



Amendments to the Franchise Tax Regulations Regarding Combined Reports

This memorandum explains amendments to the franchise tax regulations regarding combined reports. The amendments apply to taxable years beginning on or after January 1, 2013.

On December 17, 2012, the Commissioner of Taxation and Finance adopted amendments to the Business Corporation Franchise Tax Regulations. These amendments provide guidance with respect to Tax Law section 211.4 regarding the circumstances under which a taxpayer corporation is required or permitted to file a combined report with other related corporations. The amendments apply to taxable years beginning on or after January 1, 2013.

Under section 211.4 of the Tax Law, as amended by Chapter 60 of the Laws of 2007, a taxpayer that is engaged in a unitary business with its related corporations is required to file a combined report if there are substantial intercorporate transactions among the related corporations, regardless of the transfer price of the intercorporate transactions. Related corporations are corporations that meet the ownership and control requirements of Tax Law section 211.4 and section 6-2.2 of the regulations (generally an 80% direct or indirect stock ownership test). In addition, where substantial intercorporate transactions are absent, a combined report covering corporations engaged in a unitary business may be required or permitted where filing a combined report is necessary to properly reflect the tax liability.

The Tax Department issued a technical memorandum, [TSB-M-08\(2\)C](#), to address its interpretation of the statutory provisions concerning combined reporting. The TSB-M addressed, among other topics, when the substantial intercorporate transactions requirement will be met based upon a corporation's receipts and expenditures and based upon intercorporate asset transfers. The TSB-M set forth a 10-step analysis for determining whether a combined report would be required and, if so, which corporations would be included.

The amendments conform the regulations to current law and largely codify the interpretations contained in TSB-M-08(2)C. Certain amendments, however, represent a departure from interpretations set forth in the TSB-M regarding the substantial intercorporate transactions determination. The amendments change the treatment of interest paid and received on loans between related corporations where the loans constitute subsidiary capital. Under the TSB-M, this interest was not considered in the determination. Under the amendments, the interest on loans constituting subsidiary capital will factor in the determination.

With respect to the asset transfer test, which is based upon gross income derived directly from the transferred assets, the TSB-M provided that only assets transferred in exchange for stock or paid in capital would be considered. While retaining this general rule, the amendments provide that transfers of assets other than for stock or paid in capital, including through a nonmonetary property dividend, would be considered if the principal purpose of the transfer is the avoidance or evasion of tax. In addition, the amendments expand the treatment of income

from the sale of items produced from transferred production equipment. While income from the sale of items produced from transferred production equipment, by itself, would not constitute gross income derived directly from the transferred assets, income from the sale of items produced from transferred assets constituting substantially all of the production process, including associated intangibles, such as might occur in the transfer of an operating division, would constitute gross income derived directly from the transferred assets.

Amendments have also been made to the regulations relating to real estate investment trusts and regulated investment companies. Taxpayers are now referred to section 211.4 of the Tax Law for rules relating to the inclusion of these entities in a combined report. These rules have been amended by Chapter 57 of the Laws of 2008, which is described in [TSB-M-09\(1\)C](#). In addition, amendments have been made to the Franchise Tax on Banking Corporations Regulations to conform to amendments made to the Business Corporation Franchise Tax Regulations. These amendments deleted language requiring that all corporations included in the combined group use the same accounting period and provided rules for when a corporation's taxable year differs from that of its taxpayer parent. A new Part 33 has been added to the Franchise Taxes on Insurance Corporations Regulations to provide that the combined reporting provisions applicable to general business corporations apply to insurance corporations, except where otherwise provided by the Tax Law or Part 33.

For the full text of the amendments, see our Web site at www.tax.ny.gov.

NOTE: A TSB-M 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 a TSB-M.