

# NYC Update

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**December 8, 2015**

**NCCPAP, Tri-State Update**

**Tarrytown, New York**

# ***Section 1***

## ***Summary of 2015 NYC Corporate Tax Reform***

# Overview

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- ▶ General Structure of the bill
- ▶ Differences attributable to
  - S corporations
  - Tax Rates and Bases
  - NYC Business Tax Structure
  - Existing Law
  - Political process
- ▶ Modifications to Original Bill
- ▶ Recent comments, questions, etc.

# General Structure

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Effective January 1, 2015, NYC has a new tax for C-corporations, the official name is the Corporate Tax on 2015 and it is Subchapter 3-A of Chapter 6 of Title 11 of the NYC Ad Code.

The goal was to conform the NYC corporate tax to Article 9-A of the State Tax Law for C corporations and banks. This bill achieves substantial conformity for those entities and will allow them to determine NYC corporate tax according to the same basic rules that the State enacted last year in the 2014-2015 budget.

Mechanically, we are creating a new Subchapter that takes the existing General Corporation Tax and adds the statutory amendments made to Article 9-A last year. We have incorporated the major elements of State reform including:

- merger of corporate and bank tax,
- customer sourcing of income,
- simpler rules for combined business filings,
- a business income tax base,
- narrower definitions of investment capital and income,
- expense attribution
- no separate treatment of subsidiary capital, and
- simpler treatment of NOLs

# General Structure (Cont.)

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- ▶ Subchapter 3-A is intended to be parallel to the GCT, and each GCT section has a counterpart under the new subchapter that is +50 (parallelism breaks down in some internal subdivisions). We wanted the layout to be familiar and usable and allow for flipping between the GCT and 3-A.
- ▶ We've intentionally omitted many obsolete individual provisions in order to maintain the parallel numbering between the GCT and Subchapter 3-A, in the event you're confused by the presence of intentionally omitted notations in a brand new law.
- ▶ There are new sections and they are necessary to parallel the state, in particular, receipts sourcing and combination. We've also added a new section for NOLs, in large part because we just could not fit it in the same place as the state.

# S Corporations

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- ▶ Possibly the biggest difference from 9-A, and the reason for creating a new subchapter is, City taxation of S corporations.
- ▶ These corporations may elect out of tax at the federal level and may also elect out of tax under Article 9-A – they cannot at the City level. Because the City and State already take a different approach to these corporations, the City is leaving S corporations under the current General Corporation Tax and is separately studying the reform of these entities.
- ▶ This means the new subchapter 3-A has no S corporation election like the state and specifically makes clear that it only applies to non-S corporations. S corporation is defined by the federal election, not the state election.
- ▶ Similarly, amendments are made to the General Corporation Tax (GCT) and Banking Corporation Tax (BCT) to specifically state that for all tax years beginning on or after January 1, 2015, only S corporations are subject to tax.
- ▶ Net operating losses incurred by an S corporation after January 1, 2015 do not carryover if the corporation later converts into a C corporation.

# ***Tax Rates and Bases - General***

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- ▶ Generally applicable 8.85% business income tax rate, with lower rates for low income businesses and qualified manufacturers and the slightly higher bank tax rate for large financial corporations.
- ▶ Retaining the tax on capital and raising the maximum tax to \$10 million, with rate reductions for capital attributable to certain subsidiaries of utilities and insurance companies.
- ▶ Adopting the State's new schedule for the fixed dollar minimum tax.

# Tax Rates and Basis - Definitions

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- ▶ The definition of manufacturer is a hybrid of the old City new State definitions: a manufacturer must be principally engaged in the manufacture and sale of tangible personal property (>50% of gross receipts), but must also have manufacturing property in the state and the federal adjusted basis must be \$1 million or more than 50% of all its real and personal property must be in the state (this is a tweak for small interstate manufacturers).
  - Low rate applies if allocated business income is less than \$10M and phases out between \$10 - 20M of allocated business income and \$20 - 40M of unallocated business income.
- ▶ Low income/small business depends purely on income thresholds and not on employment or initial capitalization requirements. Low income/small businesses do not have an exception for the 1/10<sup>th</sup> limit on prior net operating loss conversion subtractions.
  - Lower rate applies if allocated business income is less than \$1M and phases out between \$1 - 1.5M of allocated business income and \$2 - 3M of unallocated business income.

# Tax Rates and Bases - Definitions

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- ▶ The definition of financial corporation includes corporations or combined groups that have more than \$100 billion of total assets reflected on their balance sheet, computed under GAAP, at the end of the taxable year, and:
  - More than 50% of their overall receipts allocated pursuant to the rules for financial receipts (Code § 11-654.5(5)), or
    - Including receipts from qualified and nonqualified financial instruments and commodities, and registered broker-dealer services, credit and consumer cards, and investment company services,
  - A registration or classification as a financial institution (such as a bank, savings or thrift association registered broker dealer, or agency, branch or foreign depository) except that, in the case of a combined group, more than 50% of the assets of the group must be held by one or more corporations with a financial registration or classification.

# Tax Rates and Bases – Income Tax Rates

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Type of Business	Rate in Tax Year 2015 and thereafter
Qualified Manufacturing Corporations	4.425% - 8.85%
Small businesses	6.5% - 8.85%
Financial Corporations	9%
Remaining taxpayers	8.85%

- The tax rate for qualified manufacturing corporations phases out between \$10 and \$20 million of allocated business income and \$20 and \$40 million of business income before allocation.
- The tax rate for small businesses phases out between \$1 and \$1.5 million of allocated business income and \$2 and \$3 million of business income before allocation.

# Tax Rates and Bases – Capital Tax Rates

Type of Business	Rate in Tax Year 2015 and thereafter
Cooperative housing corporations	0.04%
All other corporations	0.15%
<i>Exception:</i> the portion of total business capital directly attributable to stock in a subsidiary that is taxable as a utility within the meaning of the New York City Utility Tax or would have been taxable as an insurance corporation under the former New York City Insurance Corporation Tax	0.075%
<ul style="list-style-type: none"> <li>- The maximum tax is \$10,000,000.</li> <li>- A \$10,000 reduction applies to all capital tax calculations (provided that the capital tax cannot be less than \$0).*</li> </ul>	

# Tax Rates and Bases – Fixed Dollar Minimum Tax

<b>If New York City receipts are:</b>	<b>Fixed dollar minimum tax is:</b>
Not more than \$100,000	\$25
More than \$100,000 but not over \$250,000	\$75
More than \$250,000 but not over \$500,000	\$175
More than \$500,000 but not over \$1,000,000	\$500
More than \$1,000,000 but not over \$5,000,000	\$1,500
More than \$5,000,000 but not over \$25,000,000	\$3,500
More than \$25,000,000 but not over \$50,000,000	\$5,000
More than \$50,000,000 but not over \$100,000,000	\$10,000
More than \$100,000,000 but not over \$250,000,000	\$20,000
More than \$250,000,000 but not over \$500,000,000	\$50,000
More than \$500,000,000 but not over \$1,000,000,000	\$100,000
More than \$1,000,000,000	\$200,000

A corporation's "New York City receipts" are the same as its New York City receipts for purposes of computing its business allocation percentage. If a return is filed for a period of less than one year, the minimum tax may be reduced.

# NYC Business Tax Structure

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- ▶ The City applies a gross receipts tax to all publicly supervised utilities, wireless companies deemed to be PSC supervised utilities, and vendors of utility services.
  - PSC supervised utilities (and wireless equivalents) are excluded from Subchapter 3-A entirely, so there are no entire net income modifications for public utilities (not necessary) and public utilities are excluded from combination.
  - Vendors of utility services have a partial exemption, equal to the portion of their gross receipts subject to the NYC utility tax, and they are combinable to the extent of their taxable income.
  - Corporate partners of partnerships that are taxable under the NYC utility tax may exempt their distributive share of income to the extent it was taxed under the NYC utility tax (// UBT paid).

# NYC Business Tax Structure

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- ▶ The City does not tax insurance corporations, under the GCT or a separate tax parallel to Article 33 of the Tax Law.
  - Captive REITs and RICs that are combinable with insurance companies taxable under Article 33 are taxable (i.e., not exempt) from tax under Subchapter 3-A.
  - Captive REITs and RICs that are combinable with insurance companies taxable under Article 33 are combinable with other corporations subject to tax under Subchapter 3-A.
- ▶ The City imposes an unincorporated business tax.
  - A credit applies for UBT tax paid.
  - Publicly traded partnerships that made a one-time election to be taxable under the UBT for tax years beginning in 1996 may continue to pay UBT unless and until the election is revoked.
  - The definition of corporation specifically excludes any entity classified as a partnership for federal income tax purposes.

# Existing Law

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- ▶ Retaining property and payroll factors on the current phase-out schedule and single factor receipts – based apportionment will apply for tax years beginning on or after January 1, 2018, subject to an election for small-medium firms.
- ▶ Retaining our existing tax credits, such as our relocation credits and unincorporated business tax paid credit, with modifications to ensure these credits carryover from the General Corporation Tax and Banking Corporation Tax.
  - Ex. LM REAP – 6 years under GCT, another 6 under 3-A
  - Add back of related credit expenses to entire net income
- ▶ No 60% reduction in aviation receipts allocated to the City.
- ▶ No special treatment of Domestic International Sales Corporations.

# Existing Law

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- ▶ Retaining a deduction related to industrial waste treatment facilities and pollution control facilities (NYC does not have an investment tax credit).
- ▶ Retaining an ENI modification related to restricted stock grants
- ▶ Retaining a specific exemption for IRC § 501(c)(25) entities that hold title to real estate for corporations that are exempt under IRC § 501(c)(3).
- ▶ The statutes of limitations applicable to assessments and refunds in connection with New York State changes of income are revised to permit the City and taxpayers to make income allocation adjustments based on New York State income allocation adjustments.

# **Modification to Original Bill – City Only**

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- ▶ Removed economic nexus (haven't given up, will follow how it's working at the state level)
- ▶ Added the BCT 9% tax rate for large financial corporations
- ▶ Added a reduced, 0.075% capital tax rate for total capital attributable to certain utility and insurance subsidiaries
- ▶ Revised the definition of qualified manufacturer to include manufacturers with property in NYS, not just NYC
- ▶ Added an entire net income subtraction for interest income from certain loans secured by affordable housing or residential property located in low-income communities – phase-out above \$100M in assets
- ▶ Added a grace period for payment of estimated taxes – no penalty if the taxpayer fully pays by the first date after June 15 that estimated tax is due
- ▶ Added a revocable election for firms with less than \$50 million of receipts allocated to NYC in 2018 to continue using the 2017 3-factor business allocation percentage formula (93% sales, 3.5% property, 3.5% payroll)

# ***Modifications to Original Bill – Conforming to State***

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- ▶ Redefined investment capital to include only investments in the stock of non-unitary corporations that are: 1) held for investment for 1 year, 2) qualify as capital assets under §1221 of the IRC, 3) generate (or would generate) long term capital gain or loss upon dispositions, 4) to the extent acquired after January 1, 2015, have never been held for sale in the regular course of business, and 6) are identified as investments in the same manner required under § 1236 of the IRC (with a grace period to October 1, 2015 for non-dealers).
- ▶ Capped gross investment income at 8% of entire net income

# ***Modifications to Original Bill – Conforming to State***

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- ▶ Redefined the Qualified Financial Instrument concept so it includes loans (except loans secured by real estate), federal, state and municipal debt, asset backed securities and other government agency debt, corporate bonds, stock (except stock that is investment capital), partnership interests, physical commodities and other financial instruments not otherwise enumerated in the statute that are marked to market under IRC § 475 or § 1256 – or in the same allocation category as another instrument that's marked to market.
  - No loans if real estate loans are the only marked to market loans.

# ***Modifications to Original Bill – Conforming to State***

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- ▶ Clarifies the application of the one year holding period to presumed investment capital, in the event the taxpayer does not own the stock when it files its tax return for the taxable year it is reporting – holding period determined by the period actually owned
- ▶ Made the interest expense attribution safe harbor a revocable election
- ▶ Made the election to accelerate PNOLCs revocable
- ▶ Added a specific burden of proof requirement to discretionary income allocation adjustments
- ▶ Clarified the effect of NOLs and PNOLCs on combined report tax base
- ▶ Clarified the calculation of income for low income and manufacturing tax rates – allow PNOLCs in the calculation

# ***Recent Comments, Questions etc.***

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- ▶ Credit carryovers
- ▶ Economic nexus for in-state taxpayers
- ▶ Regulations
- ▶ Determination of preferential rate for qualified manufacturers – higher of the allocated v. unallocated

# ***Section 2***

## ***NYC Taxation of Flow-Through Entities***

# New York City Taxation of S Corporations

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- ▶ Taxation at the Entity Level
  - NYC taxes corporations that make an S election as if they were regular C corporations for purposes of the General Corporation Tax (“GCT”) and Bank Tax.
  - This also means that a qualified subchapter S subsidiary (QSub) must file a separate GCT return in NYC if it has nexus. (*Finance Memorandum 99-3*)
  - NYC Corp Tax Reform? Not for S corps!!

# ***New York City Taxation of S Corporations***

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- ▶ Since 2009, NYC has been phasing in its single factor allocation method for business income, using a phase-in over 10 years. Prior to 2009, an equal-weighted 3-factor formula was used.
- ▶ After 2017, only a sales factor will be used.
- ▶ 2014: 73% receipts, 13.5% property, 13.5% payroll
- ▶ Still “cost of performance” for apportionment of sales because of nonconformity with Corporate Tax Reform

# New York City Taxation of S Corporations

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## ▶ Taxation of Resident Individuals

- A NYC resident pays NYC tax on the same income stream from an S corporation twice – at the entity level and on the flow-through income on the individual's personal income tax return. *See Matter of Gael de Brousse, ALJ Decision DTA No. 816052 (08/06/98).*
- Despite the concern regarding double taxation, S corporations account for approximately 1/3 of GCT revenues according to NYC calculations, making it unlikely that NYC's treatment of S corporations will change anytime soon.

# ***New York City Taxation of S Corporations***

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- ▶ **Taxation of Nonresident Individuals**
  - Since nonresidents are not subject to personal income tax in New York City, they do not have to report any flow-through income or distributions from an S corporation to the City.

# New York City Taxation of S Corporations

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- ▶ 338(h)(10) elections
  - The regulations (19 RCNY 11-27(j)) tell us that a 338(h)(10) election will not be recognized for purposes of computing the GCT. So there is no deemed asset sale and no stepped up basis for the purchaser. The acquisition of the S corporation is treated as a stock sale and the purchaser does not acquire a stepped up basis. Thus, the target now has two different bases in the assets – one for NYS and federal purposes, and one for NYC purposes.
  - But the NYC resident shareholder of the target corporation determines his or her city taxable income starting with federal AGI. So, for NYS/NYC personal income tax purposes, the shareholder pays tax on gain from the deemed asset sale under 338(h)(10).

# ***NYC Taxation of LLCs and Partnerships (The UBT)***

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## ▶ Entity–Level Taxation

- The UBT is imposed on any individual or unincorporated entity (including a partnership, LLC, fiduciary or corporation in liquidation) engaged in any trade, business, profession or occupation wholly or partly carried on within New York City.
- A partnership includes any entity treated as a partnership for federal income tax purposes.
- Also applies to Schedule C taxpayers!

# ***NYC Taxation of LLCs and Partnerships (The UBT)***

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- ▶ **Exempt Activities**
  - **Own Account:** An individual or other unincorporated entity is not subject to the UBT if it only engages in activities (trade or the purchase, holding, or sale of property) for its own account. The exemption applies if the individual or entity is “primarily engaged” (90% of the gross value of its assets) in trading or investing activities for its own account.
- ▶ **Real Estate:** if activities in the nature of holding, leasing or managing real property, the taxpayer is not subject to the UBT
- ▶ **Sales reps excluded**
- ▶ **Beginning in 2009, taxpayers with unincorporated business income of \$95,000 or less are not required to file a UBT return.**
- ▶ **If the UBT is \$3400 or less, the business is permitted a credit for 100% of the tax.**

# ***NYC Taxation of LLCs and Partnerships (The UBT)***

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- ▶ Taxation of Resident Individuals
  - NYC resident individuals who are sole proprietors, LLC members (including SMLLCs) or partners in an unincorporated entity subject to the UBT can take a credit on their personal income tax return for UBT taxes paid.
    - NYC taxable income is \$42,000: 100% credit
    - NYC taxable income over \$142,000: credit of 23% of UBT paid
    - NYC taxable income between \$42,000 and \$142,000: by formula

# ***NYC Taxation of LLCs and Partnerships (The UBT)***

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- ▶ Taxation of Nonresident Individuals
  - For UBT purposes, a nonresident individual's UBT liability does not differ from that of a resident.
  - A New York State nonresident individual cannot take a credit for UBT paid, even if that individual files a nonresident return in New York.

# NYC Taxation of LLCs and Partnerships (The UBT)

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## ▶ Tiered Partnerships

- *UBT Paid Credit for Corporate Partners:* Corporate members or partners of an unincorporated entity are eligible for a credit against their NYC GCT liability if the corporation is required to include its distributive share of the income, gain, loss, deductions and/or guaranteed payments from the partnership in the corporation's tax base.
- If the corporation determines its GCT liability based on ENI, the UBT credit paid is the lesser of the following:
  - $(\text{UBT tax} + \text{credits allowable to the unincorporated business under NYC Admin. Code } \S 11-503(j)) \times (\text{total of the corporate partner's distributive share of income, gain, loss, deductions and guaranteed payments} / \text{net distributive share of all partners for whom their individual share is greater than zero}) \times 4/8.85$ . OR
  - The amount of allocated net income on the corporation's GCT return (Schedule A, line 1)  $\times 4/8.85$ .

# NYC Taxation of LLCs and Partnerships (The UBT)

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- ▶ *UBT Paid Credit for Upper-tier Partners or LLC Members:*
  - Partners or LLC members who are subject to the UBT and include in the partnership's business income their distributive share of income, gain, loss and deductions from a lower tier partnership or LLC may claim a credit for UBT tax paid. The credit equals the lesser of the following:
    - UBT paid by the distributing partnership plus the credits taken by the distributing partnership on its own return multiplied by the partners distributive share percentage or the partner's UBT liability before any business tax credits (whichever is lesser); OR
    - The UBT computed on the partner's share of income without any UBT paid credit for lower tier partnerships so long as the amount exceeds zero.

# NYC Taxation of LLCs and Partnerships (The UBT): Special Situations

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## ▶ Nexus Issues

- A corporate limited partner can be deemed to have nexus in NYC by virtue of a passive interest in an entity that is doing business in the City. But so long as there is no unitary business and no “flow of values” between the corporation’s passive interest and its active business, the corporation should be permitted to use separate accounting to allocate its income.
- In *Matter of Just Born*, TAT (E) 93-456 (GC) (1998), the taxpayer had a PA confectionary business, whose income was not subject to tax in NYC based on Public Law 86-272. But it also had a passive partnership interest in a NYC partnership whose losses offset the corporation’s income for federal purposes.
- The Tribunal held that the taxpayer could apply a discretionary adjustment and separately allocate the income from the confectionary business and the partnership, resulting in no New York City tax liability, stressing that but for the passive partnership interest, the corporate would not be subject to the GCT.

# ***NYC Taxation of LLCs and Partnerships (The UBT): Special Situations***

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## ▶ Financial Services Companies

- Expense deductions:
  - 2014 issue with announcement that NYC intended to disallow certain expense deductions by hedge fund or private equity fund managers.
  - Typically, the management company (usually some type of partnership) would receive the management fees for the fund and those fees would be subject to UBT. A separate partnership receiving a carried interest or incentive allocation fee would not be subject to the UBT, since it was trading on its own account. The management company would also deduct all of the management expenses for the fund.
  - The new NYC policy would disallow the deduction of a portion of the expense deductions as attributable to the non-taxable partnership. But nothing ever happened!

# ***NYC Taxation of LLCs and Partnerships (The UBT): Special Situations***

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- ▶ Apportionment
  - Broker–dealer sourcing rules look to market–based sourcing
  - Audit issues arising for some taxpayers

# ***NYC Taxation of LLCs and Partnerships (The UBT): 2015 NYC Task Force on Flow-Through Entities***

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## **▶ Recommendations**

- Conform to revised definition of investment capital
- Institute minimum fee for UBT
- Repeal trading/investment exemption and real estate exemption
- Improve compliance of investment management firms and hedge funds by: (i) adopting cost-plus method for determining income; and (ii) characterizing income from management fees waivers as business income
- Raise caps that limit the GCT and UBT-paid credits for PIT filers that report flow-through income

# ***Section 3***

## ***NYC Tax Compliance and Administrative Issues***

# Taxpayer Services Unit

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## Overview

- ▶ Taxpayer Services is a new unit that was created in order to respond to technical questions raised by tax practitioners about business and excise taxes, provide detailed explanations of Department of Finance policy, and work on special initiatives that are important to taxpayers and tax practitioners. The name of this unit may be changed to avoid confusion with the Office of the Taxpayer Advocate. You may contact the office by calling Ellen Miller at 718.488.2014. You may also reach us by E-mail at [taxpayerservices1@finance.nyc.gov](mailto:taxpayerservices1@finance.nyc.gov).

# Current Technical Guidance

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- ▶ The New York City Department of Finance currently utilizes the following formats to provide guidance:

## Regulations

- A regulation provides guidance for new legislation or addresses issues that arise with respect to existing statutes. Regulations interpret and give directions on complying with the law. Regulations are published in the Rules of the City of New York, after public input is fully considered through written comments and a public hearing.

## Finance Memorandum

- Finance Memoranda advise taxpayers and tax professionals of the Department's current position and/or procedures with respect to specific issues. Memoranda are merely advisory and explanatory in nature, and not declaratory rulings or rules of the Department of Finance and do not have legal force or effect, do not set precedent and are not binding on taxpayers.

## Statement of Audit Procedure

- Statements of Audit Procedure (SAPs) are used by Finance audit staff for guidance on various audit-related matters. While they are intended to instruct auditors how to resolve specific issues – and the primary purpose is internal distribution – we generally make all SAPs available on our website and they can be useful for understanding the audit process and the analysis of Finance with respect to a particular issue.

## Finance Letter Rulings

- A Letter Ruling is a written document that states Finance's position on how a law is applied to a specific set of facts submitted by the taxpayer. A ruling is binding on Finance only with respect to the person to whom it is rendered and on the condition that the actual facts match the facts stated in the request. It is the only form of specifically binding advice.

## Updates on Audit Issues

- An Update informs taxpayers of issues that Finance has identified for review and briefly summarizes Finance's analysis and recommendations. These are informal documents that Finance uses for informational purposes and may provide clarity with regard to an area of law that Finance has identified as an area of non-compliance or misunderstanding.

# ***Taxpayer Advocate's Office***

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- ▶ Taxpayer Advocate: Diana Leyden, Esq. (hired July 2015)
- ▶ Staff hired September 28, 2015
  - Attorney–Advisor: Pooja Kondabolu, Esq.
  - Case Advocates:
    - Property: Robin Bermudez
    - Collections: Francisca Owheruo
    - Business & Excise: Pooja Kondabolu, Esq.
    - Tax Analyst (and Inquiries): Nicola Nurse

# ***How to Contact the Office:***

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- ▶ 3-1-1
- ▶ General Number: (212) 312-1800
- ▶ Efax: (646) 500-6907
- ▶ Office Email:  
[DOFTaxpayerAdvocate@finance.nyc.gov](mailto:DOFTaxpayerAdvocate@finance.nyc.gov)
- ▶ Location/Mail address:  
253 Broadway, 6<sup>th</sup> Floor, New York, NY 10007
- ▶ Diana Leyden's email: [LeydenD@finance.nyc.gov](mailto:LeydenD@finance.nyc.gov)
- ▶ Diana Leyden's phone #: (212) 312-6575
- ▶ Website address: [www.nyc.gov/taxpayeradvocate](http://www.nyc.gov/taxpayeradvocate)

# ***Criteria for qualifying for help from The Office of the Taxpayer Advocate***

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1. You have made a reasonable attempt to solve your inquiry or complaint with the Department of Finance. Your inquiry or complaint has not been fixed or you have not received a timely response.
2. You believe you can show that the Department of Finance is applying the tax laws, regulations or policies unfairly or incorrectly, or have injured or will injure your Taxpayer Rights.
3. You face a threat of immediate harmful action (e.g., seizure of your funds or property) by the Department of Finance for a debt you believe you can show is not owned.
4. You face a threat or immediate harmful action (e.g., seizure of your funds or property) by the Department of Finance for a debt you believe you can show is incorrect, unfair or illegal.
5. You believe you can show that you will suffer damage that is beyond repair or a long-term harmful impact if relief is not granted
6. You believe you can show that your problem also affects other similar taxpayers and is a problem with the Department of Finance's systems or processes.
7. You believe you can show that the rare facts in your case justify help from the Office of the Taxpayer Advocate.
8. You believe you can show that there is a compelling public policy reason why you should get help from the Office of the Taxpayer Advocate

# Examples of when to contact The Office of the Taxpayer Advocate with COMPLAINTS

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- ▶ The Department of Finance has assessed a late payment or late filing penalty, *you have tried to contact the person listed on a letter* or whose name was given to you and no one is calling you back. You have information that can prove the form was not filed late or that the payment was not paid late.
- ▶ The Department of Finance has sent your client a letter informing it that a UBT tax return has not been filed. *You have called a number at the Department of Finance and have been switched to several people. No one can give you an answer.* You have proof that the return was filed, and in fact you think a refund is due. Your client would like to get the money.
- ▶ The Department of Finance misclassified property as the wrong class. Your client notified the Department of Finance property unit by a letter dated 2013 and for FY 15/16 the Department of Finance corrected it going forward, but would not correct it for FY 13/14. Your client would like to get a refund for prior years and you can prove the first time the client contacted the Department of Finance with the correct information.

# ***NYC Voluntary Disclosure Program***

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- ▶ Eligibility: to be eligible for the VDCP you cannot:
  - Be currently under audit by the Department of Finance; or
  - Have had prior contact with the Department of Finance about the specific liabilities involved; or
  - Be party to any criminal investigation being conducted by NYS or any political subdivision of NYS; or
  - Be related to a tax avoidance transaction that is a Federal or NYS reportable Transaction.

NOTE: You may participate in the program even if your tax delinquency is due to fraud or was otherwise intentional.

# ***NYC Voluntary Disclosure Program***

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- ▶ Application Process: written request, which may be anonymous
- ▶ The request must include the following information:
  - A description of the business activities in NYC and NYS;
  - When these activities began;
  - The number of employees involved in the business and their titles;
  - When the taxpayer believes taxes were first due;
  - The reason the taxes were not paid in the past;
  - The estimated business taxes on a year-by-year basis;
  - An affirmation that NYC has not contacted the taxpayer before about these specific tax liabilities and that the taxpayer is not currently under audit by the Department of Finance for any City tax.

# NYC BCMS Process

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- ▶ Time to Appeal
  - 90 days from Notice of Determination
  - 2 years for refund disallowance
- ▶ Scheduling
  - Usually with – 60 days
  - Often follow-ups
- ▶ Conference Setting
  - Conciliation letter. Taxpayer/Rep. Finance Attorney
- ▶ Should you bother?

# ***Section 4***

## ***NYC Case Updates***

# ***Unincorporated Business Tax (UBT): Payments to Partners***

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- ▶ *Tocqueville Asset Management L.P.*, TAT 10-37(E)(UB)(NYC Tax App. Trib., May 29, 2015)
  - Tribunal upheld disallowance of deduction for salaries paid to and the pension plan payments made on behalf of certain employees of the taxpayer's general partner who were also the taxpayer's limited partners.

# UBT: Worker Status

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- ▶ *Timothy J. Young*, TAT(H) 12-19 (UB) (NYC Tax App. Trib., ALJ Div., Feb. 4, 2015)
  - ALJ rejected Department's attempt to characterize a floor clerk on the American Stock Exchange as an independent contractor operating an unincorporated business subject the UBT.

# Real Property Transfer Tax (RPTT)

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- ▶ ***GKK 2 Herald LLC***, TAT(H) 13–25 (RP) (NYC Tax App. Trib., ALJ Div., Apr. 1, 2015)
  - Applying the step–transaction doctrine, the ALJ found that instead of a mere change in form qualifying for exemption and the transfer of a non–controlling interest in real property not subject to RPTT, a taxable transfer of an interest in real property occurred.

- ▶ *Jonis Realty/E. 29<sup>th</sup> Street, LLC*, TAT(H) 09–9 (RP) (NYC Tax App. Trib., ALJ Div., Sept. 9, 2015)
  - ALJ held that no transfer of a controlling economic interest in real property occurred, since one of the transfers was unplanned and took place for independent reasons; the regulatory presumption for aggregating transactions occurring within a three-year period was rebutted.

## **General Corporation Tax (GCT); Characterization of Health Maintenance Organizations (HMOs)**

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- ▶ ***Matter of Aetna, Inc.***, TAT(H) 12-3(GC) & TAT 12-4(GC) (NYC Tax App. Trib. ALJ Div. July 22, 2014)
  - HMOs were held by ALJ to be insurance companies that were exempt from the GCT and could not be included in a combined GCT return with their holding company parent.

# GCT: Apportionment

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- ▶ ***Matter of The McGraw–Hill Companies, Inc.***, TAT(H) 10–19(GC) (NYC Tax App. Trib. ALJ Div. Feb. 24, 2014)
  - ALJ concluded that receipts from S&P’s credit rating services constituted “other business receipts” and that such services constituted protected speech under the First Amendment, requiring that such receipts be treated no differently from other publishing receipts—*i.e.*, subject to an audience/circulation allocation method.
  - Tribunal disagrees and applies place-of-performance allocation method.
    - No First Amendment violation – S&P is not similarly situated to broadcasters and publishers and is not subject to content-based discrimination.
    - S&P’s credit rating revenue is service receipts, not “other business receipts.”

# Utility Taxes

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- ▶ ***IN THE MATTER OF SECURITIES INDUSTRY AUTOMATION CORP.*** TAT (E) 12-9 (UT) AND TAT (E) 12-10 (UT)
- ▶ ***Matter of Securities Industry Automation Corp.***, TAT(E) 12-9(UT), TAT(E) 12-10(UT) (NYC Tax App. Trib., Oct. 27, 2015)
  - The service at issue was an NYSE subsidiary's private telecommunications network, Secure Financial Transactions Infrastructure (SFTI), which connected financial institutions to the NYSE.
  - The Tribunal found that the majority of Petitioner's end-user fees imposed on third-party service providers were included in gross operating income and not exempt from the UT as sales for resale – The fees did not qualify as sales of SFTI access (they were not based on actual consumption), and therefore, the fees could not qualify as sales of SFTI access for resale.
  - Other sales to specific customers were, however, exempt sales for resale (the Tribunal remanded the case to determine the exact number of exempt sales).
  - Petitioner's co-location fees were also subject to the UT because the purpose of the co-location service was to provide connectivity to SFTI.

# Bank Tax: Combined Reporting

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- ▶ ***Matter of Astoria Financial Corp.***, TAT(H) 10-35(BT) (NYC Tax App. Trib. ALJ Div. Oct. 29, 2014)
  - ALJ concluded that a subsidiary, Fidata, a Connecticut passive investment company, had economic substance and was formed for valid business reasons, and that its transactions with its affiliates were not distortive and did not result in a mismatch of income; it could not be included in a combined return with its parent.