STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C060327B

On March 27, 2006, a Petition for Advisory Opinion was received from Irwin M. Slomka, c/o Morrison & Foerster LLP, 1290 Avenue of the Americas, New York, NY 10104.

The issue raised by Petitioner, Irwin M. Slomka, is whether Corporation A's investments in Eurodollar deposits and other time deposits and Yankee certificates of deposit are considered cash on hand or on deposit eligible to be treated as investment capital at Corporation A's election under section 208.7(a) of the Tax Law and subject to apportionment by its zero investment allocation percentage.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Corporation A, a holding company for an affiliated group of manufacturing corporations, is subject to tax in New York State pursuant to Article 9-A of the Tax Law.

Corporation A invests in stocks, bonds and other securities that qualify as investment capital. None of the debt instruments (bonds) are payable on demand or within six months and one day. The issuer's allocation percentage for each of these items of investment capital is zero. Corporation A's investment allocation percentage is zero.

Corporation A invests in various types of time deposits, including Eurodollar time deposits. These time deposits are usually placed with a bank's Cayman Island branch and represent unconditional obligations of the bank to repay the principal, with interest, at the conclusion of a fixed period of time, typically from overnight to six months (although the term may be as long as five years). Currently, Corporation A invests in Eurodollar deposits and other time deposits with maturities of less than six months and one day. There are penalties for early withdrawals.

Corporation A also invests in instruments known as Yankee certificates of deposit (Yankee CDs) with maturities of less than six months and one day. A Yankee CD is a certificate of deposit issued by a U.S. branch of a bank located outside the United States. All of the issuers are banking corporations. A Yankee CD is substantially similar to an ordinary certificate of deposit issued by a U.S. bank. Corporation A always acquires Yankee CDs directly from the issuing bank.

Applicable law and regulations

Section 208.5 of Article 9-A of the Tax Law provides, in part:

> The term "investment capital" means investments in stocks, bonds and other securities, corporate and governmental, not held for sale to customers in the regular course of business, exclusive of subsidiary capital and stock issued by the taxpayer, provided, however, that, in the discretion of the commissioner, there shall be deducted from investment capital any liabilities which are directly or indirectly attributable to investment capital …;

Section 208.6 of the Tax Law provides, in part:

> The term "investment income" means income, including capital gains in excess of capital losses, from investment capital, to the extent included in computing entire net income, less, (a) in the discretion of the commissioner, any deductions allowable in computing entire net income which are directly or indirectly attributable to investment capital or investment income …;

Section 208.7(a) of the Tax Law provides:

> The term "business capital" means all assets, other than subsidiary capital, investment capital and stock issued by the taxpayer, less liabilities not deducted from subsidiary or investment capital except that cash on hand and on deposit shall be treated as investment capital or as business capital as the taxpayer may elect.

Section 210.3(b) of the Tax Law provides for investment income to be allocated to New York State, in part, as follows:

> multiplying its investment income by an investment allocation percentage…
>
> *   *   *
>
> (3) … if a taxpayer's investment allocation percentage is zero, interest received on bank accounts shall be multiplied by its business allocation percentage …;

Section 3-3.2 of the Business Corporation Franchise Tax Regulations ("Regulations") provides, in part:

> (a)(1) The term *investment capital* means the taxpayer's investments in stocks, bonds and other securities issued by a corporation (except as provided in paragraph (2) of this subdivision) or by the United States, any state, territory or possession of the United States, the District of Columbia, or any foreign country, or any political subdivision or governmental instrumentality of any of the foregoing . . . At the election of the taxpayer, cash on hand and cash on deposit may be treated on any report as either investment capital or business capital . . . Any debt instrument, including a certificate of deposit, which is described in paragraph (2) or (3) of subdivision (c) of this section and is not

described in paragraph (2) of this subdivision and which is payable by its terms on demand or within six months and one day from the date on which the debt was incurred is deemed to be cash on hand or on deposit. Any such debt instrument which is payable by its terms more than six months and one day from the date on which the debt was incurred is deemed to be cash on hand or on deposit on any day which is not more than six months and one day prior to its date of maturity. Cash also includes shares in a money market mutual fund. A money market mutual fund is a no-load, open-end investment company registered under the Federal Investment Company Act of 1940 which attempts to maintain a constant net asset value per share and holds itself out to be a "money market" fund. A taxpayer may not elect to treat part of its cash as investment capital and part as business capital. No election to treat cash as investment capital may be made where the taxpayer has no other investment capital.

*   *   *

(2) Investment capital does not include:

(i) stock issued by the taxpayer;

(ii) stocks, bonds or other securities constituting subsidiary capital;

(iii) securities of an individual, partnership, trust or other nongovernmental entity which is not a corporation within the definition contained in section 208.1 of the Tax Law (such as Federal National Mortgage Association and Government National Mortgage Association pass-through certificates);

(iv) stocks, bonds and other securities of a DISC, or any indebtedness from a DISC;

(v) regular interests and residual interests in a real estate mortgage investment conduit (REMIC), as defined in section 860D of the Internal Revenue Code;

(vi) futures contracts and forward contracts; and

(vii) stocks, bonds and other securities held by the taxpayer for sale to customers in the regular course of its business.

*   *   *

(c) For purposes of paragraph (1) of subdivision (a) of this section, the phrase *stocks, bonds and other securities* means:

*   *   *

(2) debt instruments issued by the United States, any state, territory or possession of the United States, the District of Columbia, or any foreign country, or any political subdivision or governmental instrumentality of any of the foregoing;

(3) qualifying corporate debt instruments (see subdivision (d) of this section);

* * *

(d) *Qualifying corporate debt instruments*. (1) The term *qualifying corporate debt instruments* means all debt instruments issued by a corporation other than the following:

(i) instruments issued by the taxpayer or a DISC;

(ii) instruments which constitute subsidiary capital in the hands of the taxpayer;

(iii) instruments acquired by the taxpayer for services rendered or for the sale, rental or other transfer of property, where the obligor is the recipient of the services or property; however, where a taxpayer sells or otherwise transfers property which is investment capital in the hands of such taxpayer (*e.g.*, stock) and receives in return a corporate obligation issued by the recipient of such property, such corporate obligation, if it is not otherwise excluded from the category of investment capital, would constitute investment capital in the hands of the taxpayer;

(iv) instruments acquired for funds if:

(*a*) the obligor is the recipient of such funds;

(*b*) the taxpayer is principally engaged in the business of lending funds; and

(*c*) the obligation is acquired in the regular course of the taxpayer's business of lending funds;

(v) accepted drafts (such as banker's acceptances and trade acceptances) where the taxpayer is the drawer of the draft;

(vi) instruments issued by a corporation which is a member of an affiliated group which includes the taxpayer; and

(vii) accounts receivable, including those held by a factor.

Opinion

In *Deloitte & Touche LLP*, Adv Op Comm T&F, June 26, 2002, TSB-A-02(10)C, it was determined that where a taxpayer has debt instruments constituting investment capital that do not mature within six months and one day and the investment allocation percentage of the instruments is zero, investment income that represents interest income received on bank accounts is multiplied by the business allocation percentage and investment income attributable to items of cash on hand and on deposit, other than interest received on bank accounts, is multiplied by the zero investment allocation percentage.

Cash on hand and cash on deposit as used in section 208.7(a) of the Tax Law are not defined in Article 9-A of the Tax Law or in the Regulations. However, section 3-3.2(a)(1) of the Regulations, in defining *investment capital*, provides that any debt instrument, including a certificate of deposit that is described in section 3-3.2(c)(2) or (3) of the Regulations, is not described in section 3-3.2(a)(2) of the Regulations, and is payable by its terms on demand or within six months and one day from the date on which the debt was incurred, is deemed to be cash on hand or on deposit. Any such debt instrument that is payable by its terms more than six months and one day from the date on which the debt was incurred is deemed to be cash on hand or on deposit on any day which is not more than six months and one day prior to its date of maturity.

In this case, Corporation A has investments not maturing within six months and one day that constitute investment capital pursuant to section 3-3.2 of the Regulations. Corporation A also has investments in Eurodollar deposits, other time deposits, and Yankee CDs, all maturing within six months and one day. Petitioner states that Yankee CDs are substantially similar to an ordinary certificate of deposit issued by a U.S. bank. Petitioner states that Eurodollar deposits and other time deposits represent unconditional obligations of the bank to repay the principal with interest at the conclusion of a fixed period of time. Petitioner also states that there are penalties for early withdrawals of Eurodollar deposits and other time deposits. Therefore, the Eurodollar deposits and other time deposits are also substantially similar to certificates of deposit issued by U.S. banks. Accordingly, the Eurodollar deposits, other time deposits, and Yankee CDs are debt instruments and, assuming they meet all of the requirements of section 3-3.2(a)(1) of the Regulations, they constitute cash on hand and cash on deposit. Since Corporation A has items of investment capital not maturing within six months and one day, Corporation A is allowed, pursuant to section 208.7(a) of the Tax Law and section 3-3.2(a)(1), to elect to treat the investments constituting cash on hand and on deposit as investment capital.

Income from Corporation A's investment capital not maturing within six months and one day and, if Corporation A elects, income from all of Corporation A's items of cash on hand and on deposit (including the investments in Eurodollar deposits, other time deposits, and Yankee CDs) constitute investment income pursuant to section 208.6 of the Tax Law.

Pursuant to section 210.3(b) of the Tax Law, Corporation A's investment income is multiplied by its investment allocation percentage. However, since Corporation A's investment allocation percentage is zero, section 210.3(b)(3) of the Tax Law provides that Corporation A's interest received on bank accounts, if any, must be multiplied by Corporation A's business allocation percentage. Black's Law Dictionary, Eighth Edition, defines a *bank account* as "A deposit or credit account with a bank, such as a demand, time, savings, or passbook account. UCC § 4-104(a)." (p.18.) These accounts are different from a traditional certificate of deposit in that a customer can deposit and withdraw money from the account (that is, the amount of principal in the account is not fixed), and, with the possible exception of a "time" account, these accounts do not have a maturity date. The Eurodollar deposits, other time deposits, and Yankee CDs described in this Opinion are not bank accounts. Therefore, any income from such instruments is not required to be multiplied by the business allocation percentage. If Corporation A elects to treat the investments constituting cash on hand and on deposit as investment capital, Corporation A's investment income attributable to Corporation A's items of cash on hand and on deposit, other than interest received on bank accounts, is multiplied by Corporation A's zero investment allocation percentage. See *Deloitte & Touche LLP*, *supra*.

DATED: November 30, 2006

/s/
Jonathan Pessen
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Technical Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.