

**New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau**

TSB-M-80 (7)C
Corporation Tax
July 25, 1980

Opinion of Counsel

Classification of Long Term Notes

April 8, 1980

Dear

This is in reply to your January 11, 1979 letter wherein you stated that for taxable years 1974-1976 the Audit Division of this Department proposed to treat the final 15 or 20 year notes of independent companies purchased by _____ as business capital. You stated that these notes have been treated by _____ as investment capital pursuant to a January 27, 1955 opinion of Deputy Commissioner and Counsel, Mortimer M. Kassell.

I have been informed that the audit for those years has been closed and that the final 15 or 20 year notes were accepted by the auditors as investment capital since this is the classification accorded such notes in the January 27, 1955 opinion of Mr. Kassell. However, upon reviewing the briefs and loan documents which you submitted, I am of the opinion that the final 15 or 20 year notes are and should have been classified as business capital.

Subdivision 7 of section 208 of the Tax Law defines "business capital" as:

"all assets, other than subsidiary capital, investment capital and stock issued by the taxpayer, less liabilities not deducted from subsidiary or investment capital which are payable by their terms on demand or within one year from the date incurred, other than loans or advances outstanding for more than a year as of any date during the year covered by the report, except that, subject to the provisions of subdivision six of section two hundred ten of this chapter, cash on hand and on deposit shall be treated as investment capital or as business capital as the taxpayer may elect".

Subdivision 5 of section 208 of the Tax Law defines "investment capital" as:

"investments in stocks, bonds and other securities, corporate and governmental, not held for sale to customers in the regular course of business, exclusive of subsidiary capital and stock issued by the taxpayer, provided, however, that, in the discretion of the tax commission, there shall be deducted from investment capital any liabilities payable by their terms on demand or within one year from the date incurred, other than loans or advances outstanding for more than a year as of any date during the year covered by the report, which are attributable to investment capital". (underlining supplied for emphasis)

Section 3-4.2(c) of the Business Corporation Franchise Tax Regulations state that the term "other securities", as used in the definition of investment capital, is limited to:

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"securities issued by governmental bodies and securities issued by corporations of a like nature as stocks and bonds, which are customarily sold in the open market or on a recognized exchange, designed as a means of investment, and issued for the purpose of financing corporate enterprises and providing a distribution of rights in, or obligations of, such enterprises. Thus 'other securities' include debentures, notes of a type commonly dealt in upon securities exchanges or markets or commonly dealt in as a medium for investment, and certificates of indebtedness which have many of the essential characteristics of bonds, and certificates of interest and other instruments evidencing proprietary rights in corporate enterprises which have many of the essential characteristics of stock. They do not include corporate obligations not commonly known as securities, such as real property bonds and mortgages, chattel bonds and mortgages, contracts of sale, purchase money obligations, short-term notes acquired in the ordinary course of trade or business for services rendered or for sales of property which is primarily held for sale to customers, bills of lading, bills of exchange, bankers' acceptances and other commercial instruments." (20 N.Y.C.R.R. 3-4.2(c))

According to the documents you have submitted, the final 15 or 20 year notes are secured by real property and chattel mortgages. Therefore, such notes are specifically excluded from the definition of "other securities" and are properly classified as business capital. This distinguishing fact was not set forth in the January 27, 1955 opinion of Mr. Kassell.

To the extent this opinion contradicts the January 27, 1955 opinion of Mr. Kassell, such opinion is rescinded for taxable years beginning on or after the date of this opinion.

Very truly yours,

RALPH J. VECCHIO
Deputy Commissioner and Counsel