

18-3 March 29, 2018

FINANCE MEMORANDUM

June 1, 2018 Deadline for Limited Withdrawal of the Commonly Owned Group Election Made on a Tax Year 2015 or 2016 Combined Return

This memorandum provides a procedure for withdrawing the commonly owned group election made on a tax year 2015 or 2016 Form NYC-2A, *Combined Business Corporation Tax Return* (“a combined return”), for a limited time period expiring on June 1, 2018. The procedure applies to the limited situation in which the designated agent of a combined group made a timely commonly owned group election under the circumstances described in Limited time withdrawal procedure below, on the combined group’s tax year 2015 or 2016 combined return. In that specific situation only, the Department of Finance (“DOF”) will allow the designated agent to withdraw that election, but only if all the corporations in the original combined group follow all the procedures required in this memorandum by June 1, 2018.

Background

Under Administrative Code § 11-654.3, corporations that are commonly owned or controlled and conduct a unitary business must file a combined return. The common ownership or control requirements in Administrative Code § 11-654.3(2)(a) are met when:

- a taxpayer owns or controls, either directly or indirectly, more than 50% of the voting power of the capital stock of one or more other corporations; or
- more than 50% of the voting power of the capital stock of a taxpayer is owned or controlled, either directly or indirectly, by another corporation; or
- more than 50% of the voting power of the capital stock of a taxpayer, and the capital stock of one or more other corporations, is owned or controlled, directly or indirectly, by the same interests (for example, an alien, foreign, or domestic corporation, trust, partnership or individual).

Administrative Code § 11-654.3(3) also allows a group of commonly owned or controlled corporations to elect to file a combined return that includes all the corporations that meet the ownership requirements stated above, whether or not the corporations are conducting a unitary business. This election is referred to as the *commonly owned group election*. The designated agent (a taxpayer) of the combined group must make the election on an original, timely filed combined return of the combined group. The election is irrevocable and is binding for the tax year for which it is made and for the next six tax years. The composition of the commonly owned group is subject to verification on audit.

If the election is made, all the corporations that meet the ownership or control requirements will be treated as members of a single combined group for combined reporting purposes, **whether or not** these corporations are included in the same federal consolidated return. Corporations meeting any of the three ownership requirements with **any** taxpayer in the commonly owned group, either directly or indirectly, must be included in the combined group when the designated agent makes the commonly owned group

election.¹ It is not necessary for a corporation to be subject to tax on a standalone basis to be included in a combined group. Thus, the designated agent's and the other taxpayer members' parent corporations and brother-sister corporations, and their subsidiaries, are bound by the election if these entities meet the ownership requirements discussed above.

Transitional issue

DOF is aware that the commonly owned group election is a new provision of law, and some taxpayers may have made the election as a result of misunderstanding the filing requirements. In particular, combined returns that selected the commonly owned group election were required to include all corporations that met the ownership requirements in the combined group, whether or not they were included in the federal consolidated group. If the combined group on the combined return exactly matched the federal consolidated group, and excluded other corporations that met the ownership requirements, it clearly failed the filing requirements for the election. Since the composition of the combined group may differ significantly when all the required corporations are properly included, potentially resulting in a substantial tax change, DOF has decided that it is appropriate to administratively permit the designated agent to withdraw an initial commonly owned group election for tax year 2015 or 2016 under the specific circumstances and in accordance with the procedure described below.

Limited time withdrawal procedure

This withdrawal procedure is available **only** if:

- a combined return was filed for a combined group and the designated agent of the combined group made the commonly owned group election for the first time on the combined group's original, timely filed tax year 2015 or 2016 return;
- the corporations included in the combined return identically matched the corporations in the designated agent's federal consolidated return for that tax year; **and**
- the tax year 2015 or 2016 combined return did not include any other corporations that met the ownership or control requirements.

To withdraw the commonly owned group election, the designated agent **must**:

- file an amended Form NYC-2A for the first year the commonly owned group election was made, but not mark the box on Form NYC-2A, Schedule A, Line 28(a);
- mark an X in the amended return box on Form NYC-2A, page 1;
- include a statement that the commonly owned group election is being withdrawn based on this memorandum;
- include only those corporations that meet both the ownership requirement and the unitary business requirement, as described previously, in the combined group on the amended return;
- include an amended Form NYC-2A Affiliations Schedule, as well as any other required forms or attachments;
- include an amended Form NYC-2A/BC, Member's Detail Report, for each member of the combined group included in the amended combined return; and
- file these documents with DOF by June 1, 2018.

¹ Administrative Code § 11-654.3(2)(c) lists circumstances where a corporation is not required or permitted to be included in the combined return. These prohibitions extend to the commonly owned group election.

Note: Any attempted withdrawal submitted after June 1, 2018 will not be recognized.

If the designated agent properly withdraws the commonly owned group election on its tax year 2015 combined return and if the designated agent's tax year 2016 combined return has already been filed, the designated agent:

- must also amend its tax year 2016 combined return by June 1, 2018, in accordance with the instructions above, to include only those corporations in the group that meet both the ownership or control requirements and the unitary business requirement, **and**
- may **not** make the commonly owned group election on its tax year 2016 amended return (as the election must be made on a timely filed original return), but may make the election on a timely filed original return for the 2017 tax year or a subsequent tax year.

If the commonly owned group election was properly withdrawn for tax year 2015 by June 1, 2018 and the designated agent subsequently makes the election on a timely filed original return for tax year 2016 or a later tax year, the commonly owned group election is irrevocable (regardless of the entities included in the combined group) and will be binding for the tax year made and the next six tax years. The composition of the commonly owned group is subject to verification on audit.

All corporations that were taxpayer members included in the original combined return for tax years 2015 and 2016, but not included in the designated agent's amended combined returns for those tax years, must:

- file their own business corporation tax returns for those tax years by June 1, 2018, on a combined or separate basis, as applicable, **and**
- include a statement that says the commonly owned group election is being withdrawn based on this memorandum and provide the name and employer identification number of the designated agent on the original combined return for tax years 2015 and 2016.

Non-taxpayer members of the designated agent's original combined return that were not included in its amended returns for tax years 2015 and 2016 that meet the combined filing ownership or control requirements and are unitary with another taxpayer for tax years 2015 and 2016 must file combined with that taxpayer for those tax years by June 1, 2018.