



April 2, 2009

RE: Request for Ruling
Anonymous
General Corporation Tax
FLR 084884-006

Dear Mr. :

This responds to your request, dated September 22, 2008, for a ruling regarding the application of the New York City General Corporation Tax (the "GCT") to hypothetical facts concerning the qualification of an obligation as a "qualified corporate debt instrument." This office received additional information concerning this request on January 23, 2009.

FACTS

You have presented the following hypothetical facts:

The Taxpayer ("Company X") is a wholly owned subsidiary of a publicly traded company (the "US Parent"). The US Parent, a diversified holding company, engages, through its subsidiaries, in a variety of businesses, including manufacturing, telecommunications, and real estate businesses. Company X holds directly, or indirectly, the vast majority of the US Parent's businesses. Company X and the US Parent are domiciled in New York City and are subject to the New York State Franchise Tax and the GCT. Neither the US Parent nor Company X is principally engaged in the business of lending funds.

In 2006, Company X acquired approximately 9.9 percent of the stock of an Australian company (the "Australian Parent"), which is traded on the Australian stock exchange. The Australian Parent has a wholly-owned subsidiary (the "Australian Subsidiary"). The Australian Subsidiary, a public limited company, is treated as a corporation for federal income tax purposes.

The Note. In 2006, Company X loaned cash to the Australian Subsidiary in exchange for a note (the "Note"). Pursuant to the terms of the Note, the Australian Subsidiary is the "issuer" and the Australian Parent is the "guarantor." Interest on the Note is not fixed, but is payable at a rate of four percent of the net revenues of the Australian Parent. While the amount of interest to be paid is not fixed, the right to receive payments is definite and not contingent. The Note matures in 13 years from issue, at which time the principal must be repaid to Company X. For federal income tax purposes, the Note is treated as a loan. Company X is currently considering disposing of its interest in the Note.

ISSUE

You have requested a ruling that the Note is a qualifying corporate debt instrument under section 11-37(d)(1) of Title 19 of the Rules of the City of New York (“RCNY”) and that any gain or loss resulting from its disposition will be treated as gain or loss from investment capital.

CONCLUSION

Based on the facts presented, we conclude that the Note is a qualifying corporate debt instrument under 19 RCNY section 11-37(d)(1), and that any gain or loss resulting from its disposition will be treated as gain or loss from investment capital.

DISCUSSION

The GCT is imposed on corporations that do business, employ capital, own or lease property, or maintain an office in New York City. Section 11-603.1 of the New York City Administrative Code (the “Code”). Code section 11-602.5 provides that investment income means “income, including capital gains in excess of capital losses, from investment capital. . .” less deductions that are directly attributable to investment capital or income.

As a result, if the Note constitutes investment capital for purposes of the GCT, any gain or loss resulting from its disposition will be treated as gain or loss from investment capital.

The Note. Company X loaned cash to the Australian Subsidiary in exchange for the Note. Company X owns 9.9 percent of the Australian Parent and the Australian Subsidiary, a public limited company treated as a corporation for federal income tax purposes, is a wholly-owned subsidiary of the Australian Parent. Pursuant to the terms of the Note, the Australian Subsidiary is the “issuer” and the Australian Parent is the “guarantor.” Interest on the Note is not fixed, but is payable at a rate of four percent of the net revenues of the Australian Parent. While the amount of interest to be paid is not fixed, the right to receive payments is definite and not contingent. The Note matures in 13 years from issue, at which time the principal must be repaid to Company X. For federal income tax purposes, the Note is treated as a loan.

Investment capital. Code section 11-602.4 provides that “investment capital” includes “stocks, bonds, and other securities, corporate and governmental, not held for sale to customers in the regular course of business. . .” Under 19 RCNY section 11-37(a)(4) investment capital does not include:

- (i) stock issued by the taxpayer;
- (ii) stocks, bonds or other securities constituting subsidiary capital;
- (iii) securities issued by an individual, partnership, trust or other non-governmental entity that is not a corporation within the definition contained in Administrative Code §11-602.1 (e.g., Federal National Mortgage Association and Government National Mortgage Association pass-through certificates);
- (iv) regular interests and residual interests in a real estate mortgage investment conduit (REMIC), as defined in section 860D of the Internal Revenue Code;
- (v) assets reflected in the taxpayer's books and records in connection with futures contracts and forward contracts except as provided in subdivision (g) of this section; or
- (vi) stocks, bonds and other securities held by the taxpayer for sale to customers in the regular course of its business.

The Note is not excluded as investment capital under these tests: (i) it was not issued by the taxpayer; (ii) Company X does not own 50% of the Australian subsidiary (Code section 11-602.2); (iii) as explained below, the Australian Subsidiary is a corporation under Code section 11-602.1; (iv) the Australian Subsidiary is not a REMIC; (v) the assets are not reflected on Company X's books in connection with futures contracts and forward contracts; and (vi) Company X does not hold the Note for sale to customers in the regular course of business.

Qualifying corporate debt instruments. Section 11-37(c)(3) of Title 19 of the RCNY provides that "stock, bonds and other securities" include "qualifying corporate debt instruments." That regulation section also provides that debt instruments deemed to be cash do not constitute "stock bonds and other securities." Under 19 RCNY section 11-37(a)(3), any debt instrument that is payable by its terms on demand or within six months and one day from the date on which the debt was incurred, is deemed to be cash on hand or on deposit.

Under 19 RCNY section 11-37(d)(1), the term "qualifying corporate debt instruments" means all debt instruments issued by a corporation other than the following:

- (i) instruments issued by the taxpayer;
- (ii) instruments that constitute subsidiary capital in the hands of the taxpayer;
- (iii) instruments acquired by the taxpayer for services rendered, or for the sale, rental or other transfer of property, where the obligor is the recipient of the services or property; however, where a taxpayer sells or otherwise transfers property that is investment capital in the hands of such taxpayer (e.g., stock) and receives in return a corporate obligation issued by the recipient of such property, such corporate obligation, if it is not otherwise excluded from the category of investment capital, would constitute investment capital in the hands of the taxpayer;
- (iv) instruments acquired for funds if (i) the obligor is the recipient of such funds, (ii) the taxpayer is principally engaged in the business of lending funds, and (iii) the obligation is acquired in the regular course of the taxpayer's business of lending funds;
- (v) accepted drafts (such as banker's acceptances and trade acceptances) where the taxpayer is the drawer of the draft;
- (vi) instruments issued by a corporation that is a member of an affiliated group that includes the taxpayer; and
- (vii) accounts receivable, including those held by a factor.

As a threshold matter, to be a qualifying corporate debt instrument, the instrument must be "debt" and be "corporate." Although interest on the Note is not fixed, but is payable at a rate of four percent of the net revenues of the Australian Parent, the right to receive payments is definite and not contingent. The Note matures in 13 years from issue, at which time the principal must be repaid to Company X. For federal income tax purposes, the Note is treated as a loan. Thus, there is no reason that the Note should not be treated as debt.

Concerning the issue of whether the Note is "corporate" debt, the Note is issued by the Australian Subsidiary, a wholly owned subsidiary of the Australian Parent, which is treated as a corporation for federal income tax purposes. Section 11-02(a) of Title 19 of the RCNY provides that: "the term corporation includes an entity as such under the laws of the United States, any State, territory or possession thereof, the District of Columbia, or any foreign country...." See also Code section 11-602.1. The Australian Subsidiary is, thus, a corporation for purposes of the GCT, and the Note is, thus, a "corporate" obligation.

The Note, therefore, meets the threshold requirements to be a qualifying corporate debt instrument. We also conclude that the Note is not excluded under the remaining provisions of 19 RCNY section 11-37(d)(1): (i) the Note was not issued by the taxpayer; (ii) the Note does not constitute subsidiary capital in the hands of the taxpayer (Code section 11-602.2); (iii) the Note was not acquired for services rendered, or for the sale, rental or other transfer of property; (iv) Company X is not principally engaged in the business of lending funds; (v) the Note is not an accepted draft; (vi) Company X and the Australian Subsidiary are not part of an affiliated group (19 RCNY §11-37(d)(2)); and (vii) the Note is not accounts receivable.

In addition, the Note is not payable by its terms on demand or within six months and one day from the date on which the debt was incurred.

Conclusion. Based on the foregoing, we conclude that the Note, as a qualifying corporate debt instrument, is investment capital under 19 RCNY section 11-37(d)(1), and any gain or loss resulting from its disposition will be treated as gain or loss from investment capital.

Sincerely,

Dara Jaffee
Assistant Commissioner
Legal Affairs Division

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