

Subpart 3-8 of Part 3 of Subchapter A of Title 20 of the Codes, Rules and Regulations of the State of New York is repealed and a new Subpart 3-10, Net Operating Loss and Net Operating Loss Deductions for Taxable Years Beginning on or After January 1, 2015, is added to read as follows:

SUBPART 3-10

NET OPERATING LOSS AND NET OPERATING LOSS

DEDUCTIONS FOR TAXABLE YEARS BEGINNING ON OR AFTER JANUARY 1, 2015

Sections:

- 3-10.1 Definitions
- 3-10.2 Net operating loss deductions
- 3-10.3 Carryback and carryforward of net operating loss
- 3-10.4 Method of claiming credit or refund on account of net operating loss
- 3-10.5 Income from discharge of indebtedness
- 3-10.6 Carryforwards in certain corporate acquisitions
- 3-10.7 Real estate mortgage investment conduit excess inclusion
- 3-10.8 Examples

Section 3-10.1 Definitions. (Tax Law, sections 210(1)(a)(ix) and 210-C(4)(d))

(a)(1) "Net operating loss" (NOL) means the amount of a business loss incurred in a particular taxable year multiplied by the business apportionment factor for that year. The amount of business loss cannot include any New York investment capital losses, as defined in section 3-7.1 of this Part.

(2) In the case of a combined report, the NOL is the combined business loss incurred in a particular taxable year multiplied by the combined business apportionment factor for that taxable year. The amount of combined business loss cannot include any New York investment capital losses, as defined in section 3-7.1 of this Part.

25 (3) In the case of an alien corporation, the NOL is calculated using effectively connected income as a
26 starting point for the business income base.

27 (b) A “separate return year” means a taxable year of a corporation for which it files a separate return or
28 for which it filed as a member of a different combined group.

29 Section 3-10.2 Net operating loss deduction. (Tax Law, sections 210 and 210-C)

30 (a) (1) A corporation that reports as part of a consolidated group for Federal income tax purposes but on
31 a separate basis for purposes of article 9-A computes its NOL and its net operating loss deduction (NOLD) as if
32 it were filing on a separate basis for Federal income tax purposes.

33 (2) If the combined group is different than the consolidated group for Federal income tax purposes, then
34 the combined group computes its NOL and NOLD as if it were filing a consolidated return for Federal income
35 tax purposes with the combined group members.

36 (b) The NOLD for taxable years beginning on or after January 1, 2015 is not limited to the Federal
37 NOLD amount. However, such deduction is determined using the same limitations that would apply for Federal
38 income tax purposes under the IRC and the CFR regarding the NOLs of the acquired or merged loss companies.

39 (c) The NOLD that is required to be utilized in a taxable year is the amount that reduces the tax on total
40 business income after the prior net operating loss (PNOLC) subtraction and prior to the NOLD to the higher of
41 the tax on the capital base or the fixed dollar minimum tax. In the case of a combined report, the NOLD that is
42 required to be utilized in a taxable year is the amount that reduces the tax on total combined business income
43 after the PNOLC subtraction and prior to the NOLD to the higher of the tax on the combined capital base or the
44 fixed dollar minimum tax of the designated agent.

45 (d) (1) A corporation is allowed an NOLD in computing its business income base or, in the case of a
46 combined report, in computing the combined group’s business income base.

47 (2) The NOLD is the amount of NOL from one or more taxable years that are carried forward or carried
48 back to a particular taxable year, subject to the limitations in this Subpart. In the case of a combined report, the
49 NOLD is the aggregate amount of the combined group member's NOL from one or more taxable years that are
50 carried forward or carried back to a particular taxable year, subject to the limitations in this Subpart.

51 (3) When both a PNOLC subtraction and an NOLD are being claimed for a particular taxable year, the
52 PNOLC subtraction must be applied against the business income base before the NOLD.

53 (e) A corporation will not be allowed an NOLD for any NOL sustained in any of the taxable years listed
54 in paragraph (1), (2) or (3) of this subdivision:

55 (1) a New York S year. The New York S year must, however, be treated as a taxable year for purposes
56 of determining the number of taxable years to which an NOL may be carried forward or back.

57 (2) any taxable year beginning prior to January 1, 2015; or

58 (3) any taxable year in which the corporation was not a member of a combined group subject to tax
59 under article 9-A or was not subject to tax itself under article 9-A.

60 Section 3-10.3 Application of NOLs (Tax Law, sections 210(1) and 210-C).

61 (a) Except as otherwise provided in this Subpart, an NOL must be carried back three years preceding the
62 taxable year of the loss (the "loss year"). However, no NOL can be carried back to a taxable year beginning
63 before January 1, 2015. The NOL is first carried to the earliest of the three taxable years preceding the loss
64 year. If the NOL is not entirely used to offset income in that year, the remainder is carried to the second taxable
65 year preceding the loss year, and any remaining amount is carried to the taxable year immediately preceding the
66 loss year. Any unused amount of NOL then remaining may be carried forward for as many as twenty taxable
67 years following the loss year. NOLs carried forward are carried first to the taxable year immediately following
68 the loss year and then to the next immediately succeeding taxable year or years until the NOL is used up or to
69 the twentieth taxable year following the loss year, whichever comes first.

70 (b) When there are two or more NOLs, or portions thereof, carried back or carried forward to be deducted
71 in one particular taxable year, the earliest NOL incurred must be applied first.

72 (c) An NOL of a corporation from a separate return year that is filing as a member of a new combined
73 group may not be carried back to offset income of that combined group in a taxable year in which the
74 corporation was not a member of the combined group. However, it may be used or carried forward to offset
75 income of that combined group in any taxable year in which the corporation is a member of the combined
76 group.

77 (d) In the case of a combined report, the portion of the combined NOL attributable to any member of
78 the group that files a separate report, or as a member of a different group that files a combined report for a
79 preceding or succeeding taxable year will be an amount bearing the same relation to the combined loss as the
80 NOL of such corporation bears to the total NOLs of all members of the group having such losses, to the extent
81 that they are taken into account in computing the combined NOL. The NOL of the member filing the separate
82 report, or as a member of a different group filing a combined return, is to be calculated by applying the business
83 apportionment factor of the combined group to that member's proportional share of the group's NOL. A
84 combined group member's share of the combined group's NOL may be carried back only to offset that
85 corporation's business income in a separate return year. A NOL of a combined group may not be carried back to
86 offset the income of a corporation that was not a member of the combined group when the loss was incurred.

87 (e) A corporation may elect to waive the entire carry back period with respect to an NOL by making an
88 election on the corporation's original, timely filed report (determined with regard to extensions) for the taxable
89 year of the NOL for which the election is to be in effect. Once such an election is made for a taxable year, it
90 shall be irrevocable for that taxable year. In the case of a combined report, the election is made by the
91 designated agent and applies to all members of the combined group. Therefore, a member of a combined group
92 that has elected to waive the entire carry back period may not carry back its share of the NOL of the combined

93 group to a year where that corporation filed as a separate filer or member of another combined group. A
94 separate election must be made for each loss year. Failure to affirmatively waive the entire carryback period in
95 the manner prescribed by the commissioner means that such NOL must be carried back.

96 (f) If a corporation calculates a higher tax liability for the taxable year under the capital base tax or the
97 fixed dollar minimum tax than under the business income base, it does not need to utilize an NOLD. However,
98 this year will be treated as a taxable year for purposes of determining the number of taxable years to which an
99 NOL may be carried forward or back.

100 Section 3-10.4 Method of claiming credit or refund on account of net operating loss.

101 (a) A corporation claiming a credit or refund of franchise tax paid under article 9-A for a taxable year to
102 which an NOL is carried back as a deduction must file an amended return for that taxable year within the statute
103 of limitations on credit or refund pursuant to section 1087.

104 (b) For those instances in which an NOL was carried back and subsequently the amount of NOL was
105 changed:

106 (1) The Department may assess additional tax at any time that a deficiency for the taxable year of the
107 loss can be assessed in accordance with section 1083(c)(4). This applies whether or not the NOL was affected
108 by a change in business income or change to the business apportionment factor or both.

109 (2) The Department may refund an overpayment at any time that a refund for the taxable year of the loss
110 can be claimed in accordance with section 1087. This applies whether or not the NOL was affected by a change
111 in business income or change to the business apportionment factor or both.

112 (3) The Department will apply the rules in paragraphs (1) and (2) above to all years affected by the
113 revised NOL amount.

114 Section 3-10.5 Income from discharge of indebtedness.

115 A corporation's NOL carryforward to a taxable year in which the corporation has income from the
116 discharge of indebtedness that was excluded from Federal taxable income shall be reduced in the same manner
117 as provided under IRC section 108(b)(2) and related regulations. This amount of reduction shall be determined
118 by applying the New York business apportionment factor for the year of discharge to the amount of the NOL
119 carryforward that is required to be reduced.

120 Section 3-10.6 Carryforwards in certain corporate acquisitions. (Tax Law, section 210-C (4)(d))

121 (a) For purposes of this section, a "separate return limitation year" (SRLY) means any separate return
122 year of a corporation. The carryforward of any NOL incurred by a corporation for any taxable year beginning
123 on or after January 1, 2015 is limited after a reorganization or merger by the same principles for the limitation
124 of the carryforward of an NOL for Federal tax purposes as required under the provisions of IRC sections 381
125 through 384 and related regulations and any other section of the IRC or related regulations. NOLs arising in
126 taxable years beginning on or after January 1, 2015 and carried forward to a combined report from a SRLY may
127 be used to reduce the combined group's business income only to the extent of the income of the combined
128 group that is attributed to the corporation that carried forward that loss from the SRLY.

129 (b) NOL carryforward that is subject to limitation under IRC Sec 382 and related provisions. The
130 amount of NOL carryforward must reflect the respective business apportionment factor for each loss year and
131 the proportional limitation set forth under IRC section 382. The amount of NOL available for deduction from
132 the acquired corporation will be limited to the lesser of:

133 (1) the IRC section 382 limitation adjusted for New York State purposes to reflect the applicable time
134 period and business apportionment factor; or

135 (2) the amount of the apportioned business income of the acquired loss company or companies in the
136 current taxable year.

137 (c) In the event the NOLs described in subdivision (a) or (b) of this section are from the same loss year
138 as losses of the acquiring corporation, the amount of SRLY limited carryforward under subdivision (a) or the
139 IRC section 382 limited carryforward under subdivision (b) shall be applied before applying any other NOL
140 against the remaining business income of the combined group.

141 Section 3-10.7 Real estate mortgage investment conduit excess inclusion

142 (a) Following the principles of IRC section 860E(a)(1), in any taxable year the total business income of
143 any holder of a residual interest in a real estate mortgage investment conduit (REMIC) or the total combined
144 business income of a combined group that includes any holder of a residual interest in a REMIC shall not be
145 less than the amount of excess inclusion (EI) for such taxable year.

146 (b) An NOLD is not allowed in any taxable year that total business income is limited to EI pursuant to
147 subdivision (a) of this section.

148 (c) An NOL may be generated when total business income of a corporation, or in the case of a
149 combined group, total combined business income, is determined by the amount of EI pursuant to subdivision (a)
150 of this section. The amount of NOL generated is determined as follows:

151 (1) multiply the business income base calculated without regard to the amount of EI by the business
152 income base tax rate for the tax year;

153 (2) subtract from the tax computed on the business income base calculated with regard to the amount of
154 EI the higher of (i) the amount computed in paragraph (1) of this subdivision, (ii) the tax on business capital, or
155 (iii) the fixed dollar minimum tax, provided the result cannot be less than zero;

156 (3) divide the amount determined in paragraph (2) of this subdivision by the business income base tax
157 rate for the year;

158 (4) add any apportioned business loss computed without regard to EI to the amount determined in
159 paragraph (3) of this subdivision.

Section 3-10.8 Examples. The following examples assume that the corporation has (1) no PNOLC subtraction in the year and (2) at least the amount of computed NOLD required to be utilized available for deduction. While some examples may highlight multiple rules contained in this Subpart, the introductory text of the example is intended to highlight the main rule highlighted in each such example.

“Example 1:” This example is intended to highlight that New York investment capital losses must be added back in computing the business income base and any net operating loss.

Taxpayer has a Federal loss of (\$500,000), which includes a (\$40,000) New York investment capital loss that resulted from the sale of its investment capital. The taxpayer must adjust its Federal taxable income (FTI) to account for such loss when computing the business income base and its NOL.

Business Income Loss Schedule	
Federal taxable income (loss)	\$ (500,000)
Adjustment for New York investment capital loss	\$ 40,000
Federal taxable income (loss) adjusted for New York investment capital loss	\$ (460,000)

“Example 2:” This example is intended to highlight that the NOLD required to be utilized is the amount that reduces the tax on the business income base to the higher of the capital base tax or the fixed dollar minimum.

Taxpayer X computes its NOLD of \$6,730,769 required to be utilized in 2016 as follows:

NOL Deduction Schedule	
Apportioned total business income after the PNOLC but before the NOLD	7,500,000
Business income base tax rate	6.50%
Product of apportioned total business income after the PNOLC but before the NOLD and the business income base tax rate	487,500
Capital base tax	50,000
FDM	25,000
Greater of capital base tax and FDM	50,000
Difference between (a) greater of capital base tax and FDM and (b) product of apportioned total business income after PNOLC but before the NOLD and the business income base tax rate	437,500
Business income base tax rate	6.50%
Net operating loss deduction required to be utilized (\$437,500/6.5%)	6,730,769

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“Example 3.” This example is intended to highlight that the NOLD may offset income from investment capital that remains in business income due to the 8 percent of ENI limitation on gross investment income.

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Taxpayer Y incurred an NOL in 2015 of (\$3,750) that it carried forward to 2016. In

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2016, the gross investment income limitation reduced the amount the taxpayer was

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allowed to deduct as investment income from \$500 to \$360 (8% of \$4,500). As such,

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\$140 of income from investment capital was considered business income in 2016.

NOL Schedule		
	2015	2016
Entire net income	(5,000)	4,500
Investment income		360
Total business income	(5,000)	4,140
BAF	75%	85%
Apportioned total business income after the PNOLC but before the NOLD	(3,750)	3,519
Business income base tax rate		6.50%
Product of apportioned total business income after the PNOLC but before the NOLD and the business income base tax rate		229
Capital base tax		200
FDM		100
Greater of capital base tax and FDM		200
Difference between (a) greater of capital base tax and FDM and (b) product of apportioned total business income after PNOLC but before the NOLD and the business income base tax rate		29
Business income base tax rate		6.50%
NOLD required to be utilized		442
NOL carryforward from 2015 to be used in 2016	442	→ (442)
Balance of 2015 NOL available for carryforward after the 2016 tax year	(3,308)	

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“Example 4.” This example is intended to highlight how a separate filer carries back its NOL to previous years.

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Company A, a calendar-year taxpayer, was incorporated and began doing business in

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New York as of 1/1/2016. Company A had New York income and losses as follows:

NOL Schedule				
	2016	2017	2018	2019
Apportioned total business income after the PNOLC but before the NOLD	7,500,000	3,500,000	(10,000,000)	2,000,000
Business income base tax rate	6.50%	6.50%		6.50%
Product of apportioned total business income after the PNOLC but before the NOLD and the business income base tax rate	487,500	227,500		130,000
Capital base tax	28,000	25,000		17,000
FDM	50,000	50,000		50,000
Greater of capital base tax and FDM	50,000	50,000		50,000
Difference between (a) greater of capital base tax and FDM and (b) product of apportioned total business income after PNOLC but before the NOLD and the business income base tax rate	437,500	177,500		80,000
Business income base tax rate	6.50%	6.50%		6.50%
NOLD required to be utilized	6,730,769	2,730,769		1,230,769
NOL incurred	-	-	(10,000,000)	-
NOL carryback from 2018 to 2016	(6,730,769)		6,730,769	
NOL carryback from 2018 to 2017		(2,730,769)	2,730,769	
NOL carryforward from 2018 to 2019			538,462	(538,462)
Business income base	769,231	769,231	(10,000,000)	1,461,538
Business income base tax	50,000	50,000	-	95,000

“Example 5:” This example is intended to highlight how a combined group member computes its share of NOLs sustained in the loss year.

Taxpayers L, M, N & O began doing business and properly filed a combined report in New York in the 2015. As the combined group sustained an NOL, each member computes its share of the NOL as follows:

Computation of the NOL for Members of a Combined Group				
Combined Group	Business Income/(Losses) 2015	Business Loss by Member	(1)	(2)
			Member's business losses as a % of total business losses of all members with losses	Member's 2015 NOL (2015 Total BI*(1))
L	(750)	(750)	20%	(700)
M	(2,000)	(2,000)	53%	(1,867)
N	250	0	0%	0
O	(1,000)	(1,000)	27%	(933)
Totals	(3,500)	(3,750)	100%	(3,500)

If taxpayers L, M, N, and O file a combined report in 2016, the NOL CF available for use by the group would be \$3,500. However, if taxpayers L, M, and N file a combined report in 2016, the group would have an NOL CF available for use by the group of \$2,567 (\$700 + \$1,867) and taxpayer O would have an NOL CF available for use of \$933 on its separate return in 2016.

“Example 6:” This example is intended to highlight how a combined group member computes its share of NOLs and how the share of such NOLs is carried back to previous years.

In taxable year 2015, Corporation A filed a separate New York State tax return and Corporations B and C properly filed a combined report. In 2016, Corporation A was purchased by unrelated group that includes corporations B and C. The newly formed combined group A, B, and C properly files a combined New York State return and sustains an NOL in 2016. Each member of the combined group must compute its share of the NOL sustained in 2016 based on its share of the loss. Corporation A may carry back its share of the 2016 loss to its separately filed 2015 return and Corporations B and

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C may carry back their share of 2016 losses to the 2015 combined report filed by combined group B and C.

NOL Schedule			
	A is an unrelated separate Filer	BC Group	ABC Group
Corporation	2015	2015	2016
A	6,000,000		(1,750,000)
B		1,250,000	(1,275,000)
C		250,000	(1,300,000)
Apportioned total business income after the PNOLC but before the NOLD	6,000,000	1,500,000	(4,325,000)
Business income base tax rate	7.10%	7.10%	
Product of apportioned total business income (loss) after the PNOLC but before the NOLD and the business income base tax rate	426,000	106,500	
Capital base tax	45,000	18,000	
FDM	20,000	50,000	
Greater of capital base tax and FDM	45,000	50,000	
Difference between (a) greater of capital base tax and FDM and (b) product of apportioned total business income after PNOLC but before the NOLD and the business income base tax rate	381,000	56,500	
Business income base tax rate	7.10%	7.10%	
NOLD required to be utilized	5,366,197	795,775	
NOL APPLICATION			
Corporation			
A	6,000,000		(1,750,000)
B		1,250,000	(1,275,000)
C		250,000	(1,300,000)
Combined Total Apportioned Business Income after the PNOLC but before the NOLD	6,000,000	1,500,000	(4,325,000)
Carryback A's NOL carryback from 2016 to 2015	(1,750,000)		1,750,000
Carryback B and C NOL carryback from 2016 to 2015		(795,775)	795,775
Business Income Base	4,250,000	704,225	(4,325,000)
Balance of NOL incurred in 2016 after carryback to 2015			(1,779,225)

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Corporation A carried back its share of the 2016 loss of \$1,750,000 to reduce its 2015 tax. As its carryback of \$1,750,000 is less than the NOLD required to be utilized, Corporation A completely exhausted its 2016 NOL. While Corporations B and C carried back a portion

226 of the 2016 NOLs, the total NOL available for carryback of \$2,575,000 is greater than the
227 NOLD required to be utilized of \$795,775. As such, Corporations B and C must determine
228 their share of NOL carryback based on the share of losses in 2016. Of the \$795,775 carried
229 back to 2015, Corporation B's share is \$393,909 ($1,275,000/2,575,000 * \$795,775$) and
230 Corporation C's share is \$401,866 ($1,300,000/2,575,000 * \$795,775$). Corporation B's
231 2016 NOL carryforward is \$881,091 ($\$1,275,000 - \$393,909$) and Corporation C's 2016
232 NOL carryforward is \$898,134 ($\$1,300,000 - \$401,866$).

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234 “Example 7:” This example is intended to highlight how NOLs are impacted by subsequent adjustments
235 to the loss year as well as the time period for assessing deficiencies when an adjusted
236 NOL is carried to other periods.

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238 Corporation B sustains an NOL for the taxable year ending 12/31/2018 and on
239 10/15/2019 files its first amended 2015 CT-3 form to carryback the NOL of \$50,000 to
240 its 2015 taxable year ($\$100,000$ business loss multiplied by a BAF of 50%). Corporation
241 B receives a refund of \$3,250 for the 2015 taxable year.

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243 Based on a subsequent correction to the BAF by the taxpayer that changes its 2018 BAF
244 from 50% to 80%, it is determined that the actual NOL for the taxable year ending
245 12/31/2018 was \$80,000 ($\$100,000$ business loss multiplied by a BAF of 80%).
246 Corporation B files a second amended report for the 2015 taxable year in July 2020 to
247 claim the additional refund for 2015.

In December 2020, the IRS completes their examination of Corporation B and makes their final determination. The IRS required Corporation B to recognize in 2018 a deferred receipt from undelivered sales. Corporation B files a second amended 2018 report timely to report the correction to its 2018 FTI and also amend its BAF since the RAR directly impacted the 2018 BAF. As the RAR changed the 2018 NOLD, the Department calculates Corporation B's proper liability for the 2015 tax year upon receiving a copy of the RAR. As a result, Corporation B owes \$1,207 for the 2015 and the Department may assess a deficiency due by the authority granted under section 1083(c)(4).

	2018		
	As Filed	First Amended	Second Amended
Total business income before RAR	(100,000)	(100,000)	(100,000)
Adjustment to federal taxable income due to RAR			10,000
Total business income after RAR	(100,000)	(100,000)	(90,000)
BAF	50%	80%	70%
Business income base	(50,000)	(80,000)	(63,000)

	2015			
	Original	First Amended	Second Amended	Third Amended
Apportioned total business income after the PNOLC but before the NOLD	\$300,000	300,000	300,000	300,000
2018 NOL carryback to 2015	0	(50,000)	(80,000)	(63,000)
2015 business income base	\$300,000	250,000	220,000	237,000
Business income tax rate	7.10%	0	7.10%	7.10%
Business income base tax	\$21,300	17,750	15,620	16,827
Prepayments	21,000	21,000	17,750	15,620
Refund/Additional Tax *	\$300	(3,250)	(2,130)	1,207

“Example 8:” This example is intended to highlight how the SRLY principles impact the computation of an NOL.

263 During taxable year 2016 Corporation T began doing business in New York State.
 264 Corporation T filed a separate return and sustained an NOL for New York State purposes
 265 in tax period 2016. Corporations A, B, and C began doing business in NYS in 2015 and
 266 sustained losses in 2015 and 2016. They properly filed a combined report together for
 267 those years.

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 269 Effective January 1, 2017 Corporation T joins the A, B, and C group. The NOL
 270 sustained by Corporation T in 2016 represents a SRLY and is not subject to the IRC
 271 section 382 limitation. The application of the NOL is as follows:

NOL Schedule: Order of Loss Application							
	A,B,C Group	T is an unrelated separate filer	A,B,C Group	A,B,C,T Group			
	2015	2016	2016	2017	2018	2019	2020
Combined Group: A, B, C							
A	(550)		(1,250)	(4,500)	-	750	3,000
B	(375)		(750)	(250)	-	1,250	2,250
C	(175)		(300)	(5,500)	-	1,400	1,000
T		(12,500)		-	5,000	6,000	-
Combined apportioned total business income after the PNOLC but before the NOLD	(1,100)	(12,500)	(2,300)	(10,250)	5,000	9,400	6,250
<u>Application of Losses sustained prior to Combination</u>							
\$1,100 of A,B,C groups 2015 losses must be used as a deduction against A,B,C,T groups income in 2018 *	1,100				(1,100)		
\$3,900 of T's \$12,500 net operating loss can be used in 2018 as a deduction against T's business income		3,900			(3,900)		
\$6,000 of T's \$12,500 individual loss can be used in 2019 as a deduction against T's individual gain		6,000				(6,000)	
\$2,300 of A,B,C groups 2016 losses must be used as a deduction against A,B,C,T group's income in 2019			2,300			(2,300)	
Total Combined losses Available							
\$1,100 of A,B,C, T groups 2017 losses must be used as a deduction against A,B,C,T group's income in 2019				1,100		(1,100)	
\$6,250 of A,B,C, T groups 2017 losses must be used as a deduction against A,B,C,T group's income in 2020				6,250			(6,250)
Apportioned Business Income (Loss)**	-	(2,600)	-	(2,900)	-	-	-

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 273 “Example 9:” This example is intended to highlight how a separate taxpayer that is a residual interest
 274 holder in a REMIC computes its NOL in a year that its business loss is limited by EI.

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 276 Taxpayer R is a residual interest holder in a REMIC and has FTI of (\$1,000,000) before
 277 taking into account its EI for taxable year 2016. Taxpayer R has \$20,000,000 of EI. Since
 278 its total business income cannot be less than its EI, the business income base in 2016 is
 279 computed as follows:

FTI before NOL (before applying IRC §860E(a)(1))	\$ (1,000,000)
Additions to FTI	\$ 4,000,000
Subtractions from FTI	\$ (6,000,000)
ENI	\$ (3,000,000)
Investment and other exempt income	\$0
Excess interest deductions attributable to investment income	\$0
Business income	\$ (3,000,000)
Add back of income previously reported as investment income	\$ 500,000
<u>Total business income before EI limitation</u>	<u>\$ (2,500,000)</u>
<u>EI</u>	<u>\$ 20,000,000</u>
Total business income	\$ 20,000,000
BAF	25.00%
Business income base	\$ 5,000,000
Business income base tax rate	6.50%
Business income base tax	\$ 325,000

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 282 Although Taxpayer R pays tax on its EI in 2016, it still generates an NOL in such year
 283 computed as follows:

Total business income before EI limitation	\$ (2,500,000)
BAF	25%
Apportioned business loss before EI limitation	\$ (625,000)
Next highest base tax (capital base)	\$ 300,000
Tax on business income base after EI limitation	\$ 325,000
Excess of business income base tax over next highest tax base	\$ (25,000)
Business income base tax rate	6.5%
NOL generated from EI	\$ (384,615)
Total NOL generated (\$625,000) + (\$384,615)	\$ (1,009,615)

“Example 10:” This example is intended to highlight how a combined group with a member that is a residual interest holder in a REMIC computes its NOL in a year that its business loss is limited by EI.

Combined group R, S, T properly filed a combined report for taxable year 2016.

Corporation T is a residual interest holder in a REMIC with EI of \$20,000,000. All members of a NYS combined group shall be treated as a single taxpayer and the business income of the combined group cannot be less than the aggregate of the EI attributable to all members of the combined group that hold a residual interest in a REMIC. As such, the combined business income base tax is computed as follows:

Calculation of combined business income base	
Combined FTI before NOL (before applying IRC §860E(a)(1))	\$ (11,000,000)
Combined additions to FTI	\$ 3,000,000
Combined subtractions from FTI	\$ (4,000,000)
Combined ENI	\$ (12,000,000)
Investment and other exempt income	\$ -
Excess interest deductions attributable to investment income	\$ -
Combined business income	\$ (12,000,000)
Addback of income previously reported as investment income	\$ -
Combined total business income before EI limitation	\$ (12,000,000)
EI	\$ 20,000,000
BAF	25%
Combined business income base	\$ 5,000,000
Business income base tax rate	6.5%
Combined business income base tax	\$ 325,000

Although the combined group pays tax on its EI in 2016, it still generates an NOL in such year computed as follows:

Total combined business loss before EI limitation	\$ (12,000,000)
BAF	25%
Apportioned combined business loss before EI limitation	\$ (3,000,000)
<i>Excess of business income base tax over next highest tax base</i>	
Next highest base tax (capital base)	\$ 300,000
Tax on business income after EI limitation	\$ 325,000
Excess of combined business income base over next highest base	\$ (25,000)
Business income base tax rate	6.5%
NOL generated from EI (25,000/6.5%)	\$ (384,615)
Total NOL generated (\$3,000,000) + (\$384,615)	\$ (3,384,615)

Combined group R, S, and T generated a NOL of (\$3,384,615) for the tax year 2016.

“Example 11:” This example is intended to highlight how a separate taxpayer that is a residual interest holder in a REMIC computes its NOL in a year that its business income is limited by EI. Taxpayer R is a residual interest holder in a REMIC and has FTI of \$6,000,000 before taking into account its EI pursuant to IRC section 860E(a) for taxable year 2016. As Taxpayer R’s business income cannot be less than the its EI, it computes its business income base tax of \$162,500 as follows:

Combined FTI before NOL (before applying IRC §860E(a)(1))	\$ 6,000,000
Additions to FTI	\$ 2,000,000
Subtractions from FTI	\$ (1,500,000)
Entire net income (ENI)	\$ 6,500,000
Investment and other exempt income	\$ 500,000
Excess interest deductions attributable to investment income	\$ -
Business income	\$ 6,000,000
Add back of income previously reported as investment income	\$ 500,000
Total business income before EI limitation	\$ 6,500,000
EI	\$ 10,000,000
Total business income after EI limitation	\$ 10,000,000
BAF	25.00%
Business income base	\$ 2,500,000
Business income base tax rate	6.50%
Business income base tax	\$ 162,500

Even though Taxpayer R has positive business income before the EI limitation, it still generates an NOL of (\$875,000) in 2016 that is computed as follows:

Calculation of NOL Generated in 2016	
Combined FTI before NOL (before applying IRC §860E(a)(1))	\$ 6,000,000
Additions to FTI	\$ 2,000,000
Subtractions from FTI	\$ (1,500,000)
Entire net income (ENI)	\$ 6,500,000
Investment and other exempt income	\$ 500,000
Excess interest deductions attributable to investment income	\$ -
Business income	\$ 6,000,000
Add back of income previously reported as investment income	\$ 500,000
Total business income without the EI limitation	\$ 6,500,000
BAF	25.00%
Business income base without the EI limitation	\$ 1,625,000
Business income base tax rate	6.50%
Business income base tax without the EI limitation	\$ 105,625

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Calculation of the NOL	
Business income base tax with EI limitation	\$ 162,500
Business income base tax without the EI limitation	\$ 105,625
Capital base tax	\$ 100,000
Higher of the business income base without the EI limitation and capital base tax	\$ 105,625
Excess amount (\$162,500 minus \$105,625)	\$ (56,875)
Business income base tax rate	6.50%
NOL generated (56,875 divided by 6.5%)	\$ (875,000)

313

314