S T A T E O F N E W Y O R K

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I N A S S E M B L Y

March 4, 2016

Introduced by M. of A. AUBRY, BICHOTTE, BRINDISI, FARRELL, RYAN, ORTIZ, STIRPE, PICHARDO, MILLER, MOSLEY, LIFTON, COOK, BLAKE, ABINANTI, JAFFEE, HYNDMAN, CAHILL, GOTTFRIED, HOOPER, JOYNER, PEOPLES-STOKES, JEAN-PIERRE -- Multi-Sponsored by -- M. of A. BARRON, BRENNAN, DINOWITZ, GLICK, HEVESI, KEARNS, LENTOL, MAGEE, MARKEY, NOLAN, SIMON, SKARTADOS, THIELE -- read once and referred to the Committee on Ways and Means -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

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 ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Paragraph (a) of subdivision 6 of section 208 of the tax law, as amended by section 5 of part T of chapter 59 of the laws of 2015, is amended to read as follows:

(a) (i) The term "investment income" means income, including capital gains in excess of capital losses, from investment capital, to the extent included in computing entire net income, less, (A) in the discretion of the commissioner, any interest deductions allowable in computing entire net income which are directly or indirectly attributable to investment capital or investment income, (B) ANY OF CAPITAL GAIN INCLUDED IN FEDERAL TAXABLE INCOME THAT HAS TO BE RECHARACTERIZED AS BUSINESS INCOME PURSUANT TO PARAGRAPH (U) OF SUBDIVISION NINE OF THIS SECTION; provided, however, that in no case shall investment income exceed entire net income. (ii) If the amount of interest deductions subtracted under subparagraph (i) of this paragraph exceeds investment income, the excess of such amount over investment income must be added back to entire net income. (iii) If the taxpayer's investment income determined without regard to the interest deductions subtracted under subparagraph (i) of this paragraph comprises more than eight percent of the taxpayer's entire net income, investment income determined without regard to such interest deductions cannot exceed eight percent of the taxpayer's entire net income.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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S 2. Subparagraph (ix) of paragraph (a) of subdivision 1 of section 210 of the tax law is amended by adding a new clause 8 to read as follows:

(8) THE NET OPERATING LOSS DEDUCTION ALLOWED UNDER SECTION ONE HUNDRED SEVENTY-TWO OF THE INTERNAL REVENUE CODE SHALL FOR PURPOSES OF THIS PARAGRAPH BE DETERMINED TAKING INTO CONSIDERATION THE RE-CHARACTERIZATION OF INCOME PURSUANT TO PARAGRAPH (U) OF SUBDIVISION NINE OF SECTION TWO HUNDRED EIGHT OF THIS ARTICLE.

S 3. Subdivision 9 of section 208 of the tax law is amended by adding a new paragraph (u) to read as follows:

(U) SPECIAL RULE FOR CORPORATE PARTNERS PERFORMING INVESTMENT MANAGEMENT SERVICES. IN THE CASE OF A TAXPAYER THAT IS A PARTNER WHO PERFORMS INVESTMENT MANAGEMENT SERVICES (AS DEFINED IN SUBSECTION (H) OF SECTION SIX HUNDRED THIRTY-ONE OF THIS CHAPTER) FOR THE PARTNERSHIP, THE TAXPAYER WILL NOT BE TREATED AS A PARTNER FOR PURPOSES OF THIS ARTICLE WITH RESPECT TO THE AMOUNT OF THE PARTNER'S DISTRIBUTIVE SHARE OF INCOME, 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.

S 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.

S 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.

S 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.-- (1) A nonresident, other than a dealer holding property primarily for sale to customers in the ordi-

nary course of his OR HER 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 OR HER own account.

(2) THIS SUBSECTION SHALL NOT APPLY TO A PARTNER OR SHAREHOLDER PERFORMING INVESTMENT MANAGEMENT SERVICES AS DESCRIBED UNDER SUBSECTION (H) OF THIS SECTION.

S 7. Section 631 of the tax law is amended by adding a new subsection (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 INVESTMENT MANAGEMENT SERVICES UNDER THIS SUBSECTION IF AT LEAST EIGHTY PERCENT OF THE AVERAGE FAIR MARKET VALUE OF THE SPECIFIED ASSETS OF THE PARTNERSHIP, S CORPORATION OR OTHER ENTITY DURING THE TAXABLE YEAR CONSIST OF REAL ESTATE.

S 8. Section 632 of the tax law is amended by adding two new subsections (f) and (g) to read as follows:

(F) SPECIAL RULE FOR PARTNERS PERFORMING INVESTMENT MANAGEMENT SERVICES. IN THE CASE OF A PARTNER WHO PERFORMS INVESTMENT MANAGEMENT SERVICES FOR THE PARTNERSHIP, THE PARTNER WILL NOT BE TREATED AS A PARTNER FOR PURPOSES OF THIS ARTICLE WITH RESPECT TO THE AMOUNT OF THE PARTNER'S DISTRIBUTIVE SHARE OF INCOME, GAIN, LOSS AND DEDUCTION (INCLUDING ANY GUARANTEED PAYMENTS) WHICH IS IN EXCESS OF THE AMOUNT 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, BUSINESS, PROFESSION OR OCCUPATION CARRIED ON IN THE PARTNER'S OWN CAPACITY FOR PURPOSES OF THIS ARTICLE. 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 ARTICLE, AND FOR PURPOSES OF SECTION SIX HUNDRED THIRTY-ONE OF THIS ARTICLE SHALL BE ALLOCATED IN ACCORDANCE WITH THE RULES AND REGULATIONS APPLICABLE TO:

(1) INDIVIDUALS RENDERING PERSONAL SERVICES IN THE CASE OF AN INDIVIDUAL PARTNER, OR

(2) A BUSINESS CARRIED ON IN NEW YORK IN THE CASE OF A PARTNER THAT IS A PARTNERSHIP, ESTATE OR TRUST, OR

(3) A CORPORATION UNDER ARTICLE NINE-A OF THIS CHAPTER IN THE CASE OF A PARTNER THAT IS AN S CORPORATION.

FOR PURPOSES OF THIS SUBSECTION, THE AMOUNT OF THE DISTRIBUTIVE SHARE THAT WOULD HAVE BEEN DETERMINED IF THE PARTNER PERFORMED NO SERVICES, SHALL NOT BE LESS THAN ZERO.

(G) SPECIAL RULE FOR SHAREHOLDERS PERFORMING INVESTMENT MANAGEMENT SERVICES. IN THE CASE OF A SHAREHOLDER WHO PERFORMS INVESTMENT MANAGEMENT SERVICES FOR THE S CORPORATION, THE SHAREHOLDER WILL NOT BE TREATED AS A SHAREHOLDER FOR PURPOSES OF THIS ARTICLE WITH RESPECT TO THE AMOUNT OF THE SHAREHOLDER'S PRO RATA SHARE OF INCOME, GAIN, LOSS AND DEDUCTION WHICH IS IN EXCESS OF THE AMOUNT SUCH PRO RATA SHARE WOULD HAVE BEEN IF THE SHAREHOLDER HAD PERFORMED NO INVESTMENT MANAGEMENT SERVICES. INSTEAD, SUCH EXCESS AMOUNT SHALL BE TREATED AS AN AMOUNT RECEIVED FROM A TRADE, BUSINESS, PROFESSION OR OCCUPATION CARRIED ON IN THE SHAREHOLDER'S OWN CAPACITY FOR PURPOSES OF THIS ARTICLE. 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 ARTICLE, AND FOR PURPOSES OF SECTION SIX HUNDRED THIRTY-ONE OF THIS ARTICLE SHALL BE ALLOCATED IN ACCORDANCE WITH THE RULES AND REGULATIONS APPLICABLE TO:

(1) INDIVIDUALS RENDERING PERSONAL SERVICES IN THE CASE OF AN INDIVIDUAL SHAREHOLDER, OR

(2) A BUSINESS CARRIED ON IN NEW YORK IN THE CASE OF A SHAREHOLDER THAT IS AN ESTATE OR TRUST.

FOR PURPOSES OF THIS SUBSECTION, THE AMOUNT OF THE PRO RATA SHARE THAT WOULD HAVE BEEN DETERMINED IF THE SHAREHOLDER PERFORMED NO SERVICES, SHALL NOT BE LESS THAN ZERO.

S 9. For taxable years beginning on or after January 1, 2016 and before January 1, 2017, (i) no addition to tax under subsection (c) of section 685 or subsection (c) of section 1085 of the tax law shall be imposed with respect to any underpayment attributable to the amendments made by this act of any estimated taxes that are required to be paid prior to the effective date of this act, provided that the taxpayer timely made those payments; and (ii) the required installment of estimated tax described in clause (ii) of subparagraph (B) of paragraph 3 of subsection (c) of section 685 of the tax law, and the exception to addition for underpayment of estimated tax described in paragraph 1 or 2 of subsection (d) of section 1085 of the tax law, in relation to the preceding year's return, shall be calculated as if the amendments made by this act had been in effect for that entire preceding year.

S 10. Income from investment management services as defined in subsection (h) of section 631 of the tax law shall be subject to a 19% "carried interest fairness fee" payable to the state of New York until such time as the commissioner of taxation and finance has notified the legislative bill drafting commission that the United States Congress has passed and the President of the United States has signed legislation having an identical effect with this act applicable to such income earned in all of the states and territories.

S 11. This act shall take effect upon enactment into law by the states of Connecticut, New Jersey and Massachusetts of legislation having an identical effect with this act, but if the states of Connecticut, New Jersey and Massachusetts shall have already enacted such legislation, this act shall take effect immediately; provided that the commissioner of taxation and finance shall notify the legislative bill drafting commission upon the enactment of such legislation by the states of Connecticut, New Jersey and Massachusetts in order that such commission

may maintain an accurate and timely effective data base of the official text of the laws of the state of New York in furtherance of effectuating the provisions of section 44 of the legislative law and section 70-b of the public officers law.