

**New York State Department of Taxation and Finance**  
**Office of Tax Policy Analysis**  
**Technical Services Division**

TSB-A-02(11)C  
Corporation Tax  
July 3, 2002

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C010312A

On March 12, 2001, a Petition for Advisory Opinion was received from KPMG LLP, Attn. James V. Nolan, 345 Park Avenue, New York, New York 10154.

The issue raised by Petitioner, KPMG LLP, is whether certain placements by a corporation with a bank that is an affiliated corporation are treated as “cash on deposit” for purposes of Article 9-A of the Tax Law.

Petitioner submits the following facts as the basis for this Advisory Opinion, including additional information submitted on September 18, 2001 relating to the placements.

XYZ is a New York corporation. ABC, also a New York corporation, is a wholly-owned subsidiary of XYZ. DEF, a New York corporation, is a member of an affiliated group of corporations as defined pursuant to section 1504(a) of the Internal Revenue Code that includes XYZ and ABC.

XYZ is subject to tax in New York State pursuant to Article 32 of the Tax Law. ABC and DEF are each subject to tax in New York pursuant to Article 9-A of the Tax Law. XYZ, ABC and DEF are included in a consolidated federal income tax return. ABC and DEF have substantial investment capital for purposes of Article 9-A of the Tax Law.

ABC and DEF invest excess cash from their operations in interest bearing accounts with XYZ. Petitioner states that such interest bearing accounts are time deposits under section 204.2(c)(1)(i) Federal Reserve System Regulation D with maturity dates 30 days and longer. ABC and DEF record such investments as “placements and interest bearing balances due from banks,” for financial statement purposes.

Cash received from DEF is accounted for by XYZ and shown on XYZ’s bank regulatory required Call Reports, filings with the Federal Deposit Insurance Corporation and other regulatory agencies, as “deposit liabilities”. Cash received from ABC is accounted for by XYZ as “deposit liabilities”, but is not shown on XYZ’s Call Reports, because XYZ is not required to show intercompany transactions with subsidiaries on such reports.

XYZ, ABC and DEF’s operations are consolidated for financial statement reporting purposes and all intercompany accounts, including ABC and DEF’s “placements” of excess cash, are eliminated pursuant to generally accepted accounting principles for purposes thereof.

## **Discussion**

Section 208.7(a) of the Tax Law provides that the term “business capital” means all assets, other than subsidiary capital, investment capital and stock issued by the taxpayer, less liabilities not deducted from subsidiary or investment capital except that cash on hand and on deposit shall be treated as investment capital or as business capital as the taxpayer may elect.

“Cash on hand and cash on deposit” as used in section 208.7(a) of the Tax Law is not defined in Article 9-A of the Tax Law or in the Article 9-A Regulations. However, section 3-3.2(a)(1) of the Article 9-A Regulations, in defining investment capital, provides that any debt instrument, including a certificate of deposit, which is described in section 3-3.2(c)(2) or (3) of the Article 9-A Regulations, and is not described in section 3-3.2(a)(2) of the Article 9-A Regulations, and which 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. Any such debt instrument which is payable by its terms more than six months and one day from the date on which the debt was incurred is deemed to be cash on hand or on deposit on any day which is not more than six months and one day prior to its date of maturity.

Section 3-3.2(a)(1) of the Article 9-A Regulations also provides that cash includes shares in a money market mutual fund. A money market mutual fund is a no-load, open-end investment company registered under the Federal Investment Company Act of 1940 which attempts to maintain a constant net asset value per share and holds itself out to be a “money market” fund.

A taxpayer may not elect to treat part of its cash as investment capital and part as business capital. No election to treat cash as investment capital may be made where the taxpayer has no other investment capital.

In Morrison & Foerster, Adv Op Comm T&F, February 25, 1992, TSB-A-92(3)C, it was held that the term “cash on deposit” to the ordinary reader must mean nothing more than cash deposited in a bank or similar institution, both for safekeeping and to earn income.

Federal Reserve System Regulation D “Reserve Requirements of Depository Institutions,” establishes a category of deposits designated as “time deposits” for purposes of federal reserve requirements on deposit liabilities of a bank. Section 204.2(c)(1) of the Federal Reserve System Code of Federal Regulations (12 CFR Ch II, pt 204.2(c)(1)) defines “time deposit.” Pursuant to section 204.2(c)(1)(i) a “time deposit” means:

a deposit that the depositor does not have a right and is not permitted to make withdrawals from within six days after the date of deposit unless the deposit is subject to an early withdrawal penalty of at least seven days’ simple interest on amounts withdrawn within the first six days after deposit. A time deposit from which

partial early withdrawals are permitted must impose additional early withdrawal penalties of at least seven days' simple interest on amounts withdrawn within six days after each partial withdrawal. If such additional early withdrawal penalties are not imposed, the account ceases to be a time deposit. The account may become a savings deposit if it meets the requirements for a saving deposit; otherwise it becomes a transaction account. Time deposit includes funds —

(A) payable on a specified date not less than seven days after the date of deposit;

(B) payable at the expiration of a specified time not less than seven days after the date of deposit;

(C) payable only upon written notice that is actually required to be given by the depositor not less than seven days prior to withdrawal;

(D) held in club accounts (such as Christmas club accounts and vacation club accounts that are not maintained as savings deposits) that are deposited under written contracts providing that no withdrawal shall be made until a certain number of periodic deposits have been made during a period of not less than three months even though some of the deposits may be made within six days from the end of the period; or

(E) share certificates and certificates of indebtedness issued by credit unions, and certificate accounts and notice accounts issued by savings and loan associations;

The Federal Financial Institutions Examination Council (“FFIEC”) is a formal interagency body empowered to prescribe uniform principles, standards, and report forms for the federal examination of financial institutions by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision and to make recommendations to promote uniformity in the supervision of financial institutions. The FFIEC, in its glossary for use by a financial institution in preparing its Report of Condition and Income (FFIEC 031 and 041, the “Call Reports”) provides that “[t]he basic statutory and regulatory definitions of ‘deposits’ are contained in Section 3(*l*) of the Federal Deposit Insurance Act and in Federal Reserve Regulation D. The definitions in these two legal sources differ in certain respects. Furthermore, for purposes of these [call] reports, the reporting standards for deposits specified in these instructions do not strictly follow the precise legal definitions in these two sources.” (FFIEC 031 and 041, Glossary, Deposits at A-17 (6-01)). However, the FFIEC defines “time deposit” similarly to the definition contained in Federal Reserve Regulation D, and provides further that time deposits take two forms:

“time certificates of deposit” and “time deposits, open account”. The FFIEC describes each in such FFIEC 031 and 041, Glossary, Deposits at (II)(2)(b), A-23 (6-01), which provides that:

(i) Time certificates of deposit (including rollover certificates of deposit) are deposits evidenced by a negotiable or nonnegotiable instrument, or a deposit in book entry form evidenced by a receipt or similar acknowledgment issued by the bank, that provides, on its face, that the amount of such deposit is payable to the bearer, to any specified person, or to the order of a specified person, as follows:

(1) on a certain date not less than seven days after the date of deposit,

(2) at the expiration of a specified period not less than seven days after the date of the deposit, or

(3) upon written notice to the bank which is to be given not less than seven days before the date of withdrawal.

(ii) Time deposits, open account are deposits (other than time certificates of deposit) for which there is in force a written contract with the depositor that neither the whole nor any part of such deposit may be withdrawn prior to:

(1) the date of maturity which shall be not less than seven days after the date of the deposit, or

(2) the expiration of a specified period of written notice of not less than seven days.

These deposits include those club accounts, such as Christmas club and vacation club accounts, that are made under written contracts that provide that no withdrawal shall be made until a certain number of periodic deposits has been made during a period of not less than three months, even though some of the deposits are made within six days of the end of such period.

Time deposits do not include the following categories of liabilities [of the financial institution] even if they have an original maturity of seven days or more:

(1) Any deposit or account that otherwise meets the definition of a time deposit but that allows withdrawals within the first six days after deposit and that does not require an early withdrawal penalty of at least seven days’ simple interest on amounts withdrawn within those first six days. Such deposits or accounts that

meet the definition of a savings deposit shall be reported as savings deposits; otherwise they shall be reported as demand deposits.

(2) The remaining balance of a time deposit if a partial early withdrawal is made and the remaining balance is not subject to additional early withdrawal penalties of at least seven days' simple interest on amounts withdrawn within six days after each partial withdrawal. Such time deposits that meet the definition of a savings deposit shall be reported as savings deposits; otherwise they shall be reported as demand deposits.

Pursuant to section 208.7(a) of the Tax Law and Morrison & Foerster, supra, "cash on hand and cash on deposit" may include time deposits. However, a "time deposit" as defined above for purposes of Federal Reserve System Regulation D and the FFIEC call reports includes a certificate of deposit, and for purposes of Article 9-A of the Tax Law under section 3-3.2(a)(1) of the Article 9-A Regulations, a certificate of deposit is treated as a debt instrument. Therefore, time deposits, other than time certificates of deposit, are deemed to be cash on hand or on deposit for purposes of section 208.7 of the Tax Law. A certificate of deposit which is described in section 3-3.2(c)(2) or (3) of the Article 9-A Regulations and is not described in section 3-3.2(a)(2) of the Article 9-A Regulations, is deemed to be cash on hand or on deposit, pursuant to section 208.7 of the Tax Law, on any day which is not more than six months and one day prior to its date of maturity, as provided in section 3-3.2(a)(1) of the Article 9-A Regulations.

In this case, Petitioner states that ABC's and DEF's interest bearing accounts with XYZ are time deposits pursuant to section 204.2(c)(1)(i) of the Federal Reserve System Regulation D with maturity dates of 30 days or more. Such time deposits with XYZ, other than time certificates of deposit as further described in FFIEC's FFIEC 031 and 041, Glossary, Deposits at (II)(2)(b), A-23 (6-01) would constitute "cash on hand and cash on deposit" as used in section 208.7(a) of the Tax Law and Morrison & Foerster, supra.

However, if ABC's and DEF's time deposits with XYZ are time certificates of deposit as further described in FFIEC 031 and 041, Glossary, such time certificates of deposit would be debt instruments that could not be deemed to be cash on hand or on deposit pursuant to section 3-3.2(a)(1) of the Article 9-A Regulations, because such certificates of deposit are not described in section 3-3.2(c)(2) or (3) of the Article 9-A Regulations. The debt instrument in this case would not be issued by a government entity as described in section 3-3.2(c)(2) of the Article 9-A Regulations. Further, Petitioner states that XYZ is the parent of ABC and an affiliate of DEF. Pursuant to sections 3-3.2(c)(3) and (d)(1)(vi) of the Article 9-A Regulations a qualifying corporate debt instrument for purposes of such section 3-3.2(c)(3) does not include a debt instrument that is issued by a corporation such as XYZ, which is a member of an affiliated group which includes the taxpayer (ABC or DEF in the present case).

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To the extent that ABC's and DEF's interest bearing accounts with XYZ are treated as cash on hand or on deposit as provided herein, ABC and DEF may elect to treat such accounts as investment capital or as business capital as provided in section 208.7(a) of the Tax Law.

DATED: July 3, 2002

/s/  
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NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.