

## **New York: Department Issues Guidance on Identifying Investment Capital**

The New York State Department of Taxation and Finance recently issued a Technical Memorandum that outlines the identification requirements for Article 9-A taxpayers with investment capital, [TSB-M-15\(4\)C, \(5\) \(July 7, 2015\)](#). Recall, under New York's recent corporate tax reform effective for tax years beginning on or after January 1, 2015, net investment income from qualifying investment capital is excluded from a taxpayer's business income. Likewise, investment capital (net of liabilities attributable to such investment capital) is excluded from a taxpayer's business capital tax base. Investment capital means those investments in stock of non-unitary corporations that satisfy a five-part test. To qualify, investments in non-unitary stock must 1) qualify as a "capital asset" under section 1221 of the Internal Revenue Code (IRC), 2) be held for investment for more than one year, 3) generate long term capital gain or loss under the IRC if disposed of, 4) for stock acquired on or after January 1, 2015, have never been held for sale to customers in the regular course of business, and 5) before the close of the day on which the stock was acquired, be clearly identified in the corporation's records as stock held for investment in the same manner as required under IRC section 1236(a)(1) (the identification requirement is extended to seven days for certain floor specialists as defined in IRC section 1236(d)). The Department's Technical Memorandum provides the procedures required to satisfy the identification requirement for investment capital.

### **Dealers Subject to IRC Section 1236**

For corporations that are dealers subject to IRC section 1236, stock must be identified in the corporation's records as held for investment under IRC section 1236(a)(1) to satisfy the identification requirement for

investment capital. Identification of the stock as held for investment under IRC section 475 or a separate New York identification does not meet the identification requirement.

### **Non-Dealers**

For corporations that are not dealers, stock acquired before October 1, 2015 that otherwise meets the requirements for investment capital must be clearly identified in the corporation's records as stock held for investment before October 1, 2015. Non-dealers must record qualifying investment stock in a separate account maintained solely for investment capital purposes. That account must be separate from any account established for stock held for sale to customers. The account may be maintained in the taxpayer's books of account for recordkeeping purposes only or it may be a separate depository account maintained by a clearing company as nominee for the corporation. The account must disclose the name of the stock, the CUSIP number of the stock (or CINS number for international securities), date of purchase, the number of shares purchased, and the purchase price of the stock. If the stock is sold, the investment capital account must disclose the date of sale, the number of shares sold and the sales price for that stock. The account must readily identify the length of time the stock was owned by the corporation.

### **Stock Acquired Pursuant to Options**

For stock purchased by a corporation pursuant to an option, the corporation must clearly identify the option as held for investment before the close of the day on which the option was acquired to qualify the stock as investment capital. For non-dealers, stock acquired on or after October 1, 2015 pursuant to an option acquired by the taxpayer prior to October 1, 2015 may only be identified as investment capital if the corporation's records clearly identified the option as held for investment prior to October 1, 2015.

### **Corporate Partners**

A corporate partner using the aggregate method to compute its tax may treat its proportionate share of the stock owned by the partnership as investment capital

only if the requirements for investment capital are satisfied at the partnership level. Therefore, the five-part test discussed above, including the identification requirement, must be met at the partnership level before a corporate partner may treat its proportionate ownership of the stock as investment capital. A corporate taxpayer that becomes a partner in a non-dealer partnership on or after October 1, 2015, where the non-dealer partnership had not, prior to the date the corporation became a partner, identified any stock as investment capital pursuant to the five-part test, may not treat any stock owned by the partnership before the corporation became a partner as investment capital.

### **Combined Reports**

The investment capital requirements, including the identification requirements, apply to investments in stock held by all corporations in the combined group, whether or not the corporations are taxpayers.

### **New York City Corporate Tax**

Following the identification procedures set forth in the Technical Memorandum will also satisfy the requirements for identifying investment capital for New York City tax purposes.

### **Next Steps**

Corporations and partnerships that hold stock for investment should review these identification requirements and begin to implement procedures to comply with the requirements outlined in the memorandum. In most cases, stock or options currently held that may qualify as investment capital must be identified as such before October 1, 2015. Taxpayers should also put procedures in place to properly identify stock acquired on or after October 1, 2015 as investment capital before the close of the day on which such stock was acquired.

Please contact [Dave Turzewski](#), [Fred James](#), [Russell Levitt](#), or [Dale Kim](#) if you have questions on recently-released TSB-M-15(4)C, (5)I.

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