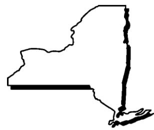

New York State
Department of
Taxation and Finance
Taxpayer Guidance Division

Technical Memorandum
TSB-M-13(6)C
Corporation Tax
August 8, 2013

Summary of Budget Bill Corporation Tax Changes Enacted in 2013 – Effective for Tax Years 2013 and After

This memorandum contains a summary of the corporation tax changes that are part of the 2013-2014 New York State budget (Chapters 57 and 59 of the Laws of 2013). The changes contained in the memorandum are effective for tax years 2013 and after. A separate memorandum will be issued containing the budget bill corporation tax changes first effective for tax years after 2013. The following legislative changes are summarized in this memo:

- Amendments to the related members royalty expense add-back and income exclusion provisions
- Credit for alternative fuel vehicle refueling property and electric vehicle recharging property
- Empire State film production and post-production tax credits
- Extension of the electronic filing and electronic payment provisions
- Metropolitan Transportation Authority (MTA) surcharge extender
- New York State Business Incubator and Innovation Hot Spot Support Act
- Rehabilitation of historic properties credit
- Veterans Remembrance and Cemetery Maintenance and Operation Fund

Amendments to the related members royalty expense add-back and income exclusion provisions (Articles 9-A, 13, 22, 32, and 33)

Chapter 59 of the Laws of 2013 (Part E) made technical changes to the computation of net income that address the related members royalty expense add-back and income exclusion. The income exclusion for royalty payments paid to related members has been repealed, and the related members royalty expense add-back has been amended.

Under the new law, a taxpayer that is not included in a combined report with a related member must now add back royalty payments directly or indirectly paid, accrued, or incurred in connection with one or more direct or indirect transactions with one or more related members during the taxable year. These royalty payments must be added back to the extent deductible in calculating federal taxable income. This add-back applies unless the taxpayer meets one of the following four exceptions:

- The add-back will not apply to the portion of the royalty payment for which the taxpayer establishes by clear and convincing evidence of the form and type specified by the Commissioner of the Tax Department that:

  - the related member was subject to tax in New York or another state or possession of the United States, a foreign nation, or a combination of these on a tax base that included the royalty payment paid, accrued, or incurred by the taxpayer;
  - the related member during the same taxable year directly or indirectly paid, accrued, or incurred the portion of the royalty payment to a person that is not a related member; and
  - the transaction giving rise to the royalty payment between the taxpayer and the related member was undertaken for a valid business purpose.

- The add-back will not apply if the taxpayer establishes by clear and convincing evidence of the form and type specified by the commissioner that:

  - the related member was subject to tax on, or measured by, its net income in New York, another state or possession of the United States, or a combination of these;
  - the tax base for the tax included the royalty payment paid, accrued, or incurred by the taxpayer; and
  - the aggregate effective rate of tax applied to the related member in those jurisdictions is not less than 80% of the statutory rate of tax that applied to the taxpayer under Tax Law section 210 (Article 9-A); section 290 (Article 13); section 1455 (Article 32); or sections 1502, 1502-A, or 1502-B (Article 33) for the taxable year.

- The add-back will not apply if the taxpayer establishes by clear and convincing evidence of the form and type specified by the commissioner that:

  - the royalty payment was paid, accrued, or incurred to a related member organized under the laws of a country other than the United States;
  - the related member's income from the transaction was subject to a comprehensive income tax treaty between that country and the United States;
  - the related member was subject to tax in a foreign nation on a tax base that included the royalty payment paid, accrued, or incurred by the taxpayer;
  - the related member's income from the transaction was taxed in that country at an effective rate of tax at least equal to that imposed by New York; and
  - the royalty payment was paid, accrued, or incurred pursuant to a transaction that was undertaken for a valid business purpose and using terms that reflect an arm's-length relationship.

- The add-back will not apply if the taxpayer and the commissioner agree in writing to the application or use of alternative adjustments or computations. The commissioner may, in his or her discretion, agree to the application or use of alternative adjustments or computations if he or she concludes that the income of the taxpayer would not be properly reflected in the absence of such an agreement.

The definition of a related member under the Tax Law has been amended. A *related member* is a related person as defined by section 465(b)(3)(C) of the Internal Revenue Code, except 50% is substituted for the 10% ownership threshold.

The *effective rate of tax,* as to any state or possession of the United States, is defined as the maximum statutory rate of tax imposed by the state or possession on or measured by a related member's net income multiplied by the apportionment percentage, if any, applicable to the related member under the laws of that jurisdiction. For purposes of this definition, the effective rate of tax for any state or possession is zero if the related member's net income tax liability in that jurisdiction is reported on a combined or consolidated return including both the taxpayer and the related member where the reported transactions between the taxpayer and the related member are eliminated or offset.

When computing the effective rate of tax for a jurisdiction in which a related member's net income is eliminated or offset by a credit or similar adjustment that is dependent upon the related member either maintaining or managing intangible property or collecting interest income in that jurisdiction, the maximum statutory rate of tax imposed by that jurisdiction must be decreased to reflect the statutory rate of tax that applies to the related member as effectively reduced by that credit or similar adjustment.

Example 1: A related member, who is not part of a combined report, is subject to the tax in another jurisdiction. The other jurisdiction's rate of tax on apportioned net income is 9%. The related member's net income of $100,000 is reduced by a $20,000 modification that is dependent upon the related member managing intangible property in that jurisdiction. The effective rate of tax would be computed as follows:

($100,000 - $20,000) X 9% = $7,200
$7,200 / $100,000 = 7.2%
The related member's effective rate of tax is 7.2%.

Example 2: Assume the same facts as in Example 1, except the tax on the related member's net income is reduced by a $2,000 credit that is dependent upon the related member managing intangible property in that jurisdiction. The effective rate of tax would be computed as follows:

$100,000 X 9% = $9,000
$9,000 - $2,000 = $7,000
$7,000 / $100,000 = 7%
The related member's effective rate of tax is 7%.

These amendments apply to taxable years beginning on or after January 1, 2013.

(Tax Law sections 208.9(o), 292(a)(6), 612(r),1453(r), and 1503(b)(14))

Credit for alternative fuel vehicle refueling property and electric vehicle recharging property (Articles 9, 9-A, and 22)

Chapter 59 of the Laws of 2013 (Part G) established a credit for the installation of alternative fuel vehicle refueling property and electric vehicle recharging property. The credit applies to qualified property placed in service in New York State during the taxable year. The credit is allowed for tax years beginning on or after January 1, 2013, but before January 1, 2018.

The credit may be claimed by corporations that are taxable under Tax Law Article 9, section 183 (franchise tax on transportation and transmission corporations and associations); Article 9, section 184 (additional franchise tax on transportation and transmission corporations and associations); Article 9, section 185 (franchise tax on farmers', fruit growers', and other like agricultural corporations organized and operated on a co-operative basis); and Article 9-A (franchise tax on business corporations). This includes a corporation that is a partner in a partnership (or member of a limited liability company (LLC) that is treated as a partnership for federal income tax purposes).

The credit may also be claimed by resident and nonresident individuals, estates, and trusts that are taxable under Tax Law Article 22 (personal income tax). This includes an individual, estate, or trust that is a partner in a partnership (including a member of an LLC that is treated as a partnership for federal income tax purposes), a shareholder of a New York S corporation, or the beneficiary of an estate or trust.

The credit for each installation of alternative fuel vehicle refueling property and electric vehicle recharging property is equal to the lesser of $5,000 or 50% of the cost of the property that:

- is placed in service in New York State during a taxable year beginning on or after January 1, 2013, but before January 1, 2018;
- constitutes qualified alternative fuel vehicle refueling property or electric vehicle recharging property; and
- has not been paid for, **totally or in part**, from the proceeds of grants, including grants from the New York State Energy Research and Development Authority or the New York Power Authority.

For additional information on the credit, see TSB-M-13(5)C, (3)I, *Credit for Alternative Fuel Vehicle Refueling Property and Electric Vehicle Recharging Property.*

(Tax Law sections 187-b, 210.24, and 606(p))

Empire State film production and post-production tax credits (Articles 9-A and 22)

Chapter 59 of the Laws of 2013 (Part B) made several changes to the Empire State film production and post-production tax credits. These changes are summarized below.

Extension and reallocation of credits. The Empire State film production and post-production credits have been extended to allow an additional $420 million per year in tax credits for tax years 2015 through 2019. In addition, the annual allocation to the Empire State film post-production credit is increased from $7 million to $25 million for tax years 2015 through 2019. The Commissioner of Economic Development has the authority to redirect post-production credit funds to the film production credit if there are insufficient claims for the post-production credit, and applications for the film production credit exceed the allotted total. In addition, the commissioner may redirect film production credit funds to the post-production credit if there are insufficient claims for the film production credit, and applications for the post-production credit exceed the allotted total.

Relocated television production added to definition of a qualified film. The definition of a qualified film has been amended to include a relocated television production.

A *relocated television production* means a television production:

- that is a talk or variety program that filmed at least 5 seasons outside New York State prior to its first relocated season in New York;
- whose episodes are filmed in New York State before a studio audience of 200 or more; and
- that incurs at least $30 million in annual production costs in New York State, or at least $10 million in capital expenditures at a qualified production facility in New York.

This provision is effective as of March 28, 2013.

Additional credit for upstate film production projects and post-production projects. For tax years 2015 through 2019, there is an additional credit available for both film production projects and post-production projects in upstate New York. Each credit is equal to 10% of the wages or salaries paid to individuals directly employed by a qualified film or qualified independent film production company for services performed by those individuals in the production or post production work on a qualified film in one of the following counties:

> Alleghany, Broome, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Cortland, Delaware, Erie, Essex, Franklin, Fulton, Genesee, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Monroe, Montgomery, Niagara, Oneida, Onondaga, Ontario, Orleans, Oswego, Otsego, Schoharie, Schuyler, Seneca, St. Lawrence, Steuben, Tioga, Tompkins, Wayne, Wyoming, or Yates.

Partners in partnerships and shareholders of New York S corporations are allowed a credit equal to their pro rata share of the partnership's or S corporation's credit.

Wages and salaries of individuals directly employed as writers, directors, music directors, producers, and performers (including background actors with no scripted lines) are excluded from both credits. In addition, the qualified film must have a minimum budget of $500,000. Post-production services must be performed at a qualified post-production facility located in one of the above counties.

The additional credits are funded from the annual allocations of the film production credit and the film post-production credit. However, the combined aggregate amount of the additional credit for both film and post-production projects may not exceed $5 million per year.

Changes to post-production credit eligibility. To be eligible for the post-production credit, the qualified post-production costs, excluding visual effects and animation (VFX) costs, at a qualified post-production facility must meet or exceed 75% of the total post-production costs, excluding VFX costs, paid or incurred in the post-production of a qualified film at any post-production facility.

Qualified post-production costs for VFX are eligible for the post-production credit if the costs for VFX at a qualified post-production facility meet or exceed the lesser of:

- $3 million, or
- 20% of the total post-production costs for VFX paid or incurred in the post-production of a qualified film at any post-production facility.

A taxpayer may claim a credit for qualified post-production costs, excluding VFX costs, and for qualified post-production costs for VFX, if the criteria in the previous paragraphs are satisfied for both costs.

The eligibility changes to the post-production credit apply to taxpayers submitting initial applications to the Governor's Office for Motion Picture and Television Development on or after March 28, 2013.

The eligibility changes to the post-production credit also apply to taxpayers who filed an initial application before March 28, 2013, but who had not yet submitted a final application to the Governor's Office for Motion Picture and Television Development as of March 28, 2013, if the taxpayers agree to the additional reporting requirements added to section 3 of Part Y-1 of Chapter 57 of the Laws of 2009[1].

Film post-production credit limitation. If the amount of the film post-production credit allowed is:

- at least $1 million, but less than $5 million, the credit must be claimed over a two-year period beginning in the first taxable year in which the credit may be claimed and in the next succeeding taxable year. One-half of the credit allowed is claimed in each year.

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[1] Section 3 of Part Y-1 of Chapter 57 of the Laws of 2009 was amended to include additional reporting requirements such as the names and location information of taxpayers who are allocated a tax credit, corresponding credit amounts, and project identifying information. A report including this information must be provided to the Director of the Division of Budget, the Chairman of the Assembly Ways and Means Committee, and the Chairman of the Senate Finance Committee.

- at least $5 million, the credit must be claimed over a three-year period beginning in the first taxable year in which the credit may be claimed and in the next two succeeding taxable years. One-third of the credit allowed is claimed in each year.

This provision is effective as of March 28, 2013.

For more information about the film production credit and the post-production credit, visit the New York State Governor's Office for Motion Picture and Television Development Web site at www.nylovesfilm.com.

(Tax Law sections 24(a)(5), 24(b)(1), 24(b)(3), 24(b)(8), 24(e)(4), 31(a)(3), and 31(a)(5))

Extension of the electronic filing and electronic payment mandate provisions

Chapter 59 of the Laws of 2013 (Part H) extended the revised electronic filing and electronic payment mandate provisions for tax preparers established under Part U of Chapter 61 of the Laws of 2011. These provisions have been extended through December 31, 2016. The provisions were set to expire on December 31, 2013.

Under these provisions, a tax preparer who prepares authorized tax documents for more than ten different taxpayers during any calendar year, and in a succeeding year prepares one or more authorized tax documents using tax software, must file all authorized tax documents electronically in that succeeding tax year as well as each year thereafter. These provisions apply to tax preparers who first become subject to the mandate for calendar years beginning on or after January 1, 2012, but before January 1, 2017.

Note: Tax preparers who met a prior e-file mandate requirement in a previous year must still electronically file all authorized tax documents in succeeding tax years if they prepare one or more returns using tax software.

The e-file mandate rules that were in effect prior to the revised provisions established under Chapter 61 of the Laws of 2011 will be restored as of January 1, 2017.

For the most up-to-date information on the e-file mandate for tax preparers, see the Tax Department Web site (www.tax.ny.gov).

Metropolitan Transportation Authority (MTA) surcharge extender (Articles 9, 9-A, 32, and 33)

Chapter 59 of the Laws of 2013 (Part A) extended the MTA surcharges imposed under Articles 9, 9-A, 32, and 33 of the Tax Law through tax years ending prior to December 31, 2018.

(Tax Law sections 183-a(1), 184-a(1), 186-c(1)(a)(1), 209-B(1), 1455-B(1), and 1505-a(a))

New York State Business Incubator and Innovation Hot Spot Support Act (Articles 9-A and 22)

Chapter 59 of the Laws of 2013 (Part C) created the New York State Business Incubator and Innovation Hot Spot Support Act (the Act) to support companies in New York State that are in the early stages of development. The Act provides for operating grants and other assistance to New York State incubators and New York State innovation hot spots for the purpose of developing successful businesses in the state by providing technical assistance, direct mentorship, entrepreneurial education, and business development services. In addition, new section 38 has been added to the Tax Law to provide for New York State innovation hot spot program tax benefits.

Under the Act, Empire State Development (ESD) is authorized to issue an annual request for proposals for grants and assistance based on available appropriations and to designate qualified applicants as New York State incubators. In addition, in each of state fiscal years 2013 and 2014, ESD is authorized to designate five qualified New York State incubators as New York State innovation hot spots. These New York State innovation hot spots can certify certain clients as a *qualified entity* eligible for tax benefits under section 38 of the Tax Law.

The tax benefits available to a qualified entity subject to tax under Article 9-A of the Tax Law (the franchise tax on business corporations) are described below. These tax benefits are allowed for five tax years beginning with the first tax year a qualified entity becomes a tenant in (or is part of) a New York State innovation hot spot.

- A qualified entity that is located within the innovation hot spot will only be subject to the fixed dollar minimum tax under Article 9-A.
- An entity that is:
  - a corporate partner of a qualified entity, or
  - is a qualified entity that is located both within and without an innovation hot spot, is allowed only a deduction (in the form of a subtraction modification) for the amount of income or gain included in its federal taxable income that is attributable to operations at or as part of the innovation hot spot.

In addition, a qualified entity that is a tenant in (or is part of) a New York State innovation hot spot is eligible for a credit or refund for the 4% state sales and use tax and the 3/8% tax imposed by the state in the Metropolitan Commuter Transportation District on the retail sale of tangible personal property and certain taxable services. The credit or refund will be allowed for sixty months beginning with the first full month after the qualified entity becomes a tenant or becomes part of an innovation hot spot.

Note: A taxpayer that claims any of the tax benefits described above is no longer eligible for any other New York State exemption, deduction, credit, or refund to the extent attributable to the business operations of a qualified entity at (or as part of) a New York State innovation hot spot. The election to claim any of the tax benefits described above is not revocable.

An individual who is the sole proprietor of a qualified entity or a member of a limited liability company (LLC), a partner in a partnership, or a shareholder in a New York S corporation (where the LLC, partnership, or New York S corporation is a qualified entity) who is subject to tax under Article 22 of the Tax Law (personal income tax) is also eligible for tax benefits under section 38 of the Tax Law.

(Tax Law sections 38, 208.9(a)(18), 209.11, 612(c)(39), and 1119(d)(1); section 11-1712(c)(35) of the Administrative Code of the City of New York; and section 1(16-v) of the Urban Development Corporation Act)

Rehabilitation of historic properties credit (Articles 9-A, 22, 32, and 33)

Chapter 59 of the Laws of 2013 (Part F) made several amendments to the Tax Law with regard to the rehabilitation of historic properties credit.

The following amendments are effective for tax years beginning on and after January 1, 2013:

- The enhanced credit allowed under Tax Law sections 210.40(1)(A), 606(oo)(1)(A), 1456(u)(1)(A), and 1511(y)(1)(A) has been extended to tax years beginning before January 1, 2020. The enhanced credit amount is equal to 100% of the federal credit allowed under Internal Revenue Code (IRC) subsection 47(a)(2). However, the credit cannot exceed $5 million per structure. Prior to the amendments, the enhanced credit was due to expire for tax years beginning on or after January 1, 2015.

  Note: For tax years beginning on or after January 1, 2020, the credit will equal 30% of the federal credit allowed under IRC subsection 47(a)(2) and cannot exceed $100,000 per structure.

- To be eligible for the credit, all or part of a rehabilitation project must be located within a census tract that is identified as being at or below 100% of the state median family income. The state median family income is computed as of January 1 of each year using the most recent five-year estimate from the American Community Survey published by the United States Census Bureau. (The determination of eligibility is made by the New York State Office of Parks, Recreation and Historic Preservation.)

The following amendments are effective for tax years beginning on and after January 1, 2015, and apply to qualified rehabilitation projects placed in service on or after January 1, 2015:

- If the credit allowed for a tax year reduces the tax to the applicable minimum amount for taxpayers subject to tax under Tax Law Article 9-A, Article 32, or Article 33, any excess will be treated as an overpayment of tax to be credited or refunded. Interest will not be paid on the overpayment.

- If the credit allowed for a tax year exceeds the amount of tax owed by a taxpayer subject to tax under Tax Law Article 22, any excess will be treated as an overpayment of tax to be credited or refunded. Interest will not be paid on the overpayment.

The credit is only refundable for qualified rehabilitation projects placed in service on or after January 1, 2015. For qualified rehabilitation projects placed in service before January 1, 2015, the credit is not refundable, but any excess can be carried over to the following year or years.

(Tax Law sections 210.40, 606(oo), 1456(u), and 1511(y))

Veterans Remembrance and Cemetery Maintenance and Operation Fund (Articles 9-A and 22)

Chapter 57 of the Laws of 2013 (Part W) created the Veterans Remembrance and Cemetery Maintenance and Operation Fund. This fund has been created for the purpose of the construction, establishment, expansion, improvement, support, operation, maintenance, and provision of perpetual care of veterans cemeteries in New York State.

New sections 627-a and 209-H have been added to the Tax Law to require a space on New York State personal income tax returns and corporate franchise tax returns for the purpose of allowing taxpayers to make voluntary contributions to the fund for tax years 2013 and after.

(Tax Law sections 627-a and 209-H, State Finance Law section 97-mmmm, and Executive Law sections 353.12 and 365)

NOTE: A TSB-M is an informational statement of existing department policies or of changes to the law, regulations, or department policies. It is accurate on the date issued. Subsequent changes in the law or regulations, judicial decisions, Tax Appeals Tribunal decisions, or changes in department policies could affect the validity of the information presented in a TSB-M.