

Income/Franchise:

New York: Comments on Updated Draft Proposed Corporation Franchise Tax Rules are Due by August 2

Draft Proposed Amended New York State Article 9-A Business Corporation Franchise Tax Regulations, Part 1, Part 2, and Part 3, N.Y. Dept. of Tax. & Fin. (4/28/21); *Draft Proposed Amended New York State Article 9-A Business Corporation Franchise Tax Regulations, new Part 10*, N.Y. Dept. of Tax. & Fin. (4/28/21). The New York State Department of Taxation and Finance (Department) released combined updates to previously posted draft proposed amendments to New York Article 9-A State Business Corporation Franchise Tax Regulations, Parts 1, 2 and 3 covering definitions, nexus, income and capital, capital losses, prior net operating loss conversion subtraction, and net operating losses – many of which are “minor editorial and consistency edits.” The updates also include draft proposed regulations addressing accounting periods, which had not been previously posted. Regarding nexus, some notable updates include:

URL: <https://www.tax.ny.gov/pdf/bus/ct/parts-1-through-3-april-2021.pdf>

URL: <https://www.tax.ny.gov/pdf/bus/ct/special-entities-april-2021.pdf>

- Adding to the list of activities deemed insufficient to subject a foreign corporation to tax activities that are typically engaged in by banking corporations, based on activities included in the bank tax regulations (under prior law), and
- Clarifying that if all members of a unitary group are exempt from taxation because of P.L. 86-272, then the unitary group is not required to file a combined report.

The updates also

1. Incorporate recent legislative changes regarding the treatment of repatriated income and global intangible low-taxed income (GILTI);
2. Clarify the rules for capital losses sustained in a non-captive real estate investment trust (REIT) filing year if an entity ceases to qualify as a REIT; and
3. Revise an example to show the interaction of “separate return limitation year” (SRLY) and Internal Revenue Code (IRC) section 382 limitations.

Additionally, the Department explains that this draft “continues to assume that the separate accounting election for corporate partners will be repealed and the nexus thresholds for certain foreign limited partners will be increased as a result;” however, it states that it is still studying these changes and “has yet to make a final determination.” If it is decided to maintain the separate accounting election and current nexus thresholds, “those changes will be separately circulated for review” – as such, the Department is explicitly requesting feedback on this topic.

The Department also released updates to its previously posted (from May 2020) draft proposed amendments to New York Article 9-A State Business Corporation Franchise Tax Regulations, new Part 10, containing previously posted special rules for qualified New York manufacturers, corporate partners, New York S

corporations, REITS, regulated investment companies (RICs), and domestic international sales corporations (DISCs). According to the Department, in addition to minor editorial changes and consistency edits, the updates include:

- Inclusion of a definition of “goods” for purposes of a qualified New York manufacturer;
- Clarifications of what constitutes manufacturing activities;
- Clarification of the business apportionment factor (BAF) computation for corporate partners computing tax under the aggregate method;
- An added example of the tax computation for corporate partners using the entity method; and
- Clarification of the sourcing of GILTI for New York S corporations.

Moreover, the Department explains that it is currently reviewing the need for special rules for real estate mortgage investment conduits (REMICs).

Collectively – for all these new draft proposed amendments to New York Article 9-A State Business Corporation Franchise Tax Regulations – the Department states that it does not anticipate that many substantive changes will need to be made before the formal promulgation process begins. Accordingly, “if there are comments that have not yet been submitted or proposed changes have not been made but you believe are necessary, we strongly encourage such feedback be submitted during this comment period so that the Department may consider them before the formal promulgation process begins.” Comments on these proposals are due to the Department by August 2, 2021. Please contact us with any questions.

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