

15-3 July 17, 2015

FINANCE MEMORANDUM

Investment Capital Identification Requirements for the Corporate Tax of 2015

The 2015-2016 New York State budget, Part D of Chapter 60 of the Laws of 2015, significantly changed the taxation of corporations in New York City (the “City”). With the exception of S corporations, all corporations, including banks, are subject to a new corporate tax under Subchapter 3-A of Chapter 6 of Title 11 of the Administrative Code of the City of New York. The change is effective January 1, 2015.

S corporations, and qualified subchapter S subsidiaries, under subchapter S of the Internal Revenue Code of 1986, as amended, continue to file returns and pay tax under the City’s General Corporation Tax and Banking Corporation Tax.

Subchapter 3-A adopts a new paradigm for the taxation of investment income and investment capital that conforms to the New York State Article 9-A Corporate Franchise Tax, as amended by Part A of Chapter 59 of the Laws of 2014 and Part T of Chapter 59 of the Laws of 2015.

Under the new definition of investment capital in Administrative Code section 11 652.4(a) and Tax Law section 208.5(a), investment capital means those investments in stocks of non-unitary corporations that satisfy a five-part test, which requires that the investments in stock:

- satisfy the definition of a capital asset under section 1221 of the Internal Revenue Code (IRC) at all times the taxpayer owned such stock during the tax year,
- are held by the taxpayer for investment for more than one year,
- if disposed of, generate (or would generate) long-term capital gains or losses under the IRC,
- for stocks acquired on or after January 1, 2015, have never been held for sale to customers in the regular course of business after the close of the day on which the stock was acquired, and
- before the close of the day on which the stock was acquired, must be clearly identified in the corporation’s records as stock held for investment in the same manner as required under IRC section 1236(a)(1) for the stock of a dealer in securities to be eligible for capital gain treatment (whether or not the corporation is a dealer in securities subject to section 1236).¹

In the case of a combined report, the investment capital requirements apply to investments in stock held by all corporations included in the group, whether or not the corporations are taxpayers.

¹ Corporations that are floor specialists as defined in IRC section 1236(d) that have stock that is subject to the timing rules for identification set forth in section 1236(d)(1)(A) must clearly identify such stock as held for investment in the floor specialists’ records before the close of the seventh business day after acquisition.

The purpose of this memorandum is to describe the identification procedures required to satisfy the fifth part of the investment capital test. This memorandum is consistent with New York State Department of Taxation and Finance Technical Memorandum TSB-M-15(4)C, 5(l), and a taxpayer that satisfies the investment capital identification requirements for Article 9-A taxpayers set forth in that memorandum also satisfies the investment capital identification requirements for Subchapter 3-A taxpayers set forth below.

Identification by dealers

For corporations that are dealers subject to IRC section 1236, stock acquired before and after October 1, 2015, must be clearly identified in the corporation's records as stock held for investment under IRC section 1236(a)(1) in order to satisfy the investment capital identification requirement. A separate New York identification is not allowed because the presence or absence of the federal identification under IRC section 1236 is determinative. Identification of the stock as held for investment for purposes of IRC section 475 is not sufficient.

Transition rule for non-dealers

For corporations that are not dealers subject to IRC section 1236, stock acquired before October 1, 2015, that otherwise meets the requirements to be investment capital, must be clearly identified in the corporation's records as stock held for investment before October 1, 2015, in order to satisfy the investment capital identification requirement.

Identification procedures for non-dealers

The investment capital identification procedures for corporations that are not dealers subject to IRC section 1236 are as follows:

- The stock must be recorded in an account maintained for investment capital purposes only. That account must be separate from any account maintained for stock held for sale to customers. The account may be an account maintained in the taxpayer's books of account for recordkeeping purposes only or it may be a separate depository account maintained by a clearing company as nominee for the corporation.
- The investment capital account must disclose the name of the stock, the CUSIP number of the stock (or CINS number for international securities), date of purchase, the number of shares purchased and the purchase price of the stock. If the stock is sold, the investment capital account also must disclose the date of sale, the number of shares sold and the sales price for that stock. The investment capital account must be set up in a manner that readily identifies the length of time the stock was owned by the corporation.

Identification procedures for stock acquired pursuant to options

If the stock is purchased by a corporation pursuant to an option, the stock may be identified as investment capital only if the corporation, before the close of the day on which the option was acquired, clearly identified the option in its records as held for investment. For corporations that are not dealers for purposes of IRC section 1236, any stock purchased on or after October 1, 2015, pursuant to an option acquired by the corporation prior to October 1, 2015, may not be identified as investment capital unless the corporation clearly identified the option in its records as held for investment prior to October 1, 2015.

Corporate partnership rules

If the corporation is a partner in a partnership and the corporation is using the aggregate method to compute its tax, the corporation's proportional part of the stock owned by the partnership may qualify as investment capital if the statutory requirements for investment capital are satisfied at the partnership level. In particular, the partnership must follow the identification procedures specified in this memorandum for the stock to qualify as investment capital. Thus, if the partnership is a dealer for purposes of IRC section 1236, stock acquired before and after October 1, 2015, must

be clearly identified by the partnership as held for investment under section 1236(a)(1) in order to satisfy the investment capital identification requirement. For partnerships that are not dealers subject to IRC section 1236, stock acquired before October 1, 2015, that otherwise meets the requirements to be investment capital, satisfies the investment capital identification requirement if the partnership makes the identification before October 1, 2015, in accordance with the identification procedures described in this memorandum for corporations that are not dealers.

If, on or after October 1, 2015, a corporation becomes a partner in a partnership that is not a dealer for purposes of IRC section 1236 and the partnership, prior to the date the corporation becomes a partner, had not identified any stock as investment capital using the procedures described in this memorandum, only stock acquired by the partnership on and after the date the corporation became a partner may potentially qualify as investment capital.

Identification on combined reports

Each corporation included in a combined report must follow the identification procedures described in this memorandum for investments in stock owned by that corporation. Thus, each corporation included in the combined report that is not a dealer subject to IRC section 1236 must maintain its own investment capital account and follow the identification procedures described in this memorandum.

Effect of identification

If a stock is not clearly identified as investment capital in the manner required, that stock will **not** qualify as investment capital as defined in Administrative Code Section 11 652.4(a). However, even if the stock is identified as required, it will not qualify as investment capital unless all the other requirements of Administrative Code Section 11 652.4(a)(i)-(iv) are satisfied.

NOTE: This is an informational statement of existing department policies or of changes to the law, regulations, or department policies. It is accurate on the date issued. Subsequent changes in the law or regulations, judicial decisions, Tax Appeals Tribunal decisions, or changes in department policies could affect the validity of the information presented in this statement.