

Treatment of the Sale of Subsidiary Stock when a Subsidiary is Included in a Combined Report

This memorandum sets forth the Tax Department's policy on how, for purposes of computing entire net income (ENI) under the business corporation franchise tax (Article 9-A of the Tax Law), the gain or loss from the sale of stock in a subsidiary is treated when the subsidiary is included with its parent corporation in a combined report in the year of the sale. This policy reflects the holding of the recent Tax Appeals Tribunal decision in *Matter of Bausch & Lomb*, N.Y.S Tax Appeals Tribunal (December 20, 2007).

General

In *Matter of Bausch & Lomb*, the Tax Appeals Tribunal held that the loss incurred by a parent corporation from the sale of stock in a subsidiary included in a combined report with the parent in the year of the sale is allowed in computing combined ENI. (For purposes of this memorandum a subsidiary included in a combined report with its parent in the year of the subsidiary's sale will be referred to as an *included subsidiary*.)

While *Matter of Bausch & Lomb* involved a loss on the sale of stock of an included subsidiary, its holding would also apply to gains from the sale of stock of an included subsidiary. Thus, based on the decision, the following rules apply:

- When a parent sells stock of an included subsidiary, no modification to federal taxable income (FTI) is made in the computation of ENI for any gain or loss from the sale of stock of the included subsidiary. If the sale of stock of an included subsidiary results in a capital loss carry back or carry forward, no modification to FTI is made in the computation of ENI for the carry back or carry forward year regardless of whether the subsidiary is included in a combined report with the parent in the carry back or carry forward year.
- After ENI is computed, the gain or loss on the sale of stock of an included subsidiary is considered business income in the determination of what is investment income and business income.
- The business income in the year of the sale or, in the case of a capital loss carry back or carry forward, the carry over year, is allocated by the parent's (or where the parent is a member of a combined group, the group's) business allocation percentage (BAP) for that year. For the taxable year the stock of the included subsidiary is sold, the combined group's BAP will reflect the activities, business, income, and capital of the included subsidiary (in addition to the activities, business, income, and capital of the other corporations included in the combined report) during the period for which it is included in the combined report. However, the receipts from the sale of the stock of an included subsidiary are not

included in the receipts factor of the BAP. Based on section 4-4.6(e) of the business corporation franchise tax regulations, the sale of the stock is considered the sale of a capital asset. Receipts from the sale of capital assets are not business receipts and are not included in the receipts factor of the business allocation percentage.

- A parent corporation is allowed to deduct expenses that are attributable to the stock of an included subsidiary.¹
- The stock of the included subsidiary is not included in combined business capital and investment capital or combined subsidiary capital for the period the subsidiary is included in the combined report.

Effective date

The Tribunal's decision applies to all taxable years that remain open under the statute of limitations. Therefore, corporations affected by this change must amend any previously filed returns for any open years. Generally, the statute of limitations remains open for three years after the original return was filed. A claim for credit or refund should be filed on Form CT-8, *Claim for Credit or Refund of Corporation Tax Paid*. Where additional tax is due, an amended CT-3-A, *General Business Corporation Combined Franchise Tax Return*, or CT-3, *General Business Corporation Franchise Tax Return*, should be filed.

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

¹ See TSB-A-94(13)C