SUBSTANCE OF THE ADOPTED RULE

DEPARTMENT OF TAXATION AND FINANCE

This rule amends the Business Corporation Franchise Tax Regulations, as published in Subchapter A of Chapter I of Title 20 NYCRR, the Franchise Tax on Banking Corporations Regulations, as published in Subchapter B of Chapter I of such Title, and the Franchise Taxes on Insurance Corporations Regulations, as published in Subchapter C of Chapter I of such Title, relating to combined reports.

Section 1 amends section 3-2.2 of the regulations to eliminate language contained in such section relating to Foreign Sales Corporations (FSCs) because the corresponding IRC provisions relating to FSCs have been repealed.

Sections 2 and 3 amend sections 3-11.1 and 3-12.1 of the regulations relating to Real Estate Investment Trusts (REITs) and Regulated Investment Companies (RICs), respectively, to refer taxpayers to section 211.4 of the Tax Law for rules relating to the inclusion of such entities in a combined report.

Sections 4 and 5 amend sections 3-13.2 and 3-13.5 of the regulations, respectively, to correct cross-references to section 6-2.2(b) relating to the definition of unitary business that was moved to section 6-2.3(e) by section 12 of this proposal.

Section 6 makes technical amendments to the index of Subpart 6-2 of the regulations.

Sections 7 and 8 amend section 6-2.1 of the regulations to eliminate the discretionary language relating to when a combined report is permitted or required. This language has been replaced with rules as to when a combined report is required or permitted due to the presence or absence of substantial intercorporate transactions among related corporations.

Section 9 amends section 6-2.2 of the regulations to delete the language relating to the unitary business requirement. The unitary business language has been moved to section 6-2.3 relating to the substantial

intercorporate transactions requirement as it is more appropriately suited there. Technical and clarifying amendments have also been made to the language relating to the capital stock requirement. Language has also been added to the capital stock requirement to provide that for purposes of measuring the 80 percent stock ownership/control requirement, such ownership will be determined based on the total voting power rather than the total number of shares of the stock owned. In addition, it provides a definition of the term "related corporations".

Sections 10, 11, and 12 rename section 6-2.3 of the regulations and make numerous other amendments to the section. Many of the amendments are derived from technical memorandum TSB-M-08(2)C. The existing discretionary language relating to when a combined report is permitted or required and the language and examples relating to the presumption of distortion have been eliminated. This language has been replaced with language that requires a combined report where there are substantial intercorporate transactions. The new language provides a list of activities and transactions that are considered in determining whether substantial intercorporate transactions exist. It further provides rules as to how the requirement may be met applying certain percentage tests. It also provides a series of steps for taxpayers to follow in determining whether a combined report is required, and if so, which corporations are included in the report. In addition, language has been added to provide that a combined report may be required or permitted where substantial intercorporate transactions are absent, but such a report is necessary in order to properly reflect the tax liability under Article 9-A. Lastly, it adds language previously contained in section 6-2.2 of the regulations relating to the determination of whether a corporation is part of a unitary business.

Section 13 renames section 6-2.4 of the regulations and makes various technical and clarifying amendments to the section.

Section 14 amends section 6-2.5 of the regulations to delete language which provides that a foreign corporation not subject to tax will not be required to be included in a combined report unless inclusion is

necessary to properly reflect the tax liability of one or more taxpayers in the group because of substantial intercorporate transactions or some agreement, understanding, arrangement or transaction whereby the activity, business, income or capital of any taxpayer is improperly or inaccurately reflected. It also makes it clear that corporations organized under the laws of a country other than the United States may not be included in a combined report. It eliminates language that requires a FSC to be included in a combined report because the IRC provisions relating to FSCs have been repealed. Examples that illustrate when a FSC is required to file a combined report have also been eliminated. It also makes it clear that a corporation subject to or that would be subject to, if subject to tax, another New York State Franchise tax may not be included in a combined report under Article 9-A. In addition, it adds language to conform to the statute, that aviation corporations and railroad and trucking corporations that allocate pursuant to Tax Law sections 210.3(a)(7)(A) and 210.3(a)(8), respectively, may not be included in a combined report with any other corporation unless such corporation allocates in the same manner. Various technical and clarifying amendments have also been made.

Section 15 renames section 6-2.6 of the regulations and adds language to refer REITs and RICs to section 211.4 of the Tax Law for information relating to the inclusion of such entities in a combined report.

Section 16 renumbers section 6-2.7 of the regulations to 6-2.8 and adds a new section 6-2.7 that provides examples illustrating where a combined report is required or permitted.

Section 17 makes technical and clarifying amendments to section 6-2.8 of the regulations, as renumbered by section 16.

Section 18 amends section 6-3.2 of the regulations to delete language requiring that all corporations in the combined group use the same accounting period. New language has been added providing that where a corporation’s taxable year differs from that of the taxpayer parent, that the applicable taxable year to be included in the combined report is the taxable year that ends within the taxable year of the taxpayer parent. Technical and clarifying amendments have also been made.

Sections 19 and 20 make amendments to sections 21-2.1 and 21-3.2 of the Article 32 regulations to correspond with the Article 9-A amendments described in section 18 of this summary.

Section 21 adds a new Part 33 to the Article 33 regulations to provide that the provisions of Subpart 6-2 of Article 9-A regulations are applicable to combined returns filed under section 1515(f) of the Tax Law except where otherwise provided by the Tax Law or Part 33. Specific language is provided to codify certain exceptions.

Section 22 provides that the rule will be effective on the date the Notice of Adoption is published in the State Register and apply to taxable years beginning on or after January 1, 2013.