

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

TSB-A-82(15.1)C
Corporation Tax
May 9, 1984

STATE OF NEW YORK
STATE TAX COMMISSION

MODIFIED ADVISORY OPINION PETITION NO. C820830A

On October 12, 1982 an Advisory Opinion was issued to the Ore and Chemical Corporation, 605 Third Avenue, New York, N.Y. 10158. TSB-A-82(15)C. Such Advisory Opinion is modified by appending thereto the following discussion of an issue not treated therein.

Petitioner requests an Advisory Opinion to the effect that interest paid by a corporation to a shareholder owning more than 5% of the issued capital stock of such corporation would be fully deductible where such shareholder borrows funds solely on behalf of such corporation, to which the funds are re-lent in turn, the interest paid by such corporation to the shareholder being merely "passed-through" the shareholder, as through a conduit, to the outside lender.

Article 9-A of the Tax Law imposes the State Franchise Tax on Business Corporations, which tax is computed on the one of four alternative bases which yields the highest tax. One of these bases is "entire net income", which is Federal taxable income with certain modifications. The modification set forth in section 208.9(b)(5) of the Tax Law, with certain statutory exceptions, disallows ninety per cent of a corporate taxpayer's Federal deduction for interest paid on indebtedness to a shareholder owning more than 5% of the stock of the taxpayer. Such provision reads as follows:

(b) Entire net income shall be determined without the exclusion, deduction or credit of:

. . .

(5) ninety per centum of interest on indebtedness directly or indirectly owed to any stockholder or shareholder (including subsidiaries of a corporate stockholder or shareholder), or members of the immediate family of an individual stockholder or shareholder, owning in the aggregate in excess of five per centum of the issued capital stock of the taxpayer, except that such interest may, in any event, be deducted.

(i) up to an amount not exceeding one thousand dollars,

(ii) in full to the extent that it relates to bonds or other evidences of indebtedness issued, with stock, pursuant to a bona fide plan of reorganization, to persons who, prior to such reorganization, were bona fide creditors of the corporation or its predecessors, but were not stockholders or shareholders thereof.

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(iii) in full where the investment allocation percentage is applied to entire net income, and

(iv) in full to the extent that it is paid to a federally licensed small business investment company.

It is hereby determined that the interpretation requested by Petitioner is not consonant with the applicable statutory provision. Section 208.9(b)(5) of the Tax Law requires the add-back of ninety per cent of the taxpayer's Federal deduction for interest paid to the shareholder. The only exceptions to this requirement arise in those situations which come within the purview of section 208.9(b)(5)(i) through (iv) of the Tax Law. It is not within the power of the administering agencies of the statute to permit other variations.

DATED: October 6, 1983

s/FRANK J. PUCCIA
Director
Technical Services Bureau