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COMPARISON OF LLC v. SUBCHAPTER S CORPORATION

LLC	***SUBCHAPTER S***
• upon borrowing, members can increase the tax basis of their LLC interests	• S corp. shareholders' tax basis in shares does not increase
• members can contribute appreciated property in exchange for membership interest (e.g., R/E) without realizing gain	• S corp. shareholder realizes gain upon contribution of appreciated property
• member pays self-employment tax	• Employer pays Medicare, FICA, FUTA, WC, State Unemployment
• double taxation avoided	• double taxation avoided
• earnings only taxed upon distribution	• earnings taxed whether distributed or not (but add to basis in shares)
• must file partnership tax return (1-member LLC treated as individual for tax purposes)	• only file individual tax return
• Health insurance is deductible for > 2% member)	• Health insurance is deductible for > 2% shareholders
• limited personal liability	• limited personal liability
• fewer structural/hierarchy formalities (but need for Operating Agreement)	• must follow state corporate law formalities (e.g., annual meeting)
• unlimited number of members; no restrictions on membership	• limited to 100 members; some restrictions on membership (e.g., individuals only)
• unrestricted transferability of interests (subject to Operating Agreement)	• unrestricted transferability of interests (subject to Shareholders' Agreement)
• can have multiple classes of stock; flexibility in distribution	• limited to one class of stock; proportionate distributions -NB variable voting rights does not violate one-class rule
• can have subsidiaries	• can have subsidiaries
• developing body of corporate and tax law	• well developed corporate and tax law

• losses deductible up to basis (loans do not increase basis); unused can carried forward indefinitely	• losses deductible up to basis (which is increased by loans); unused can be carried forward indefinitely
• not universally accepted/understood in business and financial circles	• universally accepted/understood
• all distributions are subject to self-employment tax	• ability to make dividends that are not subject to self-employment tax
• Perpetual existence	• Perpetual existence
• Capital is more difficult to raise, due to relative unfamiliarity with LLC form	• Capital can be raised easily through sale of stock
• An LLC is owned by Members who can either serve as day-to-day managers or appoint a Manager	• A corporation is owned by shareholders, who elect Directors, who appoint Officers for day-to-day management
• Formation - Articles of Organization, Appointment of Agent, Operating Agreement, Issuance of Membership Interests, Organizational Resolutions, IRS Form SS-4.	• Formation - Articles of Incorporation, Appointment of Agent, Code of Regulations, Issuance of Shares, Organizational Resolutions, [Shareholder Agree.], IRS Forms SS-4, 2553
• Dissolution - Only requires simple certificate filing	• Dissolution - requires obtaining releases or filing affidavits from taxing authorities
• Creditor of member only obtain a "charging order" (but no voting rights)	• Creditor of shareholder can obtain ownership of shares (and all economic and voting rights)
• No cumulative voting	• Cumulative voting gives minority owners more power
• Minority owners have lesser rights to access records	• Minority owners have greater right to access company records

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