

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

**NOTICE OF RULEMAKING**

Pursuant to the power vested in me as Commissioner of Finance by sections 389(b) and 1043 of the New York New York City Charter and section 11-687(1) of the Administrative Code of the City of New York, I hereby promulgate the within amendment to the Rules Relating to the New York City Banking Corporation Tax.

/S/ Andrew S. Eristoff  
Commissioner of Finance

Section 1. Subparagraph (iii) of paragraph (2) of subdivision (b) of Section 3-03 of Title 19 of the Rules of the City of New York Relating to the Banking Corporation Tax promulgated November 27, 1985 and last amended April 18, 2000, is amended to read as follows:

(iii) Each corporation included in a Federal consolidated group must compute its Federal taxable income for purposes of the banking corporation tax law as if such corporation had computed its Federal taxable income on a separate basis for Federal income tax purposes. Provided, however, in the case of a target corporation, as defined in section 338(d)(2) of the Internal Revenue Code, that is a member of a selling consolidated group, as defined in [§] section 338(h)(10)(B) of the Internal Revenue Code, with respect to which an election under [such §] section 338(h)(10) has been made, such election shall be recognized for purposes of Subchapter 3 of Chapter 6 of Title 11 of the Administrative Code. For purposes of determining entire net income, the Federal taxable income of such target corporation shall include any gain or loss on the deemed asset sale by such target corporation recognized by virtue of such election. For purposes of determining entire net income, the Federal taxable income of a member of the selling consolidated group, as so defined, that is subject to tax under such Subchapter shall not include any gain or loss on the sale or exchange of stock of [a] such target corporation [which is] not recognized by virtue of such election [, but only if such member files on a combined report with such target corporation for the period including the acquisition date, as such term is defined in section 338(h)(2) of the Internal Revenue Code].

§2. Subparagraph (iv) of such paragraph 2 is renumbered as (v) and a new subparagraph (iv) is added to read as follows:

(iv) For purposes of determining entire net income of an affiliated target corporation, as defined in Treasury Regulation section 1.338(h)(10)-1(b)(3) that is a member of a selling affiliated group that does not file a federal consolidated return, and for which an election under section 338(h)(10) of the Internal Revenue Code has been made, the Federal taxable income of such affiliated target corporation shall include any gain or loss on the deemed asset sale by such affiliated target corporation recognized by virtue of such election. For purposes of determining entire net income of the selling affiliate of such affiliated target corporation, Federal taxable income shall not include any gain or loss on the sale or exchange of stock of such affiliated target corporation not recognized by virtue of such election.

§3. Such paragraph is amended to add a new subparagraph (vi) to read as follows:

(vi) For purposes of Subchapter 3 of Chapter 6 of Title 11 of the Administrative Code, any election pursuant to section 338(h)(10) of the Internal Revenue Code made with respect to a target corporation that is an S corporation for Federal tax purposes will be deemed to be an invalid election and will not be recognized for purposes of such subchapter. If pursuant to this subparagraph, a section 338(h)(10) election of an S corporation is not recognized, the corresponding election pursuant to

section 338(g) will be deemed invalid and will not be recognized for purposes of Subchapter 3 of Chapter 6 of Title 11 of the Administrative Code. See Treas. Reg. §1.338(h)(10)-1(c)(4). The basis of the assets of the target corporation will be determined without regard to any adjustments made pursuant to section 338(b).

§4. Paragraph 2 of subdivision a of section 3-05 of such rules is amended to read as follows:

(2) *Short period returns.* (Administrative Code[,] §11-646(a).) A short period return is required in the case of:

(i) a newly organized taxpayer whose first accounting period is less than 12 months;

(ii) a foreign corporation [which]that becomes subject to the banking corporation tax in New York City subsequent to the commencement of its Federal accounting period;

(iii) a taxpayer [which]that dissolves, merges, consolidates or ceases to be subject to tax pursuant to the banking corporation tax prior to the close of its accounting period for Federal income tax purposes;

(iv) a taxpayer [which]that changes its accounting period for Federal income tax purposes;

(v) a taxpayer [which]that becomes part of or ceases to be part of a Federal consolidated group during the year; [or]

(vi) a taxpayer that changes from one Federal consolidated group to another Federal consolidated group during the year[.]; and

(vii) a taxpayer that is an old target (within the meaning of Treas. Reg. §1.338-2(c)(17)) for which an election is made pursuant to section 338 of the Internal Revenue Code and not deemed invalid pursuant to section 3-03(b)(2)(vi) of these rules, if the acquisition date, as defined in section 338(h)(2) of the Internal Revenue Code, is other than the last day of the taxpayer's taxable year determined without regard to such election.

A short period report required by this subdivision shall cover the period provided in subdivision (a) of section 3-02 of these rules and shall be filed as provided in subdivision (d) of this section.

§5. Paragraph 1 of subdivision d of such section is amended to read as follows:

(d) *Time and place for filing returns.* (1) *Time for filing returns.* (Administrative Code, §11-646(a)) Returns must be filed at the times set forth in this [subparagraph] subdivision.

(i) [Every]Except as provided in paragraph (8) of this subdivision, every calendar year taxpayer must file its return on or before the 15th day of March following the close of its calendar year.

(ii) [Every]Except as provided in paragraph (8) of this subdivision, every fiscal year taxpayer must file its return on or before the 15th day of the third month following the close of its fiscal year.

*Example 1:* A corporation selects the fiscal year basis of reporting and uses September 30 as the last day of its fiscal year. Its return must be filed on or before December 15.

(iii) [Every]Except as provided in paragraph (8) of this subdivision, every taxpayer using a 52-53 week accounting period must file its annual return on or before the 15th day of the third month following the date on which its fiscal year is deemed to have ended. A 52-53 week accounting period which ends within seven days from the last day of any calendar month will be deemed to have ended on the last day of such month (See: §3-02(a)(4) of these regulations — 52-53 week fiscal year taxpayers).

*Example 2:* A corporation selects a 52-53 week accounting period ending on the Monday nearest the last day of November. In 1985, the Monday nearest the last day of November is Monday, December 2. The accounting period is deemed to have ended on the last day of November and its return must be filed on or before February 15, 1986.

§6. Such subdivision is amended to add a new paragraph (8) to read as follows:

(8) *Short period reports.* (i) *Taxpayers joining a Federal consolidated group.* (A) *Short period precedes joining the group.* Except as otherwise provided in subparagraph (iii) or (iv) of this paragraph, where a taxpayer, not previously part of a Federal consolidated group, becomes part of a Federal consolidated group on a day other than the first day of its Federal taxable year, determined without reference to its membership in the group, and the taxpayer is required to file a Federal short period return for the period from the first day of its taxable year through the end of the day on which it becomes such a member pursuant to Treas. Reg. §1.1502-76(b), the taxpayer must file a report under this section covering the same period. The short period report required by this subparagraph shall be due on the due date for the Federal short period return as provided by paragraph (1) or (2) of subdivision (c) of Treas. Reg. §1.1502-76, whichever is applicable. This provision does not apply in the case of an amended Federal short period return required under Treas. Reg. §1.1502-76(c)(2). An amended return for any such short period must be filed within 90 days after the taxpayer files an amended return with

the United States Treasury Department. See paragraph (4) of subdivision (a) of this section.

(B) *Short period follows joining group.* Except as otherwise provided in subparagraph (iii) or (iv) of this paragraph, where a taxpayer joins a Federal consolidated group, including a situation where a taxpayer leaves one group to join another, the taxpayer must file a short period report under this paragraph covering the period from the day it becomes a member of the group through the end of its new taxable year for purposes of Subchapter 3 of Chapter 6 of Title 11 of the Administrative Code of the City of New York, which shall be the same as the end of the taxable year of the new consolidated group. Such report shall be filed on or before the 15<sup>th</sup> day of the third month following the end of its new taxable year.

(ii) *Taxpayers leaving a Federal consolidated group, (A) Short period precedes leaving group.* Except as otherwise provided in subparagraph (iii) or (iv) of this paragraph, where a taxpayer ceases to be part of a Federal consolidated group, including a situation where a taxpayer leaves one Federal consolidated group to join another, the taxpayer must file a report under this paragraph covering the period from the beginning of its taxable year up to the date it leaves the group. Such report shall be the filed on or before the 15<sup>th</sup> day of the third month following the close of its taxable year determined as if it had not ceased to be a member.

(B) *Short period follows leaving group.* Except as otherwise provided in subparagraph (iii) or (iv) of this paragraph, where a taxpayer ceases to be part of a Federal consolidated group, other than a situation where a taxpayer leaves one Federal consolidated group to join another, the taxpayer must file a short period report under this paragraph covering the period from the day it ceases to be a member of the group through the end of its taxable year determined as if it had not left the group. Such report shall be filed on or before the 15<sup>th</sup> day of the third month following the close of its taxable year determined as if it had not ceased to be a member.

(iii) *Short period returns relating to IRC §338 elections.* (A) Subject to the provisions of clause (B), if a taxpayer is an old target (within the meaning of Treas. Reg. §1.338-2(c)(17)) any short period report required by section 3-05(a)(2) of these rules shall cover the same period as is covered by the Federal report and shall be due on the due date for the Federal short period return set forth in Treas. Reg. §1.338-10(a)(6), including any deemed extensions granted pursuant to Treas. Reg. §1.338-10(a)(6)(ii)(B).

(B) This subparagraph shall not apply to an amended return described in Treas. Reg. §1.338-10(a)(6)(ii)(D). An amended return for any such short period must be filed within 90 days after the taxpayer files an amended return with the United States Treasury Department. See paragraph (4) of subdivision (a) of this section.

(C) Subparagraph (i) of paragraph (3) of this subdivision shall not apply to a taxpayer for which an election is made pursuant to section 338 of the Internal

Revenue Code, regardless of whether such election is deemed invalid pursuant to section 3-03(b)(2)(vi) of these rules, notwithstanding any deemed cessation of existence of such taxpayer pursuant to Treas. Reg. §1.338(h)(10)-1(d)(4).

(iv) If a corporation required to file a short period report as provided in this subdivision becomes subject to tax under Subchapter 3 of Chapter 6 of Title 11 of the Administrative Code on a date other than the first day of such short period, the short period report shall begin on the date the corporation becomes subject to tax under such Subchapter. Except as provided in subparagraph (iii) of this subdivision, if a corporation required to file a short period report as provided in this subdivision ceases to be subject to tax under Subchapter 3 of Chapter 6 of Title 11 of the Administrative Code on the last day of such short period, the provisions of paragraph (3) of this subdivision shall apply in determining the due date for such short period report.

§7. Subparagraph (i) of paragraph (3) of subdivision (d) of such section is amended to read as follows:

(i) (A) A taxpayer [which]that ceases to do business in New York City in a corporate or organized capacity and thereby ceases to be subject to the banking corporation tax [or any taxpayer which ceases to be subject to the banking corporation tax because of a change in the nature of its activities or because of a change in the ownership or control of its voting stock ](See: §3-02(c) of these [regulations] rules – Cessation Periods), is required to file a return on or before the 15<sup>th</sup> day following the date of such cessation[, date of such change] or at such other time as the commissioner of Finance may require, covering the period from the close of its last calendar or fiscal year up to and including the date of such cessation [or such change].

(B) A taxpayer that ceases to be subject to the banking corporation tax because of a change in the nature of its activities or because of a change in the ownership or control of its voting stock (See: §3-02(c) of these rules – Cessation Periods), is required to file a return on or before the 15<sup>th</sup> day following the date of such change or at such other time as the commissioner of Finance may require, covering the period from the close of its last calendar or fiscal year up to and including the date of such change.

This subparagraph shall not apply to a taxpayer for which an election is made pursuant to section 338 of the Internal Revenue Code, regardless of whether such election is deemed invalid pursuant to section 3-03(b)(2)(vi) of these rules, notwithstanding any deemed cessation of existence of such taxpayer pursuant to Treas. Reg. §1.338(h)(10)-1(d)(4).

§8. The amendments made by sections 1 through 3 and section 7 will be effective immediately and will apply to all open years. The amendments made by sections 4 through 6 will apply to returns filed for tax periods beginning on or after January 1, 2001.

## **BASIS AND PURPOSE OF AMENDMENTS**

These amendments affect the portion of the Rules Relating to the New York City Banking Corporation Tax governing the calculation of entire net income and the filing of returns. Specifically, these amendments provide that the Department will recognize and give effect to a Federal election made under Internal Revenue Section 338(h)(10) in all cases except where the target corporation is an S corporation for Federal income tax purposes. In addition, these amendments provide that certain short period reports resulting from changes to a Federal consolidated group will be due on the same date as the Federal short period return is due. The amendments relating to IRC §338(h)(10) elections will be effective immediately and will apply to all open years. The amendments relating to short period returns will be effective immediately and will apply to returns filed for tax periods beginning on or after January 1, 2001.

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Andrew S. Eristoff  
Commissioner of Finance