opinion. Section 12-2-25 of the South Carolina Code (Supp. 2008) provides certain definitions

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pertaining to limited liability companies and specifically, single-member limited liability companies. The provision you are particularly concerned with states as follows:

(B) For South Carolina tax purposes:

(1) a single-member limited liability company, which is not taxed for South Carolina income tax purposes as a corporation, is not regarded as an entity separate from its owner

S.C. Code Ann. § 12-2-25(B)(1). One could argue that because single-member LLCs are “not regarded as an entity separate from [their] owner[s],” single-member LLCs are eligible under section 12-43-220 to receive a four percent assessment ratio.

Section 12-2-25(B)(1) is contained among the general provisions of the South Carolina tax law. Moreover, this provision does not limit “tax purposes” to only income tax purposes or indicate it does not apply for purposes of property tax. Thus, we understand the argument that because the LLC, which owns the property, is not separate from its owner and that owner would otherwise individually satisfy the requirements for the property to be treated as his or her legal residence, the LLC may qualify for the preferential four percent assessment ratio.

While a court may find otherwise, we do not believe the Legislature intended for this provision to allow single-member LLCs to be eligible for the preferential assessment ratio pursuant to section 12-43-220. The Legislature originally enacted section 12-2-25 as part of the South Carolina Limited Liability Company Act in 1994, the law establishing LLCs as legal entities in South Carolina. As originally adopted, section 12-2-25 did not contain the provision cited above as subsection (B)(1). The Legislature added this portion of the statute in 1997. We believe by adding this provision, the Legislature intended to supply a State counterpart to the federal law, which provides that a single-member LLC is “disregarded as an entity separate from its owner” for federal tax purposes. 26 C.F.R. § 301.7701-2(c)(2). Thus, we are of the opinion that this provision pertains to income taxes. This conclusion is further supported by the fact that the Legislature specifically references South Carolina income tax in this provision. Thus, reading this provision as a whole, we believe the Legislature did not intend for this provision to apply to other areas of taxation including the taxation of property held by the LLC. As such, we do not believe our prior opinion is clearly erroneous. Nonetheless, if the Legislature intended section 12-2-25(B)(1) of the South Carolina Code to allow single-member LLCs to receive the preferential four percent assessment ratio, we suggest it amend either section 12-2-25(B)(1) or section 12-43-220 to reflect this intention.

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Conclusion

Based on our analysis above, we are of the opinion that single-member LLCs are not eligible for the four percent assessment ratio allowed for legal residences as provided for in section 12-43-220 of the South Carolina Code.

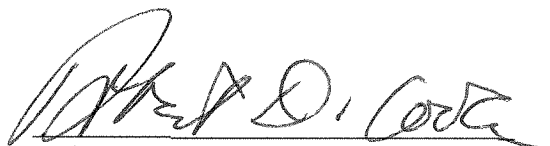
Very truly yours,

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