

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-99(19)C
Corporation Tax
June 24, 1999

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C990323A

On March 23, 1999, a Petition for Advisory Opinion was received from S. Nobile & Company, 135 West 41st Street, Suite 1600, New York, New York 10036.

The issue raised by Petitioner, S. Nobile & Company, is whether the exclusion allowed for dividends received from subsidiary capital, pursuant to section 208.9(a)(1) of the Tax Law, in computing entire net income is limited to the amount excluded for federal income tax purposes.

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

A corporation which is a member of an affiliated group of corporations is included in a federal consolidated return with its subsidiaries but files on a separate company basis for purposes of New York State franchise tax purposes under Article 9-A of the Tax Law.

For federal income tax purposes net operating losses (NOL) were carried back, but, due to the New York State limitation with respect to NOL carrybacks, such losses were carried forward for purposes of Article 9-A of the Tax Law. In order to increase the amount of NOL deduction for purposes of Article 9-A (New York NOL deduction cannot exceed federal NOL deduction), taxpayer reduced the amount of dividend exclusion and increased the amount of the NOL deduction on its separate federal proforma return. The corporation did not exclude 100 percent of the dividends it received from its subsidiaries in computing its federal taxable income at line 30 of its federal proforma Form 1120.

Discussion

Section 208.9 of the Tax Law provides that "entire net income" means total net income from all sources, which shall be presumably the same as the entire taxable income which the taxpayer is required to report to the United States Treasury Department, except as provided in section 208.9 and section 210.3(d) and (e) of the Tax Law.

Section 208.9(a)(1) of the Tax Law provides that entire net income shall not include income, gains and losses from subsidiary capital.

Section 208.9(b)(2) of the Tax Law provides that entire net income shall be determined without the deduction of any part of any income from dividends or interest on any kind of stock, securities or indebtedness, except as provided in section 208.9(a)(1) and (2) of the Tax Law.

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Section 3-2.2(b) of the Business Corporation Franchise Tax Regulations ("Article 9-A Regulations") provides that federal taxable income is the starting point in computing entire net income. Generally, *federal taxable income* means taxable income as defined in section 63 of the Internal Revenue Code ("IRC"). After determining federal taxable income, it must be adjusted as required by sections 3-2.3, 3-2.4, 3-2.5 and 3-2.6 of the Article 9-A Regulations.

Section 63 of the IRC provides that the term "taxable income" means gross income minus the deductions allowed by Chapter 1 of the IRC. Section 61 of the IRC defines "gross income" generally, as all income from whatever source derived, and includes dividend income. Section 241 of the IRC provides that in computing taxable income, in addition to the deductions provided in sections 161 through 198 of the IRC, there shall be allowed other special deductions for corporations, including a deduction for dividends received by corporations that is contained in section 243 of the IRC.

Section 3-2.2(c) of the Article 9-A Regulations provides that each corporation included in a federal consolidated group must compute its federal taxable income for purposes of Article 9-A of the Tax Law as if such corporation had computed its federal taxable income on a separate basis for federal income tax purposes (a federal proforma Form 1120 return).

Section 3-2.3(a)(1) of the Article 9-A Regulations provides that in computing entire net income, federal taxable income must be adjusted by adding to it any part of any income from dividends or interest on any kind of stock, securities or indebtedness for which a deduction has been allowed for federal income tax purposes.

Section 3-2.4(a)(1) of the Article 9-A Regulations provides that in computing entire net income, federal taxable income is adjusted by subtracting from it all dividends, interest and gains from subsidiary capital with certain exceptions not relevant in this case.

Accordingly, in this case, when the corporation computes its entire net income pursuant to section 208.9 of the Tax Law, the corporation's starting point, pursuant to section 3-2.2(b) of the Article 9-A Regulations, is federal taxable income, as determined under section 63 of the IRC. Since the corporation is included in a federal consolidated group, but files separately for purposes of Article 9-A of the Tax Law, pursuant to section 3-2.2(c) of the Article 9-A Regulations, the corporation must compute its federal taxable income for purposes of Article 9-A of the Tax Law as if such corporation had computed its federal taxable income on a separate basis for federal income tax purposes. In computing such federal taxable income, dividends are included in gross income pursuant to section 61 of the IRC, and under section 243 of the IRC, a special deduction is allowed for dividends received by corporations.

After determining its federal taxable income on a proforma basis, the corporation must make the adjustment as required by section 208.9(b)(2) of the Tax Law and section 3-2.3(a)(1) of the

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Article 9-A Regulations to add back to such federal taxable income the amount of dividends received from subsidiary capital that was subtracted as a special deduction pursuant to section 243 of the IRC. The corporation must also make the adjustment as required by section 208.9(a)(1) of the Tax Law and section 3-2.4(a)(1) of the Article 9-A Regulations to subtract from such federal taxable income, the amount of dividends received from subsidiary capital that was included in gross income under section 61 of the IRC.

DATED: June 24, 1999

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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