

Supplemental Summary of Corporation Tax Legislative Changes Enacted in 2003

This memorandum summarizes the corporation tax technical corrections legislation (Chapter 686 of the Laws of 2003) enacted on October 21, 2003. It also announces the Tax Law related provisions of the brownfields cleanup legislation (Part H of Chapter 1 of the Laws of 2003) enacted on October 7, 2003.

Chapter 686 makes technical corrections to the provisions of the Tax Law that were amended by (or affected by) Chapters 62 and 63 of the Laws of 2003. Therefore, as it relates to Chapter 686, this memorandum serves as a supplement to TSB-M-03(5)C, *Summary of Corporation Tax Legislative Changes Enacted in 2003*.

Entire net income (ENI) and New York unrelated business taxable income (New York UBTI) modifications for royalty payments made to, or received from, related members (Articles 9-A, 13, 32, and 33)

Addition for royalty payments made to a related member

For tax years beginning on or after January 1, 2003, in computing ENI under Articles 9-A, 32, and 33, taxpayers are required to add to federal taxable income (FTI) royalty payments made to a related member during the tax year to the extent the payments were deductible in calculating FTI. In addition, in computing New York UBTI under Article 13, taxpayers are required to add to federal unrelated business taxable income (federal UBTI) royalty payments made to a related member during the tax year to the extent the payments were deductible in calculating federal UBTI.

The addition of royalty payments is not required if, and to the extent that, such payments meet either of the following conditions:

1. The related member during the same tax year, directly or indirectly, paid the amount to or incurred the amount with respect to, a person or entity that is not a related member, and such transaction was done for a valid business purpose and the payments are made at arm's length.
2. The royalty payments are paid to, or are incurred with respect to, a related member organized under the laws of a country other than the United States, are subject to a comprehensive income tax treaty between that country and the United States, and are taxed in that country at a tax rate at least equal to that imposed by New York State.

Subtraction for royalty payments received from a related member

For tax years beginning on or after January 1, 2003, in computing ENI under Articles 9-A, 32, and 33, taxpayers may subtract from FTI royalty payments received directly or indirectly from a related member during the tax year to the extent these payments are included in the taxpayer's FTI, unless such royalty payments were not required to be added to FTI (or federal UBTI, if applicable) by the related member. In addition, in computing New York UBTI under Article 13, taxpayers may subtract from federal UBTI royalty payments received directly or indirectly from a related member during the tax year to the extent these payments are included in the taxpayer's federal UBTI, unless the royalty payments were not required to be added to federal UBTI (or FTI, if applicable) by the related member.

Definitions

Related member or members means a person, corporation, or other entity, including an entity that is treated as a partnership or other pass-through vehicle for federal income tax purposes, whether such person, corporation or entity is a taxpayer or not, where one such person, corporation, or entity, or set of related persons, corporations or entities, directly or indirectly owns or controls a controlling interest in another entity. Such entity or entities may include all taxpayers under Articles 9, 9-A, 13, 22, 32, 33, or 33-A of the Tax Law.

Controlling interest means, in the case of a corporation, either thirty percent or more of the total combined voting power of all classes of stock of the corporation, or thirty percent or more of the capital, profits or beneficial interest in such voting stock of the corporation. In the case of a partnership, association, trust or other entity, it means thirty percent or more of the capital, profits or beneficial interest in the partnership, association, trust or other entity.

Royalty payments are payments directly connected to the acquisition, use, maintenance or management, ownership, sale, exchange, or any other disposition of licenses, trademarks, copyrights, trade names, trade dress, service marks, mask works, trade secrets, patents, and any other similar types of intangible assets as determined by the Commissioner of Taxation and Finance, and includes amounts allowable as interest deductions under section 163 of the Internal Revenue Code to the extent such amounts are directly or indirectly for, related to, or in connection with the acquisition, use, maintenance or management, ownership, sale, exchange or disposition of such intangible assets.

Valid business purpose is one or more business purposes, other than the avoidance or reduction of taxation, which alone or in combination constitute the primary motivation for some business activity or transaction that changes in a meaningful way, apart from tax effects, the economic position of the taxpayer. The economic position of the taxpayer includes an increase in the market share of the taxpayer, or the entry by the taxpayer into new business markets.

Disclosure of Information

To facilitate administration of these provisions, the Tax Law was amended to grant the

Commissioner of Taxation and Finance the authority to disclose to a taxpayer, or taxpayer's related member, the information relating to any royalty payments paid, incurred, or received by such taxpayer, or related member, to or from the other. Such information includes the treatment of such payments by the taxpayer, or related member, in any report or return transmitted to the Commissioner under the Tax Law.

(Tax Law sections 208.9(o) and 211(14); 292(a)(6) and 295; 1453(r) and 1467(f); 1503(b)(14) and 1518(g))

Power of the Commissioner of Taxation and Finance to adjust the Metropolitan Commuter Transportation District (MCTD) allocation percentage of non-life insurance corporations (Article 33)

For tax years beginning before 2003, the Commissioner of Taxation and Finance was granted authority to adjust the MCTD allocation percentage for all insurance corporations. Chapter 62 of the Laws of 2003, which established a separate premiums-based tax for non-life insurance corporations, did not include a provision authorizing the Commissioner to adjust the MCTD allocation percentage for non-life insurance corporations. This authority has now been granted with the amendment of paragraph (2) of subdivision (a) of section 1505-a of the Tax Law.

Paragraph (2) of subdivision (a) of section 1505-a of the Tax Law contains the methodology, procedures and computations used by a taxpayer that is a non-life insurance corporation to determine its MCTD allocation percentage. For tax years beginning on or after January 1, 2003, if the Commissioner determines that the application of the methodology, procedures, and computations set forth in this paragraph does not properly reflect the activity, business, or income of the taxpayer within the MCTD, the Commissioner may adjust the methodology, procedures, and computations for purposes of making the MCTD allocation by:

- replacing the direct premiums factor with one or more other factors such as expenses, purchases, receipts other than premiums, real property or tangible personal property; or
- any other similar or different method which fairly and properly allocates the franchise tax imposed under section 1502-a of the Tax Law, computed after the application of any tax credits, to the MCTD.

(Tax Law section 1505-a(a)(2))

Tax Law provisions of the brownfields cleanup legislation (Articles 9, 9-A, 32, and 33)

Sections 21, 22, and 23 were added to the Tax Law to provide for three new tax credits relating to the clean-up and remediation of brownfields. The credits are refundable, and apply to tax years beginning on or after April 1, 2005.

Section 21 provides for the "Brownfield Redevelopment Tax Credit." This credit consists of the sum of three credit components relating to costs associated with: site preparation; tangible property; and on-site groundwater remediation.

Section 22 provides for the “Tax Credit for Remediated Brownfields.” This credit is for real property taxes paid with respect to qualified sites.

Section 23 provides for the “Environmental Remediation Insurance Credit.

Entire net income modifications were also added to Articles 9-A, 32, and 33 that require taxpayers to add to federal taxable income those premiums paid for environmental remediation insurance that were deducted in computing federal taxable income, and for which the section 23 credit is being claimed.

(Tax Law sections 21, 22, and 23; 208.9(b)(18); 1453(b)(3); 1503(b)(2)(N-1))