

COMMENT LETTER

March 12, 2019

ICI Submits Opposition Letter to NY Carried Interest Proposal (pdf)

STATE OF NEW YORK

3976 2019-2020
Regular Sessions IN ASSEMBLY January 31, 2019 _____ Introduced by M. of A. AUBRY --
read once and referred to the Committee on Ways and Means AN ACT to amend the tax
law, in relation to investment management services to a partnership or other entity The
People of the State of New York, represented in Senate and Assem- bly, do enact as follows:
1 Section 1. Paragraph (a) of subdivision 6 of section 208 of the tax 2 law, as amended by
section 5 of part T of chapter 59 of the laws of 3 2015, is amended to read as follows: 4 (a)
(i) The term "investment income" means income, including capital 5 gains in excess of
capital losses, from investment capital, to the 6 extent included in computing entire net
income, less, in the(A) 7 discretion of the commissioner, any interest deductions allowable
in 8 computing entire net income which are directly or indirectly attribut- 9 able to
investment capital or investment income, (B) any of capital gain 10 included in federal
taxable income that has to be re-characterized as 11 business income pursuant to
paragraph (u) of subdivision nine of this 12 provided, however, that in no case shall
investment incomessection; 13 exceed entire net income. (ii) If the amount of interest
deductions 14 subtracted under subparagraph (i) of this paragraph exceeds investment 15
income, the excess of such amount over investment income must be added 16 back to
entire net income. (iii) If the taxpayer's investment income 17 determined without regard to
the interest deductions subtracted under 18 subparagraph (i) of this paragraph comprises
more than eight percent of 19 the taxpayer's entire net income, investment income
determined without 20 regard to such interest deductions cannot exceed eight percent of
the 21 taxpayer's entire net income. 22 § 2. Subparagraph (ix) of paragraph (a) of
subdivision 1 of section 23 210 of the tax law is amended by adding a new clause 8 to read
as 24 follows: 25 (8) the net operating loss deduction allowed under section one hundred
26 seventy-two of the internal revenue code shall for purposes of this 27 paragraph be
determined taking into consideration the re-characteriza- EXPLANATION--Matter in
(underscored) is new; matter in bracketsitalics [] is old law to be omitted. LBD05825-01-9
A. 3976 2 1 tion of income pursuant to paragraph (u) of subdivision nine of section 2 two
hundred eight of this article. 3 § 3. Subdivision 9 of section 208 of the tax law is amended
by adding 4 a new paragraph (u) to read as follows: 5 (u) Special rule for corporate partners
performing investment manage- 6 ment services. In the case of a taxpayer that is a partner
who performs 7 investment management services (as defined in subsection (h) of section 8
six hundred thirty-one of this chapter) for the partnership, the taxpay- 9 er will not be
treated as a partner for purposes of this article with 10 respect to the amount of the
partner's distributive share of income, 11 gain, loss and deduction (including any

guaranteed payments) which is in excess of the amount that such distributive share would have been if the partner had performed no investment management services. Instead, such excess amount shall be treated as an amount received from a trade or business carried on by the taxpayer, and notwithstanding any state or federal law to the contrary, such excess amount shall be characterized as a payment for services rendered. For purposes of this paragraph, the amount of the distributive share that would have been determined if the partner performed no services, shall not be less than zero.

§ 4. Section 210 of the tax law is amended by adding a new subdivision 4 to read as follows:

4. Rule for investment management services to a partnership or other entity. For purposes of subdivision three of this section, the amount of distributive share of partnership income, gain, loss or deduction (including any guaranteed payments) received as a partner by a corporation which renders investment management services to a partnership or other entity, as defined in subsection (h) of section six hundred thirty-one of this chapter, which is in excess of the amount that such distributive share would have been if the partner had performed no investment management services, shall be treated as a business receipt that arises from the performance of services. For purposes of this subdivision, the amount of the distributive share that would have been determined if the partner performed no services, shall not be less than zero.

§ 5. Subsection (b) of section 617 of the tax law, as amended by chapter 606 of the laws of 1984, is amended to read as follows:

(b) Character of items. Each item of partnership and S corporation income, gain, loss, or deduction shall have the same character for a partner or shareholder under this article as for federal income tax purposes. Where an item is not characterized for federal income tax purposes, it shall have the same character for a partner or shareholder as if realized directly from the source from which realized by the partnership or S corporation or incurred in the same manner as incurred by the partnership or S corporation. See subsections (f) and (g) of section six hundred thirty-two of this article for special rules for partners and shareholders performing investment management services.

§ 6. Subsection (d) of section 631 of the tax law, as amended by chapter 28 of the laws of 1987, is amended to read as follows:

(d) Purchase and sale for own account.-- A nonresident, other than (1) a dealer holding property primarily for sale to customers in the ordinary course of his trade or business, shall not be deemed to carry on a business, trade, profession or occupation in this state solely by reason of the purchase and sale of property or the purchase, sale or writing of stock option contracts, or both, for his own account.

A. 3976 3 1 (2) This subsection shall not apply to a partner or shareholder performing investment management services as described under subsection 3 (h) of this section.

§ 7. Section 631 of the tax law is amended by adding a new subsection 5 (h) to read as follows:

(h) Investment management services. (1) For purposes of this section, the term "investment management services" to a partnership, S corporation or other entity means providing a substantial quantity of any of the following services to the partnership, S corporation or other entity:

- (i) advising the partnership, S corporation, or entity as to the advisability of investing in, purchasing, or selling any specified asset, or
- (ii) managing, acquiring, or disposing of any specified asset, or
- (iii) arranging financing with respect to acquiring specified assets, or
- (iv) any activity in support of any service described in subparagraphs (i) through (iii) of this paragraph.

(2) For purposes of this subsection, the term "specified asset" means securities (as defined in section four hundred seventy-five (c)(2) of the internal revenue code without regard to the last sentence thereof), real estate held for rental or investment, interests in partnerships, commodities (as defined in section four hundred seventy-five (e)(2) of the internal revenue code), or options or derivative contracts with respect to any of the foregoing.

(3) A partner or shareholder will not be deemed to be

providing 27 investment management services under this subsection if at least eighty 28 percent of the average fair market value of the specified assets of the 29 partnership, S corporation or other entity during the taxable year 30 consist of real estate. 31 § 8. Section 632 of the tax law is amended by adding two new 32 subsections (f) and (g) to read as follows: 33 (f) Special rule for partners performing investment management 34 services. In the case of a partner who performs investment management 35 services for the partnership, the partner will not be treated as a part- 36 ner for purposes of this article with respect to the amount of the part- 37 ner's distributive share of income, gain, loss and deduction (including 38 any guaranteed payments) which is in excess of the amount such distribu- 39 tive share would have been if the partner had performed no investment 40 management services. Instead, such excess amount shall be treated as an 41 amount received from a trade, business, profession or occupation carried 42 on in the partner's own capacity for purposes of this article. Notwith- 43 standing any state or federal law to the contrary, such excess amount 44 shall be characterized as a payment for services rendered for purposes 45 of this article, and for purposes of section six hundred thirty-one of 46 this article shall be allocated in accordance with the rules and regu- 47 lations applicable to: 48 (1) individuals rendering personal services in the case of an individ- 49 ual partner, or 50 (2) a business carried on in New York in the case of a partner that is 51 a partnership, estate or trust, or 52 (3) a corporation under article nine-A of this chapter in the case of 53 a partner that is an S corporation. 54 For purposes of this subsection, the amount of the distributive share 55 that would have been determined if the partner performed no services, 56 shall not be less than zero. A. 3976 4 1 (g) Special rule for shareholders performing investment manage- 3 ment services. In the case of a shareholder who performs investment manage- 3 ment services for the S corporation, the shareholder will not be treated 4 as a shareholder for purposes of this article with respect to the amount 5 of the shareholder's pro rata share of income, gain, loss and deduction 6 which is in excess of the amount such pro rata share would have been if 7 the shareholder had performed no investment management services. 8 Instead, such excess amount shall be treated as an amount received from 9 a trade, business, profession or occupation carried on in the sharehold- 10 er's own capacity for purposes of this article. Notwithstanding any 11 state or federal law to the contrary, such excess amount shall be char- 12 acterized as a payment for services rendered for purposes of this arti- 13 cle, and for purposes of section six hundred thirty-one of this article 14 shall be allocated in accordance with the rules and regulations applica- 15 ble to: 16 (1) individuals rendering personal services in the case of an individ- 17 ual shareholder, or 18 (2) a business carried on in New York in the case of a shareholder 19 that is an estate or trust. 20 For purposes of this subsection, the amount of the pro rata share that 21 would have been determined if the shareholder performed no services, 22 shall not be less than zero. 23 § 9. For taxable years beginning on or after January 1, 2019 and 24 before January 1, 2020, (i) no addition to tax under subsection (c) of 25 section 685 or subsection (c) of section 1085 of the tax law shall be 26 imposed with respect to any underpayment attributable to the amendments 27 made by this act of any estimated taxes that are required to be paid 28 prior to the effective date of this act, provided that the taxpayer 29 timely made those payments; and (ii) the required installment of esti- 30 mated tax described in clause (ii) of subparagraph (B) of paragraph 3 of 31 subsection (c) of section 685 of the tax law, and the exception to addi- 32 tion for underpayment of estimated tax described in paragraph 1 or 2 of 33 subsection (d) of section 1085 of the tax law, in relation to the 34 preceding year's return, shall be calculated as if the amendments made 35 by this act had been in effect for that entire preceding year. 36 § 10. Income from investment management services as defined in 37 subsection (h) of section 631 of the tax law shall be subject to a 19% 38 "carried interest fairness fee" payable to the state of New York until 39 such time as the commissioner of taxation and

finance has notified the 40 legislative bill drafting commission that the United States Congress has 41 passed and the President of the United States has signed legislation 42 having an identical effect with this act applicable to such income 43 earned in all of the states and territories. 44 § 11. This act shall take effect upon enactment into law by the states 45 of Connecticut, New Jersey and Massachusetts of legislation having an 46 identical effect with this act, but if the states of Connecticut, New 47 Jersey and Massachusetts shall have already enacted such legislation, 48 this act shall take effect immediately; provided that the commissioner 49 of taxation and finance shall notify the legislative bill drafting 50 commission upon the enactment of such legislation by the states of 51 Connecticut, New Jersey and Massachusetts in order that such commission 52 may maintain an accurate and timely effective data base of the official 53 text of the laws of the state of New York in furtherance of effectuating 54 the provisions of section 44 of the legislative law and section 70-b of 55 the public officers law.

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