



SALT Alert!



SALT Alert! 2016-29: New York City “Clarifies” Eligibility for Broker-Dealer Apportionment

On November 25, 2016, the New York City Department of Finance (“DOF”) issued an [Update on Audit Issues memorandum](#) (“the Memorandum”) addressing eligibility for broker-dealer receipts allocation. Under the New York City Unincorporated Business Tax (“UBT”) and General Corporation Tax (“GCT”), a securities or commodities broker-dealer is eligible to source certain receipts for apportionment purposes based on the mailing address of the customer responsible for paying the service fee, rather than sourcing such receipts from the fees based on where the taxpayer performed the services.¹ Many taxpayers registered as broker-dealers with locations in New York benefit from the ability to source receipts based on the customer location. The Memorandum addresses two issues: (i) whether an entity may use the broker-dealer sourcing provisions if it is not a registered securities or commodities broker-dealer, and (ii) whether an entity may invoke the broker-dealer registration status of its single member limited liability company (which it owns and treats as a disregarded entity for tax purposes), in order to use the broker-dealer sourcing provisions for its own receipts/activities.

With respect to the first issue, the Memorandum appears to clarify that an entity must be registered with the Securities & Exchange Commission / Financial Industry Regulatory Authority (“SEC/FINRA”) or the Commodities Futures Trading Commission / National Futures Association (“CFTC/NFA”) in order to avail itself of the broker-dealer sourcing provisions. The Memorandum provides that the DOF no longer believes that certain representations made in previous ruling requests were reliable.² The Memorandum provides that “taxpayers may not rely on [the Rulings] to take the position that unregistered entities may characterize themselves as Registered under the Broker-Dealer Provisions.” In addition, the Memorandum provides that the prior rulings did not establish that having registered representatives, who are associated persons of a registered securities broker-dealer affiliate, entitles their unregistered employer to “act in the same capacity as a broker or dealer.” Furthermore, the Memorandum provides that the rulings did not establish that registration as a commodity pool operator (“CPO”) or commodity trading advisor (“CTA”) entitles an entity to act in the same capacity as a broker or dealer. The Memorandum leaves room for such CFTC/NFA registered

taxpayers, on a case-by-case basis, to establish that they are “legally acting in the capacity of a broker or dealer,” but it does not appear that the mere existence of a registration entitles a taxpayer to the broker-dealer sourcing provisions.

On the second issue, the Memorandum provides that there is no basis for extending the application of the broker-dealer sourcing provisions to unregistered owners of registered single member limited liability companies, despite the tax treatment of such wholly-owned companies as entities disregarded as separate from their owners. As such, DOF will only consider the application of the broker-dealer sourcing provisions to receipts generated by the registered single member liability company itself, and will not permit the broker-dealer sourcing provisions to apply to receipts earned by the unregistered single member owner.

Next steps

It is our understanding that the DOF’s new pronouncement regarding broker-dealer receipts allocation will be applied on audit examination to all open tax years. As such, taxpayers should consider whether exposure now exists for prior tax years. Taxpayers should also consider the Memorandum on a prospective basis. Finally, while the same broker-dealer receipts allocation provisions have been in place for the New York State corporate franchise tax both before and now under corporate tax reform legislation, there are no official pronouncements from the New York State Department of Taxation and Finance addressing either of the two topics covered in the City’s Memorandum. Please contact [Dale Kim](#) or [Russ Levitt](#) with questions.

Footnotes

¹ Note that under the State and City corporate tax reform legislation effective for 2015 and forward, New York City corporate taxpayers no longer source service revenues based on their work location but, rather, use a customer-based sourcing approach. Tax reform has not yet been extended to the City UBT.

² See Finance Letter Rulings [#12-4934/UBT \(dated August 19, 2013\)](#) and [#13-4950/UBT \(dated March 28, 2014\)](#).