

# New York State Bar Association

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**Kevin Kerwin**, Associate *Director* • *Department of Governmental Relations* • (FAX) 518/487-5579

August 31, 2017

The Honorable Nonie Manion  
Acting Commissioner  
New York State Department of Taxation and  
Finance  
W.A. Harriman Campus, Building 9  
Albany, NY 12227

**Re:** Report No. 1379 on Draft Regulations Regarding Prior Net Operating Loss  
Conversion (“PNOLC”) Subtraction

Dear Acting Commissioner Manion:

I am submitting herewith for your consideration materials developed by the State Bar Association’s  
Tax Section, relating to the above-referenced issue.

Thank you for your attention to this matter.

Sincerely,

Kevin M. Kerwin

cc:

Robert D. Plattner  
Deputy Commissioner  
Office of Tax Policy Analysis

Amanda Hiller  
Deputy Commissioner and Counsel  
Office of Counsel

Deborah Liebman  
Deputy Counsel  
Office of Counsel



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Report No. 1379  
August 31, 2017

Ronald F. Kennedy  
Director of Governmental Relations  
New York State Bar Association  
One Elk Street  
Albany, NY 12207

## Re: Report No. 1379 on Draft Regulations Regarding Prior Net Operating Loss Conversion ("PNOLC") Subtraction

Dear Mr. Kennedy:

I am pleased to submit this report of the Tax Section of the New York State Bar Association commenting on draft regulations prepared by the New York State Department of Taxation and Finance regarding the prior net operating loss conversion ("PNOLC") subtraction under Article 9-A. The draft regulations provide guidance regarding certain provisions of the 2014 and 2015 New York State corporate tax reform legislation, which went into effect for tax years beginning on or after January 1, 2015.

Under New York State corporate tax reform, the manner in which a corporation computes and deducts its New York State NOL was significantly changed, for example, by requiring that NOLs be apportioned. Therefore, NOL carryovers generated in tax years commencing before 2015 are no longer available under the new regime, but must be converted into a PNOLC subtraction, which may be used to reduce a taxpayer's apportioned business income in future years. The draft regulations provide important guidance and clarity on various aspects of the PNOLC subtraction computation. Overall, and subject to our comments in the report, we believe the draft regulations correctly set forth the requirements for computing the UNOL amount and the PNOLC subtraction.

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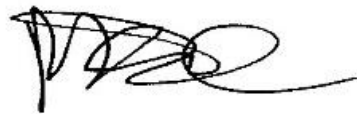
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Stephen B. Land

The report makes various recommendations regarding the draft regulations, including:

- (i) suggesting additional clarity with respect to certain pre-2015 net operating loss (“NOL”) limitations that are used to compute the PNOLC subtraction;
- (ii) commenting on certain of the examples in the draft regulations;
- (iii) discussing the competing issues relating to the creation in the draft regulations of a three-year limitations period for adjustments to the taxpayer’s unabsorbed net operating loss (“UNOL”) computation, which is used in computing the PNOLC subtraction; and
- (iv) recommending additional clarification regarding the scope of the PNOLC recordkeeping requirements.

We appreciate your consideration of the recommendations contained in the report. If you have any questions or comments regarding this report, we will be pleased to discuss our comments or assist the Department in any way that we can.

Respectfully submitted,



Michael S. Farber  
Chair

Attachment

## Tax Section

Tax #3 (Report No. 1379)

August 31, 2017

**Report on New York State  
Department of Taxation and Finance  
Draft Regulations  
Regarding Computation of the Prior Net Operating  
Loss Conversion (“PNOLC”) Subtraction**

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# **Report on Draft Regulations Regarding Computation of the Prior Net Operating Loss Conversion (“PNOLC”) Subtraction<sup>1</sup>**

## **I. INTRODUCTION**

This report comments on draft regulations under Tax Law Article 9-A prepared by the New York State Department of Taxation and Finance (“Department”), dated May 5, 2017, relating to the computation of the prior net operating loss conversion subtraction (the “Draft Regulations”). The regulations are intended to provide guidance in interpreting certain provisions of the 2014 and 2015 New York State budget legislation regarding corporate tax reform under Article 9-A (the “Legislation”) that, among other things, provides for taxpayers with net operating losses (“NOLs”) incurred in tax years beginning before January 1, 2015 – tax years prior to the effective date of the corporate tax reform legislation – to convert those NOLs into a prior net operating loss conversion (“PNOLC”) subtraction available as a deduction against apportioned business income for tax years beginning after 2014. A copy of the Draft Regulations is attached to this report.

The Tax Section appreciates the opportunity to provide comments on the Draft Regulations before they are formally proposed pursuant to Article 2 of the State Administrative Procedures Act. We commend the Department for the comprehensive nature of these draft regulations, which include several useful examples that help explain the complexities of this new concept under the Tax Law.

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<sup>1</sup> The principal drafters of this report were Irwin M. Slomka, Joshua E. Gewolb, Raymond J. Freda and Kara M. Kraman. Helpful comments were received from Michael Farber, Maria T. Jones, Stephen B. Land, Erika J. Nijenhuis, and Michael L. Schler. This report reflects solely the views of the Tax Section and not those of the NYSBA Executive Committee or its House of Delegates.

## II. BACKGROUND

Under the Legislation, the manner of computing and deducting a corporation's New York State NOL was significantly changed for tax years beginning after 2014. For example, NOLs generated after 2014 are computed on an apportioned basis, are no longer limited to the "amount allowed" for federal income tax purposes under Section 172 of the Internal Revenue Code (the "Code"), and are not required to have originated in the same source year as the federal NOL deduction for that tax year. While NOLs continue to bear the same 20-year carryforward period as for federal purposes, the full amount of the NOLs may now be carried back three years, although not to years prior to 2015.

Significantly, and principally because of these differences, NOL carryovers generated in tax years beginning prior to January 1, 2015 are no longer available for carryforward under the new regime. Instead, taxpayers are permitted to convert those amounts into a "prior NOL conversion subtraction" (the "PNOLC subtraction").<sup>2</sup> The PNOLC subtraction may then be used by the taxpayer to reduce its apportioned business income for a period of up to 20 years or until its taxable year beginning in 2035, whichever comes first.

Before a taxpayer can determine its PNOLC subtraction for the tax year, it must calculate its "PNOLC subtraction pool," which first requires that the taxpayer determine its "unabsorbed net operating loss" ("UNOL") amount.<sup>3</sup> A taxpayer's UNOL is computed as follows: For its last tax year beginning in 2014 (the "base year"), the taxpayer must first multiply the amount of its unabsorbed NOL that was not deductible in previous taxable years and was eligible for carryover on the last day of the base year by its base year business allocation percentage (the "base year BAP"), and then multiply that amount by its base year tax rate (in most cases, the

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<sup>2</sup> Tax Law § 210.1(a)(viii)(B)(1), (2) ("prior net operating loss conversion subtraction" defined).

<sup>3</sup> Tax Law § 210.1(a)(viii)(B)(1)(II) ("unabsorbed net operating loss" defined).



former 7.1% tax rate on entire net income). The resulting amount is then divided by 6.5% to determine the “PNOLC subtraction pool” available for future use.<sup>4</sup> The computation of the PNOLC subtraction pool permits a taxpayer to ascertain the value of its pre-2015 New York State NOLs at the time corporate tax reform went into effect, and thereby stabilize the value of its unused NOLs for financial reporting purposes.<sup>5</sup>

Other than for small business corporations, which may claim the entire NOL conversion subtraction in a single taxable year, the amount of a taxpayer’s PNOLC subtraction available in subsequent tax years will equal either: (i) 1/10 of the PNOLC subtraction pool amount, plus any amount of its unused PNOLC subtraction from prior years; or (ii) in the case of a taxpayer electing to use the 50% allotment method, 1/2 of the NOL subtraction pool amount in its first two tax years beginning on or after January 1, 2015 and before January 1, 2017.<sup>6</sup> Under the 50% allotment election, which must be made on the taxpayer’s first return timely filed for the tax year beginning on or after January 1, 2015 and before January 1, 2016, the subtraction amount for each tax year is up to 50% of the taxpayer’s NOL conversion subtraction in the first two tax years within that period. Any pool amount remaining for tax years beginning after 2016 must be forfeited, although the taxpayer may revoke its 50% allotment election, and thereby avoid forfeiting the unused amount, by timely filing an amended return for each year that it claimed the 50% election.

Provided the taxpayer has UNOLs eligible for carryover on the last day of its base year, the availability of those UNOLs is extended up to 20 years, regardless of when the underlying NOL carryovers were set to expire.

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<sup>4</sup> Tax Law § 210.1(a)(viii)(B)(2)(II).

<sup>5</sup> New York State Dep’t of Taxation & Fin., *New York State Corporate Tax Reform Outline* (April 2014).

<sup>6</sup> Tax Law § 210.1(a)(viii)(B)(2)(III), (IV).

The manner of computing the PNOLC subtraction in the case of a combined Article 9-A return depends on whether there is a change in the Article 9-A combined group between the base year and the tax year the subtraction is claimed.<sup>7</sup> The PNOLC subtraction reduces the taxpayer's tax on its apportioned business income base to the higher of the alternative capital base or the fixed dollar minimum base, with the unused PNOLC amount generally available for carry forward.<sup>8</sup>

### **III. EXECUTIVE SUMMARY**

The principal conclusions of this report are as follows:

1. Overall, we believe that the Draft Regulations correctly set forth the requirements for computing the UNOL amount, and the PNOLC subtraction, although we recommend that the regulations provide additional clarity with respect to certain of the pre-2015 NOL limitations in computing the UNOL. We also have comments and questions regarding certain of the examples in Draft Regulation section 3-9.3 and section 3-9.9.

2. The three-year limitation period from when the PNOLC subtraction is first claimed by the taxpayer for adjustments to the UNOL, as set forth in Draft Regulation section 3.9-2(e), although inconsistent with the general rules for adjustments to NOL carryforwards, is a reasonable exercise of the Department's regulatory authority, and provides desired finality and certainty regarding the UNOL amount.

3. Additional clarification should be provided regarding the scope of the recordkeeping requirements contained in Draft Regulation section 3-9.11.

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<sup>7</sup> Tax Law § 210.1(a)(viii)(B)(3) ("combined groups").

<sup>8</sup> Tax Law § 210.1(a)(viii)(B)(4).

## IV. DISCUSSION

### A. Computation of the Unabsorbed Net Operating Loss. (Draft Regulation Section 3-9.2(a)-(d))

#### 1. Draft Regulation

Draft Regulation section 3-9.2(a)-(d) sets forth rules for computing the UNOL amount, the first step in calculating the PNOLC subtraction. Under the Draft Regulation, this requires first computing both the federal and New York State NOLs available for carryover, and then computing both the federal and New York State eligible NOL carryover amounts.

The Draft Regulation provides that the NOLs available for carryover are subject to the NOL deduction limitations as set forth in either former Tax Law section 208(9)(f) (Article 9-A) or former Tax Law section 1453(k-1) (former Article 32), and the rules in 20 NYCRR section 3-8 as those provisions were in effect on December 31, 2014.<sup>9</sup> The rules set forth in 20 NYCRR section 3-8.2 provide three primary NOL deduction limitations: (i) no deduction is allowed for an NOL sustained in any year the corporation was not subject to tax under Article 9-A; (ii) an NOL that is carried back or forward for federal tax purposes must be adjusted to reflect a taxpayer's New York adjustments to its federal taxable income; and (iii) a taxpayer's NOL may not exceed its deduction allowable for federal tax purposes ("federal deduction limitation").<sup>10</sup>

In addition, under the Draft Regulations, where NOLs from two or more years, or the portions of NOLs from two or more years, are to be included in the PNOLC subtraction, current Regulation section 3-8.5 setting forth the "aggregation method" of deducting the NOLs continues to apply. The aggregation method requires that a taxpayer compute both the aggregate of its federal NOLs from two or more years and the aggregate of its New York NOLs for two or

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<sup>9</sup> Draft Reg. § 3-9.2(b)(1)(i).

<sup>10</sup> 20 NYCRR §§ 3-8.2(b)-(d).

more years to be carried to a particular year, and then use whichever aggregate NOL amount is smaller.<sup>11</sup>

Finally, in computing NOL amounts available for carryover, the Draft Regulation provides that, consistent with the Department’s practice regarding pre-2015 NOLs, taxpayers must apply their New York State NOLs against their entire net income (“ENI”) to reduce ENI to zero (to the greatest extent possible), regardless of the tax base on which the tax was actually paid.<sup>12</sup>

The Draft Regulation then sets forth rules for determining the available NOLs that qualify as eligible NOL carryover amounts. To be eligible, there must be both a federal and New York State NOL sustained in the same year (the “same source year” limitation).<sup>13</sup> We note that the same source year limitation is not expressly set forth in either the former Tax Law or in 20 NYCRR section 3-8.2, but instead is found in the case law.<sup>14</sup> The Draft Regulation also requires application of the federal separate return limitation year rules, “subject to the rules in this section.” It also provides that when Code Section 382 has limited the deductibility of a pre-2015 federal and New York State NOLs and those losses remain available for carryover on the last day of the taxpayer’s base year, the losses not previously deducted because of the section 382

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<sup>11</sup> Draft Reg. § 3-9.2(c)(1).

<sup>12</sup> *But see Matter of TD Holdings II, Inc.*, DTA No. 825329 (N.Y.S. Tax App. Trib., Apr. 7, 2016), *appeal pending*, Appellate Division, 3rd Dep’t (involving a challenge under former Article 32 to the Department’s requirement that NOLs must be applied against the taxpayer’s entire net income, even where the tax was imposed under an alternative tax base).

<sup>13</sup> Draft Reg. § 3-9.2(b)(2)(ii).

<sup>14</sup> *See, e.g., In re Lehigh Valley Indus. Inc.*, DTA No. 801617 (N.Y.S. Tax App. Trib., May 5, 1988) (holding that since the starting point in determining the New York State NOL deduction is the amount of the federal NOL deduction, it is reasonable to conclude that the New York State NOL deduction must originate from the same source year as the federal NOL deduction); *Matter of Five Star Equipment, Inc.*, DTA Nos. 824861 & 825006 (N.Y.S. Tax App. Trib., Apr. 15, 2015).

limitation are included in the eligible NOL carryover amount, but are limited by a prescribed formula, “subject to the rules in this section.”<sup>15</sup>

Under the Draft Regulation, a taxpayer’s eligible NOL carryover is the lesser of its eligible federal NOL carryover and its eligible New York State NOL carryover, which reflects the incorporation of the aggregation method of deducting NOLs set forth in 20 NYCRR section 3-8.5.<sup>16</sup>

## 2. *Comments*

### a. Background.

We note at the outset that the Legislation itself provides considerable detail regarding the PNOLC subtraction computation, reducing (but certainly not eliminating) the need for interpretive regulations to provide guidance regarding this technical and somewhat arcane mechanism for utilizing prior NOLs. To a significant extent, the PNOLC subtraction is rooted in the NOL computation that was in existence prior to 2015. This is because of the statutory definition of the UNOL, which refers to the taxpayer’s unabsorbed NOL “as calculated under [the Tax Law as] in effect on [December 31, 2014].”<sup>17</sup> In prescribing the mechanics of the UNOL computation, and as required by the Legislation, the Draft Regulations apply several NOL limitations that were in effect for tax years prior to 2015. Several of those limitations were clearly reflected either in the Tax Law or in the Article 9-A regulations, such as the federal deduction limitation, while certain other limitations, like the same source year limitation, had their roots in the former Tax Law but were principally articulated by case law. We have endeavored to evaluate whether the Draft Regulations have properly applied these pre-2015 limitations, without commenting on the correctness of the pre-2015 limitations.

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<sup>15</sup> Draft Reg. § 3-9.2(b)(2)(v).

<sup>16</sup> Draft Reg. § 3-9.2(c)(1).

<sup>17</sup> Tax Law § 210.1(a)(viii)(B)(II).

In addition, with respect to the pre-2015 limitations – to which the UNOL definition makes reference – we note that in our Report No. 1301,<sup>18</sup> commenting on the 2014 draft corporate tax reform legislation, we identified a potential ambiguity regarding the UNOL computation. Our comment concerned the requirement in the proposed 2014 Legislation that to be included in the UNOL calculation, the amount must have been “eligible for carryover on the last day of the base year.”<sup>19</sup> The potential ambiguity was whether the phrase meant that the same source year and federal deduction limitations only applied in determining a taxpayer’s NOL deduction, but not in determining the amount “eligible for carryover” referred to in the proposed 2014 Legislation. We suggested in our report that if the intent of the proposed Legislation was to apply the same source year and federal deduction limitations in computing the UNOL, the underscored language below should be added to the statutory UNOL definition:

(11) “Unabsorbed net operating loss” means the unabsorbed portion of net operating loss [under prescribed sections of the Tax Law as in effect on December 31, 2014], that was not deductible in previous taxable years and was eligible for carryover subject to the limitations for deduction under those sections, on the last day of the base year . . .<sup>20</sup>

The final Legislation enacted by the Legislature added the Tax Section’s suggested language almost verbatim.<sup>21</sup>

Subject to our comments that follow, the Tax Section is of the view that Draft Regulation section 3-9.2 correctly sets forth the requirements for computing the UNOL amount.

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<sup>18</sup> Tax Section of the New York State Bar Association, *Comments Regarding Corporate Income Tax Reform*, Rep. 1301 (March 13, 2014).

<sup>19</sup> Part A of the 2014-15 Executive Budget 30-Day Amendments to Senate S6359-A, A8559-A (REV Article VII Bill), dated Feb. 20, 2014.

<sup>20</sup> *Comments Regarding Corporate Income Tax Reform*, *supra* note 18, at 61. (Emphasis in original).

<sup>21</sup> Tax Law § 210.1(a)(viii)(B)(II) (in defining the UNOL computation, adds the phrase “subject to the limitations for deduction under such sections”).

b. Combined Reporting and Computation of UNOLs (Draft Reg. section 3-9.2(d))

The Draft Regulations specify that where there is a combined group of corporations, each member included in the group's base year Article 9-A combined return "must then compute its own UNOL for its base year" based on that "member's contribution of losses to the base year combined group's UNOL."<sup>22</sup> We suggest that the regulation make clear that determining each member's share of the combined group's UNOL amount is necessary because in the event the member leaves the combined group, the member retains its own PNOLC subtraction pool for use in future years either separately or as part of another combined group.

c. Same Source Year Limitation (Draft Reg. section 3-9.2(b)(2)(ii))

Draft Regulation section 3-9.2(b)(2)(ii) codifies the same source year limitation as follows:

A corporation's federal and New York State NOLs available for carryover are included in the eligible federal and New York State NOL carryover amount, respectively, only when there is both a federal and New York State NOL sustained in the same taxable year and available for carryover as of the last day of the corporation's base year.

Nevertheless, it appears that in the regulation's examples, discussed below, the same source year limitation is applied in a variety of situations that are not clearly covered by the above language. For instance, in Example 1 of Draft Regulation section 3-9.3, a taxpayer does not apply New York State NOLs sustained in 2011 and 2012 against its New York State 2013 and 2014 income, even though it also sustained federal NOLs in 2011 and 2012. In the example, the taxpayer applies federal losses sustained in 2009 (a year in which it had no New York State NOLs) against its 2013 and 2014 federal income, and presumably is unable to apply its 2011 and 2012 New York NOLs against its 2013 and 2014 New York income because those New York State

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<sup>22</sup> Draft Reg. § 3-9.2(d).

NOLs did not originate in the same source year as the federal NOLs that the taxpayer applied to 2013 and 2014.

We believe the same source year limitation is the least clearly defined of the pre-2015 NOL limitations, perhaps because its parameters have been articulated principally in case law, rather than under the Tax Law or by regulation. Therefore, we recommend that the Draft Regulations provide a more comprehensive definition of the scope of the same source year limitation.

d. UNOL Examples (Draft Reg. section 3-9.3)

The examples illustrating the UNOL computation are helpful.

Example 1. This example, involving ABC Company, correctly illustrates how two important limitations affect the UNOL amount. First, it makes clear that in order to be eligible for carryover, an NOL must have been sustained in a tax year in which the taxpayer was subject to New York State corporate tax. Second, the aggregation method of deducting NOLs applies to limit the eligible NOL carryover amount to the lesser of the eligible federal amount and the eligible New York State amount.

While this example (and several examples that follow) refer to ABC Company's "as if" federal NOL amounts, for clarity it would be helpful to explain the significance of the "as if" reference. We believe the reference is to the fact that when a corporation files as part of a federal consolidated return, it is necessary to compute its income and loss amounts "as if" it filed separately for federal purposes. If so, we suggest that this be set forth in a preamble to the examples.

In addition, the example should explain why in computing the New York State eligible NOL carryover amount, the New York State losses sustained in 2011 and 2012 (\$600 and \$500, respectively) are not applied against the taxpayer's entire net income in 2013 and 2014. We



assume that is because of application of the same source year limitation. However, and as noted above, the same source year limitation set forth in Draft Regulation section 3-9.2(b)(2)(ii) would not seem to prevent ABC Company from applying the New York State losses it sustained in 2011 and 2012 against its entire net income in 2013 and 2014. This is because in Example 1, ABC Company also sustained federal losses in 2011 and 2012, and therefore met the same source year limitation requirement, at least as set forth in section 3-9.2(b)(2)(ii).

Example 2. This example, involving XYZ Company, correctly applies the same source year limitation, the federal deduction limitation and the aggregate method of deducting NOLs. This example illustrates the computation of both a federal eligible NOL carryover amount and a New York eligible NOL carryover amount. As with Example 1, it would be helpful for the example to explain why the taxpayer's New York State losses sustained in 2010 (\$1,000) and 2011 (\$300) are not carried forward and applied against the taxpayer's income in 2013 (\$400).

Example 3. This example correctly illustrates how a combined group computes both its federal eligible NOL carryover amount and its New York eligible NOL carryover amount, and how the aggregate method is applied. It also correctly illustrates how each member of the combined group computes its own UNOL based on each member's contribution of losses to the combined group's UNOL.

Example 4. This example involves Corporations E and F, which together filed a New York State combined return for the tax years 2011 through 2014. The example provides that the group's NOLs carried forward from 2011 to 2013 and 2014 are limited to the amount of the federal "as if" combined NOLs that were carried forward from 2011 to 2013 (\$2,150) and 2014 (\$4,000), which is also the exact amount of federal losses it deducted in those years. The explanatory text in the example suggests that the New York State NOLs deducted in 2013 and

2014 were limited as a result of the application of the *same source year limitation*. However, we believe that the application of the *federal deduction limitation* would result in the same New York State deduction limitations. It would be helpful for the income and loss amounts in this example to be reworked so that it is clear that only the same source year limitation is operating to limit the group's New York State NOLs, and not the federal deduction limitation. Alternatively, a sentence could be added to the explanatory text of the example to note that the federal deduction limitation would also limit the group's New York State NOL deduction in 2013 and 2014 to \$2,150 and \$4,000 respectively.

Example 4 also illustrates how each member must compute its own share of the combined UNOL (as discussed above). In that regard, Corporation F's loss for 2013 (\$200) is not included in the combined UNOL computation, because the combined group had positive net income in that year. The example then shows a combined 2011 New York State unabsorbed loss carry forward amount of \$8,850. The Note appearing in the example explains that the \$8,850 is what remains after the group deducted a portion of the 2011 combined NOL in 2013 and 2014 (\$15,000, less the sum of \$2,150 and \$4,000). It would be helpful for the example to cross-reference the chart appearing at the top of page 14 of the Draft Regulations, which illustrates how the 2011 New York State combined NOL was applied to arrive at a balance of \$8,850.<sup>23</sup>

Example 5. This example is intended to demonstrate how the separate return limitation year ("SRLY") rules are applied (i) in computing a corporate taxpayer's eligible NOL carryover amounts when it begins filing as part of an Article 9-A combined return, and (ii) in computing the New York combined group's base year UNOL. In the example, Corporation T files on a separate basis for both federal and New York State purposes in tax year 2011, but then joins

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<sup>23</sup> We note that only Example 2 uses arrows to show loss carryforwards, while Examples 1, 3, and 4 do not. For clarity and consistency, we recommend that the examples either all use arrows or all not use arrows.

Group P in tax year 2012, which also includes Corporations Q and R. To simplify what can be a complicated analysis, Example 5 assumes that neither Corporation T nor Group P had any federal or New York State NOLs prior to the 2011 or 2012 tax years, respectively. The example makes clear that for the 2011 tax year, Corporation T's SRLY NOL was not subject to the Code Section 382 limitations.

For 2011, before it joined the combined group, Corporation T had a federal SRLY loss of \$250, \$100 of which is applied to reduce Group P's "as if" federal taxable income for 2012 from \$200 to \$100. Under the example, only \$100 of the \$250 loss may be applied to Group P's 2012 "as if" federal taxable income of \$200. Application of the federal deduction limitation limits the loss available for use in 2012 for New York State purposes to the same \$100. This leaves \$150 of loss available from Corporation T's federal SRLY loss in 2011 for use by the "as if" group, and \$200 available for New York State purposes.

Example 5 then correctly determines that there is a \$450 UNOL available for carryforward as of December 31, 2014, which under the aggregation method is the lesser of the eligible federal NOL carryover amount (\$500) and the eligible New York State carryover amount (\$450). The example then properly determines how each member of the base year New York State combined return computes its own share of the \$450 UNOL.

We agree with the approach taken in this example, but due to its complexity, it would be helpful if the accompanying text explained why the group's federal "as if" SRLY NOL amount that can be applied in 2012 is \$100, which appears to be because that is the amount of Corporation T's "as if" federal taxable income in 2012 (the example already explains that the federal deduction limitation serves to limit its SRLY NOL amount for New York State purposes).

In addition, the reference in the example (on page 16 of the Draft Regulations) to Corporation T's \$100 "SRLY NOL Carried Forward from 2011 to 2012 (to Group P)" is confusing. This results from the \$100 amount appearing in the column labeled "2011," possibly suggesting that the \$100 reduces Corporation T's SRLY NOL in 2011, which we do not think it does. To make the example clearer, we suggest changing the description for the line showing Corporation T's \$150 loss from "Balance" to "Balance of SRLY NOL Available for Use After 2012." Similarly, on the bottom half of the same page, the description of the column labeled "T's SRLY NOL available after carryforward 2011" should be changed to read "T's SRLY NOL Available for Carryforward After 2012." These changes would clarify that the \$150 SRLY NOL amount already reflects application of the \$100 carryforward to 2012, and therefore is the SRLY NOL balance available for use after 2012.

Example 6. This example involves a stand-alone corporation, Acme Company, and sets up a basic Code Section 382 limitation scenario. The example accurately demonstrates the various considerations that come into play when applying section 382, and, more specifically, the requirements under Draft Regulation section 3-9.2(b)(2)(v). That is, the example reflects the proper application of the formula for computing the upward limit for NOLs allowable following an Code Section 382 event, the importance of distinguishing between NOLs subject and not subject to Code Section 382, and the application of the aggregation method in determining a taxpayer's UNOL.

## **B. Computation of the PNOLC Subtraction (Draft Regulation section 3-9.7)**

### *1. Draft Regulation*

The Draft Regulations provide for a taxpayer's "PNOLC subtraction available for use" which, for the first taxable year after the taxpayer's base year, is equal to the taxpayer's "PNOLC subtraction allotment." For subsequent taxable years, the subtraction amount available for use is

the sum of (i) the “tax period PNOLC subtraction allotment” and (ii) “any unused PNOLC subtraction carryforward.” Similar rules apply in the case of an Article 9-A combined return.<sup>24</sup>

A corporation’s “tax period PNOLC subtraction allotment” – the amount that can be claimed in a taxable year – is generally 10% of its PNOLC subtraction pool, although it can be 50% of the pool amount where a 50% allotment election is made, or 100% where the taxpayer is a small business corporation. The Draft Regulations provide that the 50% allotment election must be made “on an original, timely filed return for the first 2015 taxable year, determined with regard to extensions of time.” The election can be revoked by filing an amended return for each year in which the election was claimed.<sup>25</sup>

The Draft Regulations provide for computation of the “maximum amount of the PNOLC subtraction to be deducted in a taxable year,” both for a separate Article 9-A return or in the case of a combined return.<sup>26</sup> The PNOLC subtraction with respect to the 50% allotment method is the smallest of (i) the PNOLC subtraction available for use; (ii) the maximum amount of the PNOLC subtraction to be deducted; and (iii) 50% of the PNOLC subtraction pool.<sup>27</sup> The difference between the PNOLC subtraction available for use in a taxable year and the PNOLC subtraction in that year is the “unused PNOLC subtraction carryforward.”<sup>28</sup>

The Draft Regulations also set forth rules for computing the PNOLC subtraction (i) when taxpayer that was not a member of an Article 9-A combined return in any taxable year beginning after 2014 subsequently joins a combined group in a later taxable year; and (ii) when a corporation is a member of an Article 9-A combined return for any taxable year beginning after 2014 but leaves the combined group in a later taxable year. In the latter case, the member “takes

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<sup>24</sup> Draft Reg. § 3-9.7(a).

<sup>25</sup> Draft Reg. § 3-9.7(b).

<sup>26</sup> Draft Reg. § 3-9.7(c).

<sup>27</sup> Draft Reg. § 3-9.7(d)(1)(i).

<sup>28</sup> Draft Reg. § 3-9.7(e).

its own PNOLC subtraction allotment with it,” as well as its own share of the combined group’s unused PNOLC subtraction carryforward.”<sup>29</sup>

## 2. *Comments*

Subject to our comments below regarding the examples contained in Draft Regulation section 3-9.9, the Tax Section believes that Draft Regulation section 3-9.7 is both reasonable and consistent with the principles of Tax Law section 210.1(a)(viii)(B)(2).

The examples in Draft Regulation section 3-9.9 illustrating the PNOLC subtraction pool in the context of combined groups are helpful. In Example 1, we suggest that it be clarified that Taxpayer O is not a small business taxpayer. In Example 2, we recommend that it be explained why Corporation H has a 6.5% base year tax rate, and that it be clarified that Corporation J is not a small business taxpayer. Additionally, Example 2 involves a combined group that, because a new group member in the prior tax year made its own 50% election when it filed on a separate basis, is composed of group members with different subtraction allotments. This is an important point that merits a statement in the text of Draft Regulation section 3-9.8 to make clear that changes to a combined group can result in group members having different allotment percentages in the same combined return.

Example 3. This example illustrates how Taxpayer X, which files a separate Article 9-A return and made a 50% allotment election, calculates and applies its PNOLC subtraction. Taxpayer X files two short-period returns for calendar year 2015 – January 1, 2015 through May 31, 2015 (referred to as the “First Year Following the Base Year”), and June 1, 2015 through December 31, 2015 (referred to as the “Second Year Following the Base Year”), and a full year return for 2016 (referred to as the “Third Taxable Year Following the Base Year”).

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<sup>29</sup> Draft Reg. § 3-9.8.

In the example, Taxpayer X's PNOLC subtraction pool is \$16,000, and its PNOLC subtraction allotment is 50% of that amount (\$8,000) in each of its two short period taxable years in 2015. Taxpayer X is unable to claim the full amount of its PNOLC subtraction pool (\$16,000) in its two short periods, but is permitted to carry forward to 2016 its unused PNOLC subtraction (\$2,366), which amount is then limited to \$1,408. Because Taxpayer X made a 50% allotment election, it must forfeit its unused amounts after 2016, although the regulation notes that the election can be revoked in accordance with Draft Regulation section 3-9.7(b)(2), thereby allowing the taxpayer to utilize the 1/10 per year allotment method and avoid forfeiting the unused amounts.

This example addresses an important aspect of the 50% allotment election, pursuant to which an electing taxpayer may claim up to 50% of the PNOLC subtraction pool "for the tax years beginning on or after [January 1, 2015] and before [January 1, 2017]."<sup>30</sup> In other words, the 50% allotment method permits an electing taxpayer to utilize its subtraction pool in tax years that begin within the calendar years 2015 and 2016, which can involve more than two tax years where (as in the example) the taxpayer files short-period returns within those calendar years.

We believe the example correctly provides that, although Taxpayer X is unable to utilize its entire PNOLC subtraction pool in the two short periods following its base year, it may carry forward the balance in 2016, even though 2016 is the *third* tax year following the base year. We suggest that this point be made clear in the text of Draft Regulation section 3-9.7(b)(2), and not solely in the example.

This example also appears to allow a taxpayer with two short periods in 2015 to utilize 100% of its PNOLC subtraction pool within a single calendar year. Although this may not have been intended by the Legislature, we believe the statutory language supports this result, because

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<sup>30</sup> Tax Law § 210.1(a)(viii)(B)(2)(IV).

it does not limit the PNOLC subtraction allotment that may be used where the taxpayer files short-period returns.<sup>31</sup> This result would be avoided with a rule requiring that the 50% allotment be prorated in any year in which the taxpayer files two or more short-period returns. However, we have found no authority in the statute for a rule that prorates the allotment. Moreover, even if permissible, such a rule would retroactively affect taxpayers that already filed their 2015 returns in reliance on the statutory language.

Example 4. This example involves application of the 50% allotment method, where Corporations A, B and C were properly included in an Article 9-A combined return in both the base year and in the first taxable year following the base year, but where Corporation C filed separately in the second taxable year. We agree with the result of this example, including the computation of the combined group’s PNOLC subtraction based on the sum of the PNOLC allotments of each group member, although it would be helpful for the example to explain the computation of the amount of the combined group’s \$50,000 “Maximum Amount of PNOLC Subtraction to be Deducted.”<sup>32</sup>

### **C. Impact of Combined Group Changes on the PNOLC Subtraction (Draft Regulation section 3-9.8)**

#### *1. Draft Regulation*

Draft Regulation section 3-9.8(a) provides that if a taxpayer that was not a member of a combined group in any taxable year subsequently joins the combined group in a later taxable year, such taxpayer’s PNOLC subtraction allotment is added to the combined group’s PNOLC subtraction allotment. Section 3-9.8(b) provides that if a corporation is a member of a group and subsequently leaves the group, the outgoing member takes its PNOLC subtraction allotment with

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<sup>31</sup> In contrast, in computing the fixed dollar minimum tax under Article 9-A, the law permits a taxpayer’s gross payroll and total receipts to be used to determine the minimum tax to be prorated where its taxable year is less than 12 months. Tax Law § 210.1(d)(3).

<sup>32</sup> Draft Reg. § 3-9.9, example 3 (page 38, line 701).



it to use in future taxable years, which it may utilize on a separate basis or as part of a combined group that it subsequently joins. The same rules apply to the PNOLC subtraction carryforward.

## 2. *Comments*

Each of the sections of the Draft Regulations relating to taxpayers joining a combined group specifically recites that the provisions thereof are “subject to the rules in Tax Law section 210.1(a)(viii)(B).”<sup>33</sup> That section provides rules whereby when a new member joins a combined group, its PNOLC subtraction pool amount is combined with the subtraction pool of the combined group. Although the statute does not specifically address the combination of the PNOLC subtraction allotment, we believe that the approach taken in the Draft Regulations to retain the PNOLC subtraction allotment method of the new member is both reasonable and consistent with the principles of Tax Law section 210.1(a)(viii)(B). It is also consistent with the approach taken in Draft Regulation section 3-9.7(b)(2)(ii) (regarding the 50% allotment method in the case of an Article 9-A combined return) and section 3-9.7(b)(4) (regarding the computation of the PNOLC subtraction allotment in the case of a combined group).

Consider a situation in which the 50% election is made, for example, on behalf of Combined Group A, in its original timely filed return for the first 2015 taxable year, but at the time the election is made the group plans to sell a subsidiary member of the group to Combined Group B which has not made the election. Immediately after the sale of the subsidiary, Combined Group A revokes the election. Since the subsidiary retains its 50% PNOLC subtraction allotment after it is sold and joins Combined Group B, the ability to lock in the 50%

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<sup>33</sup> We note that both Tax Law section 210.1(a)(viii)(B)(3)(II) (where the Article 9-A combined return includes additional members in the taxable year immediately succeeding the base year) and section 210.1(a)(viii)(B)(3)(IV) (where a taxpayer filed a separate return in the base year and is properly included in a combined return in any subsequent taxable year) may apply in the first taxable year following the base year.

subtraction allotment allows Combined Group B to obtain the benefit of the 50% allotment with respect to the subsidiary without having itself made the election.

Although this may afford an unintended benefit to Combined Group B (or in some cases may be detrimental to Combined Group B where it cannot use the full amount of the subsidiary's remaining 50% PNOLC subtraction allotment), we do not favor a rule permitting a valid group election to be revoked or otherwise disregarded for the subsidiary, which after being sold may not be aware of the revocation by Combined Group A, and indeed even if it was aware, could not itself revoke the election because it could no longer be included in Combined Group A's amended return(s) revoking the election.<sup>34</sup> We think the revocable nature of the 50% election reflects the Legislature's intent to afford considerable flexibility to taxpayers with respect to the election, and there is merit to having each group member retain its PNOLC subtraction allotment.

**D. Application of a limitation period for changes to the UNOL amount. (Draft Regulation section 3-9.2(e))**

1. *Draft Regulation*

Sections 3-9.2 and 3-9.6 of the Draft Regulations address the computation of the UNOL and the PNOLC subtraction pool, respectively. Draft Regulation section 3-9.2(e) would limit the ability to adjust a corporation's UNOL (whether by a corporation or by the Department on audit) generally to the three-year statute of limitations for assessments under Tax Law section 1083 "determined with regard to an extension of such time period agreed to pursuant to Tax Law section 1083(c)(1)(D)."<sup>35</sup> The limitations period would begin to run for UNOL adjustments

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<sup>34</sup> We also considered whether the regulations should permit a subsidiary to revoke the 50% election solely for itself after it is sold and joins a new group, but concluded that this approach may not be supportable under Tax Law section 210.1(a)(viii)(B)(2)(IV) because of the subsidiary's inability to file an amended return revoking the election for the year in which it was a member of the old group.

<sup>35</sup> We believe the reference should be to Tax Law section 1083(c)(2).

based on the return on which the taxpayer first claims a PNOLC subtraction (which may or may not be the first tax year beginning after 2014). The regulation specifically notes that any federal changes that are finalized after such statute of limitations has expired would not be considered. Draft Regulation section 3-9.6(c) provides that any change to the base year tax rate or base year business allocation percentage (“BAP”) used to calculate the PNOLC subtraction pool must be made within the statute of limitations on assessments for the base year determined under the principles above.

## 2. *Comments*

Neither Tax Law section 210.1(a)(viii) nor Tax Law section 1083 specifically addresses the time period in which the determination of a taxpayer’s UNOL or PNOLC subtraction pool must be finalized. Therefore, the Draft Regulations establish a limitations period that is not contained in the law itself.

The creation of a limitations period for the UNOL calculation contrasts with the general rules for adjustments to NOL carryforwards, which can be made in any open tax year in which the NOL carryforward is claimed.<sup>36</sup> The Department could instead have taken an approach that allows a taxpayer’s UNOL amount to be adjusted in any year that the taxpayer claims a PNOLC subtraction, limited by the limitations period for assessment or refund for the year claimed. That approach would not only be permissible under the statute, but would offer certain advantages.

For example, where federal RARs result in changes to a taxpayer’s taxable income for tax years beginning prior to 2015, that approach would necessarily result in an adjustment to the taxpayer’s UNOL, and consequently to its PNOLC subtraction pool. In that regard, the taxpayer’s tax liability would reflect the adjustments to its income for those pre-2015 tax years,

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<sup>36</sup> Tax Law § 1083(c)(4).

regardless of when the federal RAR was finalized.<sup>37</sup> This approach would also be consistent with the general rules with respect to assessments of deficiencies (and the issuance of refunds) arising from NOL carryforwards, both for federal and New York State tax purposes.

On balance, however, we believe the proposed rule represents a reasonable exercise of the Department's regulatory authority due to the unique nature of the PNOLC subtraction. The UNOL/PNOLC subtraction presents a different set of policy considerations from ordinary NOL carryforwards — which can be adjusted at any time the NOL is claimed — as it is in the nature of a transition rule related to specific carryforwards existing on a fixed date before corporate tax reform went into effect. Because the UNOL reflects the facts as of a fixed date, there is no reason why it cannot be examined within a prescribed period following the first year in which it is placed at issue by the taxpayer claiming a PNOLC subtraction. In contrast, an ordinary NOL carryforward is subject to change each year based on losses incurred or carryforwards utilized, thus presenting new facts to examine each time an NOL deduction is taken.

As with any rule imposing a limitation of time on adjustments, there will be instances in which the proposed rule generates inequitable results. For example, if a federal audit results in decreased New York State NOL carryforwards after the three-year limitation period has expired, taxpayers would stand to benefit.

We believe that the approach taken in the Draft Regulations, which favors greater finality and certainty regarding the UNOL amount by establishing a specified limitation period after which neither taxpayers nor the Department can adjust that amount, is reasonable, and a valid exercise of the Commissioner's authority. It is also consistent with the legislative purpose of

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<sup>37</sup> We note that taxpayers are required to report final federal RARs to New York State within 90 days (or, in the case of a combined return, within 120 days), and either concede the accuracy of those federal changes or state why they are erroneous. Tax Law § 1083(c)(3).

stabilizing the value of NOLs for financial accounting purposes.<sup>38</sup> Moreover, it furthers the administrability of the Tax Law by limiting the period in which taxpayers and the Department must engage with the technical rules of the pre-2015 New York NOL regime.

Under the Draft Regulations, the tax period in which the three-year limitation period begins differs for changes to a corporation's UNOL on the one hand (discussed above), and for making base year tax rate and BAP adjustments on the other. The Draft Regulations state that the limitation period for adjusting the UNOL begins running upon filing of the return on which a PNOLC subtraction is first claimed, which is after the base year limitation period.<sup>39</sup> Any change to the base year tax rate or BAP, however, must be made within the statute of limitations for the base year itself, which will usually expire first.<sup>40</sup>

We have considered whether the differing approaches are problematic, but conclude that the Department's approach is reasonable. There is no statutory bar to the bifurcated limitation period approach taken in the Draft Regulations. We acknowledge that there is some appeal to consistency in the limitation period for UNOL adjustments on the one hand, and base year tax rate and BAP adjustments on the other, since they are all components of the PNOLC subtraction pool. However, we believe that such consistency is outweighed here by the benefits of finality in the computation of the PNOLC pool. Moreover, if a taxpayer were permitted to adjust its base year BAP or tax rate with respect to the UNOL after the base year statute of limitations period had expired, it would allow a taxpayer to delay claiming a greater base year BAP (thereby maximizing its PNOLC subtraction pool) until after the limitations period for assessment had closed, so that the resulting increase to its base year tax liability would be time-barred.

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<sup>38</sup> *New York State Corporate Tax Reform Outline*, *supra*, note 5, at 7.

<sup>39</sup> Draft Reg. § 3-9.2(e).

<sup>40</sup> Draft Reg. § 3-9.6(c).

## **E. Recordkeeping**

### *1. Draft Regulation*

Draft Regulation section 3-9.11 identifies the tax form and schedules that must be attached to Form CT-3 when a taxpayer or combined group has a PNOLC subtraction pool. This includes not only Form CT-3.3 (Prior Net Operating Loss Conversion (PNOLC) Subtraction), but also “a detailed schedule showing the computation of the UNOL,” and showing the PNOLC subtraction allotment carryforward. In the case of an Article 9-A combined return, it will also be necessary to attach detailed schedules of each member’s own UNOL and unused allotment carryforward, “together with all material and pertinent facts related to” the claim. The Draft Regulation goes on to provide:

Such records shall be retained during the period in which the statute of limitations for a change to the PNOLC subtraction may be made by the taxpayer or the Department.

### *2. Comments*

#### *a. UNOL subtraction computation.*

We note that while the UNOL and PNOLC subtraction pool amounts are only computed once — in the tax year immediately following the base year — the Draft Regulations appear to require that schedules of the UNOL and PNOLC subtraction pool computations be provided for each year that the taxpayer or combined group has an unused PNOLC subtraction allotment carryforward. We do not see a compelling reason to require taxpayers to furnish detailed UNOL computation schedules after the first tax year following the taxpayer’s base year, and certainly not after the limitation period prescribed in section 3-9.2(e) for UNOL adjustments. This view is consistent with the instructions to Form CT-3.3 (2015), which provided:

For your first tax period that begins on or after January 1, 2015, you must attach a statement detailing how the UNOL was

computed (if filing a combined return, the statement must detail the UNOL computation for each member of the combined group).

b. Scope of Recordkeeping Requirement.

We recommend adding the following underscored language to the first sentence of section 3-9.11, for clarity and consistency with Schedule A of Form CT-3.3 (2016):

and in the case of a combined group, each member's UNOL, and the amount of each member's unused PNOLC subtraction allotment carryforward . . .

With regard to schedules other than the UNOL computation, for clarity we suggest inserting after the first sentence of section 3-9.11: "Form CT-3.3 and the described detailed schedules, other than the UNOL computation schedule, must be filed for each tax year in which a PNOLC subtraction balance is carried, even if no such subtraction can be applied for in that tax year."

Section 3-9.11 also directs the taxpayer to retain "records" relating to the UNOL computation and carryforward "during the period in which the statute of limitations for a change to the PNOLC subtraction may be made by the taxpayer or the Department." The reference to "such records" in the second sentence of the regulation, but only to "detailed schedule[s]" in the first sentence, may create ambiguity regarding whether something more than "detailed schedule[s]" must be retained. If the Department requires the retention of records "that support the detailed schedules," then we suggest removing the word "such" at the beginning of the second sentence ("such records"), and instead refer to "Records that support the detailed schedules."

c. Statute of Limitations.

The Draft Regulations should specify which statute of limitations applies with regard to the retention of records for the tax year "for a change to the PNOLC subtraction." Elsewhere,

the Draft Regulations identify two separate limitation periods: (i) the limitation period pertaining to changes to the UNOL computation (generally, three years from the filing of the return on which the PNOLC subtraction is first claimed); and (ii) the limitation period pertaining to changes to the PNOLC subtraction pool that result from changes to the base year tax rate or BAP (generally, three years from when the base year return is filed). Because changes with respect to either will affect the taxpayer's PNOLC subtraction computation, the regulation should make clear that applicable records must be retained both for the limitation period specified in section 3-9.2(e) (for adjustments to the UNOL amount), as well as for the limitation period specified in section 3-9.6(c) (for adjustments to the base year tax rate or BAP used to calculate the PNOLC subtraction pool).

An additional statute of limitations exists for each year in which the subtraction allotment is claimed, for adjustments other than with respect to the taxpayer's base year tax rate, base year BAP and its UNOL amount. For example, for any tax year in which a taxpayer's claimed PNOLC subtraction unrelated to the base year amounts and its UNOL computation requires adjustment, a separate statute of limitations would apply with respect to that tax year. The regulation should make explicit that taxpayers will not be required to retain records relating to the base year tax rate and BAP and the taxpayer's UNOL amount after the other two limitation periods have expired.



1 § 1. Subpart 3-9 of this Part is renumbered Subpart 3-14 and a new Subpart 3-9 is added  
2 to read as follows:

3 Subpart 3-9 Computation of the Prior Net Operating Loss

4 Conversion (PNOLC) Subtraction

5 Sec.

6 3-9.1 Definitions

7 3-9.2 Computation of the unabsorbed net operating loss

8 3-9.3 UNOL examples

9 3-9.4 PNOLC subtraction overview

10 3-9.5 Corporations not allowed a PNOLC subtraction

11 3-9.6 Computation of the PNOLC subtraction pool

12 3-9.7 Computation of the PNOLC subtraction

13 3-9.8 Impact of combined group changes on the PNOLC subtraction

14 3-9.9 PNOLC examples

15 3-9.10 Impact of certain corporate acquisitions and liquidations on the PNOLC  
16 subtraction

17 3-9.11 Record-keeping

18  
19 Section 3-9.1 Definitions.

20 For purposes of this Subpart, the following terms shall have the following meaning.

21 (a) The term “base year” means a corporation’s last taxable year beginning on or after

22 January 1, 2014 and before January 1, 2015.

23 (b) The term “base year BAP” means either of the following, whichever is applicable:

24 (1) the taxpayer's or combined group's, in the case of a combined report in the base year (“base  
25 year combined group”), business allocation percentage for purposes of calculating entire net  
26 income for the base year (whether or not liability was in fact based on entire net income), as  
27 calculated under Tax Law section 210(3)(a) as such section was in effect on December 31, 2014;  
28 or (2) the taxpayer's or base year combined group's, in the case of a combined report in the base  
29 year, allocation percentage for purposes of calculating entire net income for the base year  
30 (whether or not liability was in fact based on entire net income), as calculated under Tax Law  
31 section 1454 as such section was in effect on December 31, 2014.

32 (c) The term “base year tax rate” means the taxpayer's or base year combined group's, in  
33 the case of a combined report, tax rate for purposes of computing entire net income for the base  
34 year (whether or not liability was in fact based on entire net income), as calculated under either  
35 Tax Law section 210(1)(a) or Tax Law section 1455(a), whichever is applicable, as such sections  
36 were in effect on December 31, 2014.

37 (d) The term “first 2015 taxable year” means a corporation's first taxable year that begins  
38 on or after January 1, 2015 and before January 1, 2016.

39 (e)(1) The term “small business taxpayer” means a corporation that, in the first 2015 taxable  
40 year, satisfied all of the criteria specified in subparagraphs (i), (ii) and (iii) of paragraph (2) of  
41 this subdivision as of the last day of the base year; and, in the case of a combined report, means a  
42 combined group that in the first 2015 taxable year would have satisfied the criteria specified in  
43 subparagraphs (i), and (ii) of paragraph (2) of this subdivision on the last day of the base year if  
44 such group had filed a combined report in such base year, provided that each member of such

45 combined group would have satisfied the criteria specified in subparagraph (iii) of this  
46 subdivision on the last day of the base year.

47 (2) The criteria that must be satisfied to qualify as a small business taxpayer are:

48 (i) the entire net income of the corporation or the combined group for the base year  
49 before allocation was not more than \$390,000 (such amount will be annualized for a base  
50 year that constitutes a short taxable year);

51 (ii) the total amount of money and other property that the corporation or in the case of a  
52 combined report, a combined group received for stock, as a contribution to capital and as  
53 paid-in surplus, was not more than \$1 million as of the last day of the base year; and

54 (iii) the corporation was not part of an affiliated group, as defined in IRC section 1504,  
55 unless the group itself would have satisfied the requirements in subparagraphs (i) and (ii)  
56 of this paragraph if it had filed a combined report.

57  
58 Section 3-9.2 Computation of the unabsorbed net operating loss (UNOL)

59 (a) The “unabsorbed net operating loss” (hereinafter referred to in this Subpart as the  
60 UNOL) means the unabsorbed portion of net operating loss (NOL) as calculated under Tax Law  
61 section 208(9)(f) or Tax Law section 1453(k-1) as such sections were in effect on December 31,  
62 2014, that was not deductible in previous taxable years (including the base year) and was eligible  
63 for carryover on the last day of the base year, including any NOL sustained by the taxpayer  
64 during the base year. The computation of such UNOL is subject to the rules in subdivisions (b)  
65 through (e) of this section.

66 (b) To compute the unabsorbed portion of NOL that was not deductible in previous  
67 taxable years (including the base year) and was eligible for carryover on the last day of the base  
68 year, the rules in paragraphs (1) and (2) of this subdivision must be followed.

69 (1) A corporation must first compute its federal and New York State NOLs available for  
70 carryover, from taxable years beginning before January 1, 2015, as of the last day of such  
71 corporation's base year (federal and New York State NOLs available for carryover), by applying  
72 the following rules:

73 (i) Net operating losses (NOLs) are carried back and carried forward to taxable years  
74 beginning before January 1, 2015, and included in the determination of deductible NOLs,  
75 as well as remaining NOLs available for carryover, subject to NOL deduction limitations  
76 as set forth in either Tax Law section 208(9)(f) or Tax Law section 1453(k-1), whichever  
77 is applicable, and as per the rules in Subpart 3-8 of this Part, as such provisions were in  
78 effect on December 31, 2014. NOLs available for carryover do not include any NOLs  
79 that were deductible in a taxable year beginning prior to January 1, 2015, regardless of  
80 whether or not the corporation actually deducted the NOL. However, if the amount of  
81 NOL actually deducted in any taxable year is greater than the amount deductible, the  
82 NOL available for carryover is reduced by such excess amount deducted. New York  
83 State NOLs must be applied against entire net income (ENI) to reduce ENI to zero or the  
84 greatest extent possible, regardless of the tax base on which the franchise tax was actually  
85 paid.

86 (ii) If the carryforward period for an NOL, as determined in subparagraph (i) of this  
87 paragraph, ends prior to, or on, the last day of the corporation's base year, no portion of

88 such NOL is included in the NOLs available for carryover as of the last day of such  
89 corporation's base year.

90 (2) After computing its federal and New York State NOLs available for carryover, such  
91 corporation must then compute its federal and New York State carryover amounts as of the last  
92 day of such corporation's base year (its eligible NOL carryover amounts), to be used in the  
93 computation of the UNOL, by applying the following rules:

94 (i) A corporation's federal and New York State NOLs available for carryover are  
95 included in such corporation's eligible federal and New York State NOL carryover  
96 amount, respectively, subject to the rules and limitations in subparagraphs (ii) through  
97 (vi) of this paragraph.

98 (ii) A corporation's federal and New York State NOLs available for carryover are  
99 included in the eligible federal and New York State NOL carryover amount,  
100 respectively, only when there is both a federal and New York State NOL sustained in  
101 the same taxable year and available for carryover as of the last day of the  
102 corporation's base year.

103 (iii) A corporation's federal NOL sustained in a separate return limitation year  
104 (SRLY) beginning before January 1, 2015, and any corresponding New York State  
105 NOL, that was not deductible in taxable years beginning before January 1, 2015, and  
106 that was available for carryover as of the last day of the corporation's base year, is  
107 included in its entirety in the eligible federal and New York State NOL carryover  
108 amount, respectively, subject to the rules in this section.

109 (iv) If, under IRC section 381, a corporation, in a taxable year beginning prior to  
110 January 1, 2015, succeeded to the tax attributes, including federal NOL carryovers, of

111 another corporation, and such acquiring or successor corporation also succeeded to  
112 the New York State NOL carryovers of such acquired or predecessor corporation,  
113 then any such federal and New York State NOLs that were not deductible by the  
114 acquiring or successor corporation in taxable years beginning before January 1, 2015,  
115 and that were available for carryover as of the last day of the corporation's base year,  
116 are included in their entirety in the eligible federal and New York State NOL  
117 carryover amounts, respectively, subject to the rules in this section.

118 (v) A corporation's federal NOLs subject to the limitations imposed by IRC section  
119 382 as a result of an ownership change (pre-change losses) that were not deductible in  
120 taxable years beginning before January 1, 2015, and that were available for carryover  
121 as of the last day of the corporation's base year, are included in the eligible federal  
122 NOL carryover amount, subject to the rules in this section, but only to the extent that  
123 such pre-change losses, in the aggregate, that relate to such ownership change, do not  
124 exceed the amount computed as follows: (A) the applicable annual IRC section 382  
125 limitation for a post-change year for such ownership change, multiplied by 20; less  
126 (B) any such pre-change losses that were deductible in taxable years beginning before  
127 January 1, 2015. Such amount shall be computed separately for each ownership  
128 change.

129 (vi) In the case of a corporation operating on a cooperative basis under IRC section  
130 1381 that is taxable under Article 9-A or Article 32 of the Tax Law for its base year,  
131 such corporation's federal patronage and non-patronage source NOLs, and such  
132 corporation's New York State patronage and non-patronage source NOLs,  
133 respectively, that were not deductible in taxable years beginning before January 1,

134 2015, and that were available for carryover as of the last day of the corporation's base  
135 year, are combined and included in the eligible federal and New York State NOL  
136 carryover amount, respectively, subject to the rules in this section.

137 (c) (1) After applying all other rules and limitations in this section to compute the eligible  
138 federal and New York State NOL carryover amount, respectively, whichever of the two eligible  
139 NOL carryover amounts (federal or New York State) is the lesser amount is the corporation's  
140 UNOL.

141 (2) When subparagraph (v) of paragraph (2) of subdivision (b) of this section applies, for  
142 purposes of applying the limitation under paragraph (1) of this subdivision to eligible federal and  
143 New York State NOL carryover amounts to compute a corporation's UNOL, a corporation's  
144 eligible federal NOL carryover amount arising from federal NOLs subject to IRC section 382  
145 limitations is used to apply such limitation to any corresponding eligible New York State NOL  
146 carryover amount, and a corporation's eligible federal NOL carryover amount arising from  
147 federal NOLs not subject to IRC section 382 limitations is used to apply such limitation to any  
148 corresponding eligible New York State NOL carryover amount. The corporation's UNOL is then  
149 the sum of the following amounts: (i) the lesser of the eligible federal or New York State NOL  
150 carryover amounts arising from federal NOLs subject to IRC section 382 limitations; and (ii) the  
151 lesser of the eligible federal or New York State NOL carryover amounts arising from federal  
152 NOLs not subject to IRC section 382 limitations.

153 (d) In computing the UNOL of a corporation that was included in a combined report for  
154 the base year, the UNOL of the base year combined group is computed in accordance with  
155 subdivisions (a) through (c) of this section, substituting "combined group" for "corporation".  
156 Each corporation included in the base year combined group must then compute its own UNOL

157 for its base year, by multiplying the base year combined group's UNOL by a percentage that  
158 represents that base year combined group member's contribution of losses to the base year  
159 combined group's UNOL. Such percentage is calculated by: (1) dividing the total New York  
160 State NOLs of such corporation by the total New York State NOLs of all members of the  
161 combined group having such New York State NOLs (to the extent such New York State NOLs  
162 are included in the eligible New York State NOL carryover amount of the base year combined  
163 group in accordance with this section); and (2) multiplying the result by one hundred.

164 (e) Any change in the amount of a corporation's UNOL must be made within the statute  
165 of limitations under Tax Law section 1083(a) (determined with regard to an extension of such  
166 time period agreed to pursuant to Tax Law section 1083(c)(1)(D)) for the report on which a  
167 PNOLC subtraction as computed in section 3-9.7 of this Subpart is first claimed. Any federal  
168 changes that are finalized after such statute of limitations under Tax Law section 1083(a)  
169 (determined with regard to an extension of such time period agreed to pursuant to Tax Law  
170 section 1083(c)(1)(D)) has expired will not be considered in the computation of the UNOL.

171

#### 172 Section 3-9.3 UNOL Examples.

173 The following examples illustrate the application of the rules and limitations as set forth  
174 in Tax Law section 208(9)(f) and section 1453(k-1) and Subpart 3-8 of this Part, as such  
175 provisions were in effect on December 31, 2014, as well as the application of the rules and  
176 limitations in section 3-9.2 of this Subpart, in computing the eligible federal and New York State  
177 (NYS) NOL carryover amounts and the amount of the UNOL for a corporation or combined  
178 group. Numbers in the examples have been rounded.

179



180 Example 1:

181

182 ABC Company, a calendar-year taxpayer, began business in 2009 and became taxable in NYS in

183 2011. ABC Company's base year is calendar year 2014. ABC Company had federal/NYS

184 income and losses, and applied its NOLs for tax years beginning before 1/1/2015, as follows:

ABC Company	2009	2010	2011	2012	2013	2014	Eligible NOL carryover amount 12/31/2014
"As if" Federal							
Federal Taxable Income	(1,500)	(800)	(500)	(400)	300	600	
NOL Carried Forward from 2009 to 2013	300				(300)		
NOL Carried Forward from 2009 to 2014	600					(600)	
Balance	(600)	(800)	(500)	(400)	-	-	(900)
New York							
Entire Net Income	-	-	(600)	(500)	250	400	
Balance	-	-	(600)	(500)	250	400	(1,100)

185

186

187 Computation of ABC Company's eligible NOL carryover amounts and UNOL

188

189 A federal NOL that was sustained in a tax year in which ABC Company was not subject to tax in

190 New York State (i.e. the NOLs incurred in 2009 and 2010) cannot be included in ABC

191 Company's eligible federal NOL carryover amount. Therefore, ABC Company's eligible federal

192 NOL carryover amount is (\$900). ABC Company's eligible NYS NOL carryover amount is

193 (\$1,100). ABC Company's UNOL is (\$900), which is the lesser of its eligible federal NOL

194 carryover amount and its eligible NYS NOL carryover amount.

195

196 Example 2:

197 XYZ Company, a calendar-year NYS taxpayer, began business in 2009 and became taxable in

198 NYS in 2009. XYZ Company's base year is calendar year 2014. XYZ Company had

199 federal/NYS income and losses, and applied its NOLs for tax years beginning before 1/1/2015,

200 as follows:

XYZ Company	2009	2010	2011	2012	2013	2014	Eligible NOL carryover amount 12/31/2014
"As if" Federal							
Federal Taxable Income	(1,000)	(1,200)	600	(400)	300	(700)	
NOL Carried Forward from 2009 to 2011	600		(600)	-	-	-	
NOL Carried Forward from 2009 to 2013	300				(300)	-	
Balance	(100)	(1,200)	-	(400)	-	(700)	(2,300)
New York							
Entire Net Income	200	(1,000)	(300)	(100)	400	(500)	
Balance	200	(1,000)	-	(100)	400	(500)	(1,600)

201

202 Computation of XYZ Company's eligible NOL carryover amounts and UNOL

203

204 XYZ Company's federal and NYS NOLs available for carryover are only included in the eligible

205 federal and NYS NOL carryover amount, respectively, when there is both a federal and New

206 York State NOL sustained in the same taxable year and available for carryover as of the last day

207 of the corporation's base year. Thus only the federal NOLs sustained in 2010, 2012, and 2014 and

208 available for carryover as of the last day of its base year are included in the eligible federal NOL

209 carryover amount. The federal NOL sustained in 2009 is not included in the eligible federal NOL  
 210 carryover amount as there was no corresponding NYS NOL sustained in that year and available  
 211 for carryover. The NYS NOL sustained in 2011 is not included in the eligible NYS NOL  
 212 carryover amount as there was no corresponding federal NOL sustained in that year and  
 213 available for carryover. ABC Company's UNOL is (\$1,600), which is the lesser of its eligible  
 214 federal NOL carryover amount and its eligible NYS NOL carryover amount.

215 Example 3:

216 Corporations L, M, N, and O are calendar-year taxpayers that began doing business in 2011 and  
 217 properly filed as members of a combined group in NYS for 2011 through 2014. The combined  
 218 group's base year is calendar year 2014. The combined group had federal/NYS losses for tax  
 219 years beginning before 1/1/2015, as follows:

Federal	2011 FTI	2012 FTI	2013 FTI	2014 FTI	Federal "as if" group's eligible NOL carryover amount 12/31/2014
L	(400)	100	(200)	(920)	
M	980	(3,000)	(500)	(2,300)	
N	(600)	1,900	(1,400)	140	
O	(900)	(1,100)	700	(1,500)	
Totals	(920)	(2,100)	(1,400)	(4,580)	(9,000)

220

NYS Combined Group	2011 ENI	2012 ENI	2013 ENI	2014 ENI	Combined group's eligible NYS NOL carryover amount 12/31/2014
L	(500)	500	(300)	(750)	
M	850	(2,000)	(600)	(2,000)	
N	(600)	2,000	(1,500)	250	
O	(1,000)	(1,000)	500	(1,000)	
Totals	(1,250)	(500)	(1,900)	(3,500)	(7,150)

221

222 Computation of base year combined group's eligible NOL carryover amounts and UNOL and  
223 Corporation L's, M's, N's and O's UNOL:

224

225 The base year combined group's federal and NYS NOLs sustained in 2011 through 2014 and  
226 available for carryover as of the last day of its base year are included in its eligible federal and NYS  
227 NOL carryover amount, respectively, since there were both federal and NYS NOLs sustained in each  
228 of these taxable years and available for carryover as of the last day of its base year. The resulting base  
229 year combined group's eligible federal NOL carryover amount is (\$9,000) and its eligible NYS  
230 NOL carryover amount is (\$7,150). The base year combined group's UNOL is (\$7,150), which  
231 is the lesser of its eligible federal NOL carryover amount and its eligible NYS NOL carryover  
232 amount.

233 Each member of the base year combined group must then compute its own UNOL, by  
234 multiplying the base year combined group's UNOL amount of (\$7,150) by a percentage that  
235 represents each member's contribution of losses to the combined group's UNOL, as described in  
236 subdivision (d) of section 3-9.2 of this Subpart, and as illustrated below:

237

238

239

240

NYS Combined Group	2011 ENI	2012 ENI	2013 ENI	2014 ENI	Losses by Member	Member's losses as a % of total losses of all members with losses	Member's UNOL
L	(500)	500	(300)	(750)	(1,550)	13.77%	(984)
M	850	(2,000)	(600)	(2,000)	(4,600)	40.89%	(2,924)
N	(600)	2,000	(1,500)	250	(2,100)	18.67%	(1,335)
O	(1,000)	(1,000)	500	(1,000)	(3,000)	26.67%	(1,907)
Totals	(1,250)	(500)	(1,900)	(3,500)	(11,250)	100%	(7,150)

241

242

243 Example 4: Corporations E and F are calendar-year taxpayers that began doing business in 2011  
 244 and properly filed as members of a combined group in NYS for 2011 through 2014.

245 The combined group's base year is calendar year 2014. The combined group had federal/NYS  
 246 income and losses, and applied its NOLs for tax years beginning before 1/1/2015, as follows:

	2011	2012	2013	2014	Eligible NOL carryover amount 12/31/2014
Combined Group:					
"As if" Federal					
Federal Taxable Income					
Combined Group:					
Corporation E	(10,000)	(7,000)	2,000	3,000	
Corporation F	(6,000)	650	150	1,000	
Total for Federal "as if" group	(16,000)	(6,350)	2,150	4,000	
NOL Carried Forward from 2011 to 2013	2,150		(2,150)		
NOL Carried Forward from 2011 to 2014	4,000			(4,000)	
Balance	(9,850)	(6,350)	0	0	(16,200)
 New York					
Entire Net Income					
Combined Group:					
Corporation E	(11,000)	(7,700)	2,500	4,000	

Corporation F	(4,000)	100	(200)	800	
Total for combined group	(15,000)	(7,600)	2,300	4,800	
NOL Carried Forward from 2011 to 2013	2,150		(2,150)		
NOL Carried Forward from 2011 to 2014	4,000			(4,000)	
Balance	(8,850)	(7,600)	150	800	(16,450)

247

248

249 Computation of the base year combined group's eligible NOL carryover amounts and UNOL and

250 Corporation E's and F's UNOL:

251

252 The NYS NOLs carried forward from 2011 and deductible in 2013 and 2014 are limited to the  
 253 amount of the "as if" federal NOLs carried forward from 2011 to those years. The base year  
 254 combined group's federal and NYS NOLs sustained in 2011 and 2012 and available for  
 255 carryover as of the last day of its base year are included in its eligible federal and NYS NOL  
 256 carryover amount, respectively, since there were both federal and New York State NOLs  
 257 sustained in each of these taxable years and available for carryover as of the last day of the  
 258 combined group's base year. The base year combined group's UNOL is (\$16,200), which is the  
 259 lesser of its eligible federal NOL carryover amount and its eligible NYS NOL carryover amount.

260 Each member of the base year combined group must then compute its own UNOL, by  
 261 multiplying the base year combined group's UNOL amount of (\$16,200) by a percentage that  
 262 represents each member's contribution of losses to the combined group's UNOL, as described in  
 263 subdivision (d) of section 3-9.2 of this Subpart, and as illustrated below. Since 2013 is a net  
 264 income year for the combined group, Corporation F's loss of (\$200) in 2013 is not included in  
 265 the losses by member amounts below.

Member	2011 NYS NOL after carryfwd (see note)	2012 NYS NOL	2013 NYS NOL	2014 NYS NOL	Losses by Member	Member's losses as a % of total losses of all members with losses	Member's UNOL
E	(6,490)	(7,700)	-	-	(14,090)	86%	(13,932)
F	(2,360)	0	-	-	(2,360)	14%	(2,268)
Totals	(8,850)	(7,700)	0	0	(16,450)	100%	(16,200)

266

267 NOTE: Since some of the 2011 combined NOL was deductible in 2013 and 2014, the remaining  
268 available NOL from 2011 (\$8,850) is allocated to Corporations E and F based on each  
269 corporation's original loss in 2011 divided by the total combined loss for 2011 (\$15,000) as  
270 follows:

271 Corporation E  $8,850 * (11,000/15,000) = 6,490$

272 Corporation F  $8,850 * (4,000/15,000) = 2,360$

273

274 Example 5:

275 During calendar tax year 2011, Corporation T filed separately in NYS and was not part of an  
276 affiliated group. In 2012, Corporation T began filing combined in NYS as a member of Group P,  
277 which consisted of Corporations Q and R, in addition to Corporation T. Group P had no federal  
278 or NYS NOLs prior to 2012; Corporation T had no federal or NYS NOLs prior to 2011. Group  
279 P's base year is calendar year 2014. Corporation T had a NOL for both Federal and NYS  
280 purposes in 2011, which is a Separate Return Limitation Year ("SRLY"); the SRLY NOL was  
281 not subject to IRC section 382 limitations. Corporation T and Combined Group P had

282 federal/NYS income and losses, and applied the NOLs for tax years beginning before 1/1/2015,  
 283 as follows:

Corporation T	2011
Federal	
Federal Taxable Income	(250)
SRLY NOL Carried Forward from 2011 to 2012 (to Group P)	<u>100</u>
Balance	<u><u>(150)</u></u>
New York	
Entire Net Income	(300)
NOL Carried Forward from 2011 to 2012 (to Group P)	<u>100</u>
Balance	<u><u>(200)</u></u>

284  
 285

Group P	T's SRLY NOL available after carryforward 2011	2012	2013	2014	Group P's Eligible NOL carryover amounts 12/31/2014
"As if" Federal					
Federal Taxable Income					
Group P:					
Corporation Q		50	(150)	100	
Corporation R		50	0	150	
Corporation T		<u>100</u>	<u>(200)</u>	<u>(250)</u>	
Total for Federal "as if" group		200	(350)	0	
SRLY NOL Carried Forward from 2011 (from Corp T) to 2012		<u>(100)</u>			
Balance	(150)	<u>100</u>	<u>(350)</u>	<u>-</u>	<u>(500)</u>



New York				
Entire Net Income				
Group P:				
Corporation Q	(200)	(100)	50	
Corporation R	50	0	50	
Corporation T	300	(150)	(150)	
Total for Combined Group P	150	(250)	(50)	
NOL Carried Forward from 2011 (from Corp T) to 2012	(100)			
Balance	(200)	50	(250)	- (450)

286

287

288 Computation of base year Group P's eligible NOL carryover amounts and UNOL and

289 Corporation Q's, R's, and T's UNOL:

290

291 In applying the federal SRLY limitations, the amount of Corporation T's SRLY NOL from 2011

292 that can be carried forward and deducted by Group P in 2012 is limited to (\$100) for federal

293 purposes and the corresponding NYS NOL carried from 2011 and deducted by Group P in 2012

294 is also limited to (\$100), which is the amount of Corporation T's FTI for 2012. The federal and

295 NYS NOLs sustained in 2011 and 2013 and available for carryover as of the last day of Group

296 P's base year are included in its eligible federal and NYS NOL carryover amount, respectively,

297 since there were both federal and NYS NOLs sustained in each of these taxable years and

298 available for carryover as of the last day of its base year. Group P's NYS NOL sustained in 2014

299 (\$50) is not included in the eligible NYS NOL carryover amount as there was no corresponding

300 federal NOL sustained by Group P in that taxable year and available for carryover.

301  
 302 Group P's UNOL is (\$450), which is the lesser of its eligible federal NOL carryover amount and  
 303 its eligible NYS NOL carryover amount. Each member of the base year combined Group P must  
 304 then compute its own UNOL, by multiplying Group P's UNOL amount of (\$450) by a  
 305 percentage that represents each member's contribution of losses to the combined group's UNOL,  
 306 as described in subdivision (d) of section 3-9.2 of this Subpart, and as illustrated below.  
 307

Member	2011 NYS NOL after carryfwd	2012 NYS NOL	2013 NYS NOL	2014 NYS NOL	Losses by Member	Member's losses as a % of total losses of all members with losses	Member's UNOL
Q		-	(100)	-	(100)	22%	(99)
R		-	-	-	-	0%	0
T	(200)	-	(150)	-	(350)	78%	(351)
Totals	(200)	0	(250)	0	(450)	100%	(450)

308  
 309 Corporation T's NYS loss of \$150 in 2014 is not included in the losses by member amounts  
 310 above. This is because the NYS NOL sustained in that year by the combined group that included  
 311 Corporation T (i.e. Group P's 2014 combined ENI of (\$50)) was not included in the  
 312 determination of Group P's UNOL (since, as explained above, there was no corresponding  
 313 federal NOL sustained by Group P in that taxable year and available for carryover).

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 317

318 Example 6:

319 Acme Company, a calendar-year taxpayer, began business in 2009 and became taxable in NYS  
 320 in 2009. Acme Company's base year is calendar year 2014. Acme Company had a change in  
 321 ownership effective January 1, 2013, subjecting its Federal losses sustained in 2009 through  
 322 2012 to IRC section 382 limitations. The ACME company's annual section 382 limitation  
 323 amount is \$2,500. After the change in ownership Acme Company continued to file on a separate  
 324 basis for NYS purposes. Acme Company had federal/NYS losses for tax years beginning before  
 325 1/1/2015, as follows:

	Federal NOLs subject to IRC section 382				Federal NOLs not subject to IRC section 382		Eligible NOL carryover amounts 12/31/2014	
	2009	2010	2011	2012	2013	2014	Arising from NOLs subject to IRC 382 (2009-2012)	Arising from NOLs not subject to IRC 382 (2013-2014)
Acme Company								
"As if" Federal Taxable Income	(15,000)	(10,000)	(12,000)	(20,000)	(8,000)	(5,000)		
Balance	(15,000)	(10,000)	(12,000)	(20,000)	(8,000)	(5,000)	(50,000)	(13,000)
New York Entire Net Income	(20,000)	(12,000)	(10,000)	(18,000)	(5,000)	(4,000)		
Balance	(20,000)	(12,000)	(10,000)	(18,000)	(5,000)	(4,000)	(60,000)	(9,000)

326

327 NOTE: limited to  $\$2,500 \times 20 - 0 = \$50,000$ , as explained further below.

328

329 Computation of Acme Company's eligible NOL carryover amounts and UNOL

330

331 Since Acme Company has both federal NOLs available for carryover that are subject to IRC  
332 section 382 limitations (from 2009 through 2012) and federal NOLs available for carryover that  
333 are not subject to IRC section 382 limitations (from 2013 and 2014), Acme Company must  
334 separately compute its eligible federal NOL carryover amount for each, and also must separately  
335 compute its corresponding eligible NYS NOL carryover amount for each. Acme Company's  
336 federal NOLs available for carryover from 2009 through 2012 total (\$57,000). However, due to  
337 the IRC section 382 limitation, the maximum amount of such NOLs available for carryover that  
338 can be included in its eligible federal NOL carryover amount arising from federal NOLs subject  
339 to IRC section 382 limitations is limited to (\$50,000) which is the annual section 382 limitation  
340 amount of (\$2,500) multiplied by 20, less the amount of any such NOLs actually deducted (zero  
341 in this example as 2013 and 2014 are loss years). Acme Company's federal NOLs available for  
342 carryover from 2013 and 2014, totaling (\$13,000), are not subject to section 382 limitations and  
343 are included in its eligible federal NOL carryover amount arising from federal NOLs not subject  
344 to IRC section 382 limitations.

345 Acme Company's UNOL is (\$59,000), which is the sum of the following amounts: (i) the lesser  
346 of the eligible federal or New York State NOL carryover amounts arising from federal NOLs  
347 subject to IRC section 382 limitations; and (ii) the lesser of the eligible federal or New York  
348 State NOL carryover amounts arising from federal NOLs not subject to IRC section 382  
349 limitations.

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	Arising from NOLs subject to IRC section 382 2009-2012	Arising from NOLs not subject to IRC section 382 2013-2014
Eligible Federal NOL carryover amounts (A)	(50,000)	(13,000)
Eligible NYS NOL carryover amounts (B)	(60,000)	(9,000)
Lesser of (A) and (B)	(50,000)	(9,000)
UNOL	(\$59,000)	

356

357

#### Section 3-9.4 PNOLC subtraction overview.

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#### Section 3-9.5 Corporations that are not allowed a PNOLC subtraction.

366

The following corporations are not allowed a PNOLC subtraction:

367

(a) A corporation that does not have a UNOL;

368

(b) A corporation that has a base year BAP of zero percent;

369

(c) A corporation that has a base year tax rate of zero percent;

370

(d) A corporation that in its base year was not a member of a combined group subject to

371

tax under Tax Law Article 9-A or Article 32 and that was not subject to tax itself under Tax Law

372

Article 9-A or Article 32;

373 (e) A corporation that was a regulated investment company (RIC) in its base year, as  
374 defined in Tax Law section 209(7); and

375 (f) A corporation that was a New York S corporation in its base year, as defined in Tax  
376 Law section 209, as such section was in effect on December 31, 2014.

377

378 Section 3-9.6 Computation of PNOLC subtraction pool.

379 (a) The PNOLC subtraction pool for a taxpayer that was not a member of a combined  
380 group in its base year is computed as follows:

381 (1) Determine the tax value of the taxpayer's UNOL. The tax value of the UNOL is the  
382 product of (i) the amount of the taxpayer's UNOL; (ii) the taxpayer's base year BAP; and (iii) the  
383 taxpayer's base year tax rate.

384 (2) Compute the PNOLC subtraction pool. Divide the tax value of the UNOL, as  
385 determined pursuant to paragraph (1) of this subdivision, by 6.5 percent (the conversion  
386 percentage). The result is the taxpayer's PNOLC subtraction pool.

387 (b) The PNOLC subtraction pool for a corporation that was a member of a combined  
388 group in its base year, whether or not such corporation was a taxpayer in its base year, is  
389 computed as follows:

390 (1) Determine the tax value of the corporation's UNOL. The tax value of the  
391 corporation's UNOL is the product of (i) the amount of the corporation's UNOL; (ii) the  
392 combined group's base year BAP; and (iii) the combined group's base year tax rate.

393 (2) Compute the PNOLC subtraction pool. Divide the tax value of the corporation's  
394 UNOL, as determined pursuant to paragraph (1) of this subdivision, by 6.5 percent (the  
395 conversion percentage). The result is the corporation's PNOLC subtraction pool.

396 (c) Any change in the base year tax rate or base year BAP must be made within the  
397 statute of limitations under Tax Law section 1083(a) for the base year (as determined with regard  
398 to an extension of such time period agreed to pursuant to Tax Law section 1083(c)(1)(D)).

399 Section 3-9.7 Computation of the PNOLC subtraction. (a) PNOLC subtraction available  
400 for use. (1) In the case of a taxpayer that is not a member of a combined group, its PNOLC  
401 subtraction available for use in the first 2015 taxable year is equal to its tax period PNOLC  
402 subtraction allotment for such taxable year computed as provided in subdivision (b) of this  
403 section. The amount of PNOLC subtraction available for use in any taxable year following the  
404 first 2015 taxable year is equal to its tax period PNOLC subtraction allotment for such taxable  
405 year, computed as provided in subdivision (b) of this section, plus any unused PNOLC  
406 subtraction carryforward of such taxpayer, computed as provided in subdivision (e) of this  
407 section.

408 (2) In the case of a combined group, the PNOLC subtraction available for use in the first  
409 2015 taxable year is the sum of the tax period PNOLC subtraction allotments of all members of  
410 the combined group, computed as provided in subdivision (b) of this section. The amount of  
411 PNOLC subtraction available for use for a combined group in any taxable year following the  
412 first 2015 taxable year is the sum of the tax period PNOLC subtraction allotments of all members  
413 of the combined group, computed as provided in subdivision (b) of this section, plus the sum of  
414 any unused PNOLC subtraction carryforwards of all members of the combined group, computed  
415 as provided in subdivision (e) of this section.

416 (b) Tax period PNOLC subtraction allotment. A corporation's tax period PNOLC  
417 subtraction allotment is a percentage of its PNOLC subtraction pool (either 10 percent, 50  
418 percent, or 100 percent as described below) that may be claimed in a taxable year. If a

419 corporation cannot utilize the entire tax period PNOLC subtraction allotment in a taxable year,  
420 the unused portion may be considered an unused PNOLC subtraction carryforward as determined  
421 in subdivision (e) of this section.

422 (1) One hundred percent allotment method for small business taxpayers. A small  
423 business taxpayer's tax period PNOLC subtraction allotment for the first 2015 taxable year is  
424 equal to 100 percent of its PNOLC subtraction pool, even if such taxpayer does not claim a  
425 PNOLC subtraction in such year. A small business taxpayer has no tax period PNOLC  
426 subtraction allotment after the first 2015 taxable year.

427 (2) Fifty percent allotment method. (i) In the case of a corporation utilizing the fifty  
428 percent allotment method pursuant to the rules in subparagraph (ii) of this paragraph, the  
429 tax period PNOLC subtraction allotment in each of such corporation's first two taxable  
430 years after its base year is equal to 50 percent of its PNOLC subtraction pool, even if the  
431 corporation did not claim a PNOLC subtraction in any such taxable year. Such  
432 corporation has no tax period PNOLC subtraction allotment in its third taxable year after  
433 its base year and in all taxable years thereafter.

434 (ii) A taxpayer, or designated agent in the case of a combined report, must make the  
435 election to use the 50 percent allotment method on an original, timely filed return for the  
436 first 2015 taxable year, determined with regard to extensions of time for filing. Any 50  
437 percent allotment method election made on a return that is late shall be invalid and  
438 ineffective. Such election is binding on the taxpayer or, in the case of a combined group,  
439 all members of the combined group, whether or not that corporation remains in that  
440 combined group in subsequent taxable years. Provided such election may be revoked by  
441 a taxpayer or the designated agent of a combined group by timely filing an amended



442 return for each year the taxpayer or combined group claimed the 50 percent election. If  
443 such election is revoked, the revocation shall apply to the taxpayer or, in the case of a  
444 combined report, all members of the combined group at the time such election is revoked.

445 (3) Ten percent allotment method. For any corporation not subject to paragraph (1)  
446 or (2) of this subdivision, the tax period PNOLC subtraction allotment is equal to 10 percent of  
447 its PNOLC subtraction pool in each of its first ten taxable years after the base year, even if the  
448 corporation did not claim a PNOLC subtraction in any such taxable year. For corporations  
449 utilizing the ten percent allotment method, there is no tax period PNOLC subtraction allotment in  
450 the eleventh taxable year following its base year and in all taxable years thereafter.

451 (4) Combined groups. In the case of a combined group, each member of the group shall  
452 compute its own tax period PNOLC subtraction allotment using the allotment method  
453 determined by its designated agent in the first 2015 taxable year. The combined group's tax  
454 period PNOLC subtraction allotment in a taxable year is the sum of the tax period PNOLC  
455 subtraction allotments for all members of the combined group for such taxable year.

456 (c) Maximum amount of the PNOLC subtraction to be deducted. (1) In the case of a  
457 taxpayer that is not a member of a combined group, the maximum amount of the PNOLC  
458 subtraction to be deducted in a taxable year is computed as follows:

459 (i) multiply the business income tax rate for the taxable year by the apportioned business  
460 income before the PNOLC subtraction and the net operating loss deduction for the  
461 taxable year;

462 (ii) subtract from the amount computed in subparagraph (i) of this paragraph, the greater  
463 of the capital base tax or the fixed dollar minimum tax for the taxable year; and

464 (iii) divide the result in subparagraph (ii) of this paragraph by the taxpayer's business  
465 income tax rate for the taxable year.

466 (2) In the case of a combined report, the maximum amount of the PNOLC subtraction to  
467 be deducted in a taxable year is computed as follows:

468 (i) multiply the business income tax rate for the taxable year by the combined  
469 apportioned business income before the PNOLC subtraction and the net operating loss  
470 deduction for the taxable year;

471 (ii) subtract from the amount computed in subparagraph (i) of this paragraph, the greater  
472 of the combined capital base tax or the fixed dollar minimum tax attributable to the  
473 designated agent for the taxable year; and

474 (iii) divide the result in subparagraph (ii) of this paragraph by the combined group's  
475 business income tax rate for the taxable year.

476 (d) PNOLC subtraction. (1) Fifty percent allotment method.

477 (i) In the case of a corporation utilizing the 50 percent allotment method, the amount of  
478 PNOLC subtraction in a taxable year is the smallest of (A) the PNOLC subtraction  
479 available for use computed in subdivision (a) of this section; (B) the maximum amount of  
480 PNOLC subtraction to be deducted computed in subdivision (c) of this section; and (C)  
481 50 percent of its PNOLC subtraction pool.

482 (ii) In the case of a corporation utilizing the 50 percent allotment method, a PNOLC  
483 subtraction is only allowed in taxable years beginning before January 1, 2017.

484 (2) 100 percent allotment method for small business taxpayers and 10 percent allotment  
485 method.

486 (i) For all corporations not subject to paragraph (1) of this subdivision, the amount of  
487 PNOLC subtraction in a given taxable year is the lesser of the PNOLC subtraction  
488 available for use computed in subdivision (a) of this section and the maximum amount of  
489 PNOLC subtraction to be deducted as computed in subdivision (c) of this section.

490 (ii) For all corporations not subject to paragraph (1) of this subdivision, a PNOLC  
491 subtraction may be claimed for no longer than 20 taxable years or the taxable year  
492 beginning on or after January 1, 2035 but before January 1, 2036, whichever comes first.

493 (e) Unused PNOLC subtraction carryforward. If the PNOLC subtraction in a taxable  
494 year is less than the PNOLC subtraction available for use in such taxable year, then the  
495 difference between the two values is the unused PNOLC subtraction carryforward. In the case of  
496 a corporation utilizing the fifty percent allotment method, any amount of a corporation's unused  
497 PNOLC subtraction carryforward is forfeited and cannot be carried forward to any tax year  
498 beginning on or after January 1, 2017.

499  
500 Section 3-9.8 Impact of combined group changes on the PNOLC subtraction.

501 (a) If a taxpayer that was not a member of a combined group in any taxable year  
502 beginning on or after January 1, 2015 subsequently joins a combined group in a later taxable  
503 year, such taxpayer's PNOLC subtraction allotment and unused PNOLC subtraction  
504 carryforward are added to the combined group's PNOLC subtraction allotment and unused  
505 PNOLC subtraction carryforward respectively, subject to the rules in Tax Law section  
506 210.1(a)(viii)(B) and this Subpart.

507 (b) If a corporation is a member of a combined group for any taxable year beginning on  
508 or after January 1, 2015 and subsequently leaves that group in a later taxable year, the outgoing

509 member of the combined group takes its own PNOLC subtraction allotment with it to use in  
510 future taxable years. In addition, such member also takes its own share of the combined group's  
511 combined unused PNOLC subtraction carryforward, which shall be based upon its share of the  
512 combined group's PNOLC subtraction available for use in the last year it was included in the  
513 combined group. If such corporation joins another combined group, its PNOLC subtraction  
514 allotment and unused PNOLC subtraction carryforward are added to the combined group's  
515 PNOLC subtraction allotment and unused PNOLC subtraction carryforward, respectively,  
516 subject to the rules in Tax Law section 210.1(a)(viii)(B) and this Subpart. If such corporation  
517 does not join another combined group, it is allowed its PNOLC subtraction allotment and unused  
518 PNOLC subtraction carryforward on a separate basis, subject to the rules in Tax Law section  
519 210.1(a)(viii)(B) and this Subpart.

520

521 Section 3-9.9 PNOLC Examples.

522 Note that the numbers in the examples have been rounded.

523 Example 1:

524 2014 Calendar Year (Base Year)

525 Corporations L, M, N and O are properly included in a combined report. The combined group's  
526 base year BAP is 12.50 percent and the group's base year tax rate is 7.1 percent.

527

528

529 2015 Calendar Year (First 2015 Taxable Year)

530

531 Taxpayer O files on a separate basis. To compute its PNOLC subtraction pool, Taxpayer O first  
532 multiplies its UNOL by its base year combined group's base year BAP and base year tax rate  
533 ( $\$7,325 * 12.50 \text{ percent} * 7.1 \text{ percent}$ ). The result of \$65 is divided by the 6.5 percent conversion

534 percentage to arrive at a PNOLC subtraction pool of \$1,000. Since Taxpayer O properly elected  
 535 to use the 50 percent allotment method, its PNOLC subtraction pool is multiplied by 50 percent  
 536 to determine its tax period PNOLC subtraction allotment of \$500 for the first 2015 taxable year.  
 537 In the first 2015 taxable year, the PNOLC subtraction available for use is \$500, which is equal to  
 538 its tax period PNOLC subtraction allotment for such year.

Taxpayer	UNOL	Base Year BAP	Base Year Tax Rate	Conversion Percentage	PNOLC Subtraction Pool	PNOLC Subtraction Allotment Method	Tax Period PNOLC Subtraction Allotment	2015 Calendar Year PNOLC Subtraction Available for Use
O	\$7,325	12.50%	7.10%	6.50%	\$1,000	50%	\$500	\$500

539

540 Corporations L, M, and N are properly included in a combined report. The combined group is  
 541 not a small business taxpayer and it does not elect to use the 50 percent allotment method. Each  
 542 member of the combined group computes its own PNOLC subtraction pool by multiplying its  
 543 own UNOL by the base year combined group's base year BAP and base year tax rate. The result  
 544 is then divided by the 6.5 percent conversion percentage to compute the member's PNOLC  
 545 subtraction pool. Since the combined group is utilizing the 10 percent allotment method, each  
 546 member's PNOLC subtraction pool is multiplied by 10 percent to arrive at the member's  
 547 PNOLC subtraction allotment for the first 2015 taxable year. The combined group's tax period  
 548 PNOLC subtraction allotment for the first 2015 taxable year of \$3,505 is the sum of L, M, and  
 549 N's tax period PNOLC subtraction allotments for such year. The combined group's PNOLC  
 550 subtraction available for use in the first 2015 taxable year is \$3,505, which is equal to the  
 551 combined group's tax period PNOLC subtraction for such year.

552

553

2015 Group Member	Member's UNOL	Base Year BAP	Base Year Tax Rate	Conversion Percentage	Member's PNOLC Subtraction Pool	PNOLC Subtraction Allotment Method	Tax Period PNOLC Subtraction Allotment	2015 Calendar Year PNOLC Subtraction Available for Use
L	\$70,000	12.5%	7.1%	6.50%	\$9,558	10%	\$956	\$956
M	\$186,700	12.5%	7.1%	6.50%	\$25,492	10%	\$2,549	\$2,549
N	0	12.5%	7.1%	6.50%	-	--	-	-
Totals	\$256,700				\$35,050		\$3,505	\$3,505

554

555

556 Example 2:

557 2014 Calendar Year (Base Year)

558 Corporations E, F, and G are properly included in a combined report. The combined group's base  
559 year BAP is 9.5 percent and the group's base year tax rate is 7.1 percent.

560

561 Corporation H files on a separate basis, with a base year BAP of 4.8250 percent and a base year  
562 tax rate of 6.5 percent.

563

564 Corporation I was not subject to tax in New York State.

565 Corporation J files on a separate basis, with base year BAP of 9.75 percent and a base year tax  
566 rate of 7.1 percent.

567

568 2015 Calendar Year (First 2015 Taxable Year)

569

570 Corporations E, F, G, H, and I are properly included in a combined report. The group is not a  
571 small business taxpayer and it does not elect to use the 50 percent allotment method. Each

572 member computes its own PNOLC subtraction pool by multiplying its own UNOL by the base  
 573 year BAP and base year tax rate. The result is then divided by the 6.5 percent conversion  
 574 percentage to compute the member's PNOLC subtraction pool. Since the combined group is  
 575 utilizing the 10 percent allotment method, each member's PNOLC subtraction pool is multiplied  
 576 by 10 percent to arrive at the member's PNOLC subtraction allotment for the first 2015 taxable  
 577 year. The combined group's PNOLC subtraction allotment for the first 2015 taxable year is  
 578 \$2,900, which is the sum of E, F, G, H, and I's tax period PNOLC subtraction allotments for  
 579 such year. The combined group's PNOLC subtraction available for use in the first 2015 taxable  
 580 year is \$2,900, which is equal to the tax period PNOLC subtraction for such year. The combined  
 581 group is able to utilize the entire PNOLC subtraction available for use so there is no  
 582 carryforward of PNOLC subtraction from the first 2015 taxable year.

583

2015 Group Member	Member's UNOL	Base Year BAP	Base Year Tax Rate	Conversion Percentage	Member's PNOLC Subtraction Pool	PNOLC Subtraction Allotment Method	PNOLC Subtraction Allotment	2015 Calendar Year PNOLC Subtraction Available for Use
E	\$115,600	9.5%	7.10%	6.50%	\$11,996	10%	\$1,200	\$1,200
F	\$28,900	9.5%	7.10%	6.50%	\$2,999	10%	\$300	\$300
G	\$57,800	9.5%	7.10%	6.50%	\$5,998	10%	\$600	\$600
H	\$165,800	4.825%	6.50%	6.50%	\$8,000	10%	\$800	\$ 800
I	\$0	-	-	-	-	-	-	-
Total	\$368,100				\$28,993		\$2,900	\$2,900

584

585 Corporation J files on a separate basis and properly elects to use the 50 percent allotment  
 586 method. To compute its PNOLC subtraction pool, taxpayer J first multiplies its UNOL by its  
 587 base year combined group's base year BAP and base year tax rate ( $\$16,000 \times 9.750 \text{ percent} \times 7.1$   
 588 percent). The result of \$111 is divided by the 6.5 percent conversion percentage to arrive at a

589 PNOLC subtraction pool of \$1,704. Since taxpayer J properly elected to use the 50 percent  
 590 allotment method, its PNOLC subtraction pool is multiplied by 50 percent to determine its tax  
 591 period PNOLC subtraction allotment of \$852 for the first 2015 taxable year. In the first 2015  
 592 taxable year, the PNOLC subtraction available for use is \$852, which is equal to its tax period  
 593 PNOLC subtraction allotment for such year. Taxpayer J is able to use the entire PNOLC  
 594 subtraction available for use so there is no carryforward of PNOLC subtraction from the first  
 595 2015 taxable year.

Taxpayer	UNOL	Base Year BAP	Base Year Tax Rate	Conversion Percentage	PNOLC Subtraction Pool	PNOLC Subtraction Allotment Method	Tax Period PNOLC Subtraction Allotment	2015 Calendar Year PNOLC Subtraction Available for Use
J	\$16,000	9.75%	7.10%	6.50%	\$1,704	50%	\$852	\$852

596

597

598 2016 Calendar Year (Second Year Following the Base Year)

599

600 Corporations E, F, G, H, I, and J are properly included in a combined report. The group has

601 \$3,752 of PNOLC subtraction available for use, which is the sum of each member's PNOLC

602 subtraction available for use for the tax period.

2016 Group Member	Member's PNOLC Subtraction Pool	PNOLC Subtraction Allotment Method	Tax Period PNOLC Subtraction Allotment	Unused PNOLC Subtraction Carryforward from 2015 Calendar Year	2016 Calendar Year PNOLC Subtraction Available for Use
E	\$11,996	10%	\$1,200	\$0	\$1,200
F	\$2,999	10%	\$300	\$0	\$300
G	\$5,998	10%	\$600	\$0	\$600
H	\$8,000	10%	\$800	\$0	\$800
I	-	-	-	\$0	\$0
J	\$1704	50%	\$852	\$0	\$852
Total	\$30,697		\$3,752	\$0	\$3,752

603

604



605

606 Example 3:

607

608 2014 Calendar Year (Base Year)

609 In the base year, taxpayer X files a separate report. Taxpayer X's base year BAP is 15 percent

610 and its base year tax rate is 7.1 percent.

611

612 2015 Short Period 1/1/2015 - 5/31/15 (First 2015 Taxable Year)

613

614 To compute its PNOLC subtraction pool, taxpayer X first multiplies its UNOL by its base year

615 BAP and base year tax rate ( $\$97,650 \times 15 \text{ percent} \times 7.1 \text{ percent}$ ). The result of \$1,040 is then

616 divided by the 6.5 percent conversion percentage to arrive at its PNOLC subtraction pool of

617 \$16,000.

618

619 Since taxpayer X properly elected to use the 50 percent allotment method, it multiplies its

620 PNOLC subtraction pool by 50 percent to determine its tax period PNOLC subtraction allotment

621 of \$8,000 for the first 2015 taxable year. In the first 2015 taxable year, the PNOLC subtraction

622 available for use is \$8,000, which is equal to the tax period PNOLC subtraction allotment for

623 such year.

624

	UNOL	Base Year BAP	Base Year Tax Rate	Conversion Percentage	PNOLC Subtraction Pool	PNOLC Subtraction Allotment Method	Tax Period PNOLC Subtraction Allotment	First 2015 Taxable Year PNOLC Subtraction Available for Use
X	\$97,650	15.00%	7.10%	6.50%	\$16,000	50%	\$8,000	\$8,000

625

626

627 Taxpayer X computes its maximum amount of PNOLC subtraction to be deducted in the first  
 628 2015 taxable year of \$5,634 as follows:

629

630

Apportioned Business Income Before PNOLC Subtraction and NOLD	\$5,900,000
2015 Business Income Tax Rate	7.1%
Product of Apportioned Business Income Before PNOLC Subtraction and NOLD and the 2015 Business Income Tax Rate	\$418,900
Capital Base Tax	\$418,500
FDM	\$5,000
Greater of Capital Base Tax and FDM	\$418,500
Difference Between Greater of Capital Base Tax and FDM and the Product of Apportioned Business Income Before PNOLC Subtraction and NOLD and the 2015 Business Income Tax Rate	\$400
2015 Business Income Tax Rate	7.1%
Maximum Amount of PNOLC Subtraction to be Deducted ( $\$400/7.1\%$ )	\$5,634

631

632 Taxpayer X's PNOLC subtraction in the first 2015 taxable year is \$5,634, which is the smallest  
 633 of its PNOLC subtraction available for use, its maximum PNOLC subtraction to be deducted,  
 634 and 50 percent of its PNOLC subtraction pool. Since the PNOLC subtraction is less than the  
 635 PNOLC subtraction available for use, the difference between the two is taxpayer X's unused  
 636 PNOLC subtraction carryforward of \$2,366.

PNOLC Subtraction Available for Use in First 2015 Taxable Year	\$8,000
Maximum PNOLC Subtraction to be Deducted in First 2015 Taxable Year	\$5,634
50% of PNOLC Subtraction Pool	\$8,000
PNOLC Subtraction in First 2015 Taxable Year	\$5,634
Unused PNOLC Subtraction Carryforward from First 2015 Taxable Year	\$2,366

637

638 2015 Short Period 6/1/2015 - 12/31/15 (Second Taxable Year Following the Base Year)

639 Taxpayer X's tax period allotment is \$8,000 in the second taxable year following the base year,  
 640 which is 50 percent of its PNOLC subtraction pool. Taxpayer X's PNOLC subtraction available  
 641 for use in the second taxable year following the base year is the sum of its unused PNOLC  
 642 subtraction carryforward from the first 2015 taxable year and its current tax period PNOLC  
 643 subtraction allotment.

Tax Period PNOLC Subtraction Allotment	\$8,000
Unused PNOLC Subtraction Carryforward from First 2015 Taxable Year	\$2,366
PNOLC Subtraction Available for Use in Second Taxable Year Following the Base Year	\$10,366

644  
 645  
 646  
 647  
 648 Taxpayer X computes its maximum amount of PNOLC subtraction to be deducted in the second  
 649 year following the base year of \$19,718 as follows:

Apportioned Business Income Before PNOLC Subtraction and NOLD	\$4,900,000
2015 Business Income Tax Rate	7.1%
Product of Apportioned Business Income Before PNOLC Subtraction and NOLD and the 2015 Business Income Tax Rate	\$347,900
Capital base tax	\$346,500
FDM	\$5,000
Greater of Capital Base Tax and FDM	\$346,500
Difference Between Greater of Capital Base Tax and FDM and Product of Apportioned Business Income Before PNOLC Subtraction and NOLD and the 2015 Business Income Tax Rate	\$1,400
2015 Business Income Tax Rate	7.1%
Maximum Amount of PNOLC Subtraction to be Deducted ( $\$1,400/7.1\%$ )	\$19,718

650  
 651 Taxpayer X's PNOLC subtraction in the second year following the base year is \$8,000, which is  
 652 the smallest of its PNOLC subtraction available for use, its maximum PNOLC subtraction to be  
 653 deducted, and 50 percent of its PNOLC subtraction pool. Since its PNOLC subtraction is less

654 than its PNOLC subtraction available for use, the difference between these two items is taxpayer  
 655 X's unused PNOLC subtraction carryforward of \$2,366.

PNOLC Subtraction Available for Use	\$10,366
Maximum PNOLC Subtraction to be Deducted	\$19,718
50% of PNOLC Subtraction Pool	\$8,000
PNOLC Subtraction	\$8,000
Unused PNOLC Subtraction Carryforward	\$2,366

656  
 657 2016 Calendar Year (Third Taxable Year Following the Base Year)  
 658 Taxpayer X's PNOLC subtraction available for use in the third taxable year following the base  
 659 year is the sum of its unused PNOLC subtraction carryforward from the second 2015 taxable  
 660 year and its current tax period PNOLC subtraction allotment.

Tax Period PNOLC Subtraction Allotment in 2016 Calendar Year	\$0
Unused PNOLC Subtraction Carryforward from the Second Taxable Year Following the Base Year	\$2,366
PNOLC Subtraction Available for Use in 2016 Calendar Year	\$2,366

661  
 662 Taxpayer X computes its maximum PNOLC subtraction to be deducted in the third year  
 663 following the base year of \$1,408 as follows:

Apportioned Business Income Before PNOLC Subtraction and NOLD	\$14,000,000
2015 Business Income Tax Rate	7.1%
Product of Apportioned Business Income Before PNOLC Subtraction and NOLD and the 2015 Business Income Tax Rate	\$994,000
Capital base tax	\$993,900
FDM	\$10,000
Greater of Capital Base Tax and FDM	\$993,900
Difference Between Greater of Capital Base Tax and FDM and the Product of Apportioned Business Income Before PNOLC Subtraction and NOLD and the 2015 Business Income Tax Rate	\$100
2015 Business Income Tax Rate	7.1%
Maximum Amount of PNOLC Subtraction to be Deducted ( $\$100/7.1\%$ )	\$1,408

664  
 665  
 666 Taxpayer X's PNOLC subtraction in the third year following the base year is \$1,408, which is  
 667 the smallest of its PNOLC subtraction available for use, its maximum PNOLC subtraction to be

668 deducted, and 50 percent of its PNOLC subtraction pool. Although its PNOLC subtraction is  
 669 less than its PNOLC subtraction available for use, Taxpayer X's unused PNOLC subtraction  
 670 carryforward is \$0 as it is required to forfeit any unused amounts since they cannot be carried  
 671 forward to any tax year that begins on or after January 1, 2017.

672

PNOLC Subtraction Available for Use	\$2,366
Maximum PNOLC Subtraction to be Deducted	\$1,408
50% of PNOLC Subtraction Pool	\$8,000
PNOLC Subtraction	\$1,408
Difference between PNOLC Subtraction Available for Use and PNOLC Subtraction	\$958
Unused PNOLC Subtraction Carryforward	\$0

673

674 NOTE: Taxpayers that have properly elected to use the 50 percent allotment method have the  
 675 option of revoking such election in accordance with the rules found in section 3-9.7(b)(2) of this  
 676 Subpart.

677

678 Example 4:

679 2014 Calendar Year (Base Year)

680

681 Corporations A, B, and C are properly included in a combined report. The combined group's  
 682 base year BAP is 55 percent and the group's base year tax rate is 7.1 percent.

683

684 2015 Calendar Year (First 2015 Taxable Year)

685

686 Corporations A, B, and C continue to be properly included in a combined report. The group is  
 687 not a small business taxpayer and it properly elects to use the 50 percent allotment method. Each  
 688 member computes its own PNOLC subtraction pool by multiplying its own UNOL by the base

689 year combined group’s base year BAP and base year tax rate. The result is then divided by the  
 690 6.5 percent conversion percentage to compute the member’s PNOLC subtraction pool. Since the  
 691 combined group is utilizing the 50 percent allotment method, each member’s PNOLC  
 692 subtraction pool is multiplied by 50 percent to arrive at the member’s PNOLC subtraction  
 693 allotment for the first 2015 taxable year. The combined group’s tax period PNOLC subtraction  
 694 allotment is the sum of A, B, and C’s tax period allotments for the year. The combined group’s  
 695 PNOLC subtraction available for use in the first 2015 taxable year is \$36,046, which is the same  
 696 as its tax period PNOLC subtraction allotment.

Member	Member's UNOL	Base Year BAP	Base Year Tax Rate	Conversion Percentage	Member's PNOLC Subtraction Pool	PNOLC Subtraction Allotment Method	Tax Period PNOLC Subtraction Allotment	2015 Calendar Year PNOLC Subtraction Available for Use
A	\$40,000	55%	7.1%	6.50%	\$24,031	50%	\$12,015	\$12,015
B	\$50,000	55%	7.1%	6.50%	\$30,038	50%	\$15,019	\$15,019
C	\$30,000	55%	7.1%	6.50%	\$18,023	50%	\$9,012	\$9,012
Totals	\$120,000				\$72,092		\$36,046	\$36,046

697  
 698 Combined group ABC computes its PNOLC subtraction and unused PNOLC subtraction  
 699 carryforward as follows:

PNOLC Subtraction Available for Use	\$36,046
Maximum Amount of PNOLC Subtraction to be Deducted	\$50,000
50% of PNOLC Subtraction Pool	\$36,046
PNOLC Subtraction	\$36,046
Unused PNOLC Subtraction Carryforward from 2015 Calendar Year	\$0

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 701  
 702  
 703  
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 705  
 706 2016 Calendar Year (Second Taxable Year Following the Base Year)  
 707

708 Corporations A and B are properly included in a combined report but Corporation C files on a  
709 separate basis.

710 Combined group AB

Member	Member's PNOLC Subtraction Pool	PNOLC Subtraction Allotment Method	Tax Period PNOLC Subtraction Allotment	Unused PNOLC Subtraction Carryforward from First 2015 Calendar Year	2016 Calendar Year PNOLC Subtraction Available for Use
A	24,031	50%	\$12,015	\$0	\$12,015
B	30,038	50%	\$15,019	\$0	\$15,019
Total	\$54,069		\$27,034	\$0	\$27,034

711

712

713 Combined group AB's PNOLC subtraction in the second taxable year following the base year is  
714 \$20,000, which is the smallest of its PNOLC subtraction available for use, its maximum PNOLC  
715 subtraction to be deducted, and 50 percent of its PNOLC subtraction pool. Although its PNOLC  
716 subtraction is less than its PNOLC subtraction available for use, Taxpayer X's unused PNOLC  
717 subtraction carryforward is \$0 as it is required to forfeit any unused amounts since they cannot  
718 be carried forward to any tax year beginning on or after January 1, 2017.

719

PNOLC Subtraction Available for Use	\$27,034
Maximum Amount of PNOLC Subtraction to be Deducted	\$20,000
50% of PNOLC Subtraction Pool	\$27,035
PNOLC Subtraction	\$20,000
Difference between PNOLC Subtraction Available for Use and PNOLC Subtraction	\$7,034
Unused PNOLC Subtraction Carryforward	\$0

720

721 NOTE: Taxpayers that have properly elected to use the 50 percent allotment method have the  
722 option of revoking such election in accordance with the rules found in section 3-9.7(b)(2).

723  
724 Taxpayer C

Taxpayer	PNOLC Subtraction Pool	PNOLC Subtraction Allotment Method	Tax Period PNOLC Subtraction Allotment	Unused PNOLC Subtraction Carryforward from 2015 Calendar Year	2016 Calendar Year PNOLC Subtraction Available for Use
C	\$18,023	50%	\$9,012	\$0	\$9,012

725  
726 Taxpayer C's PNOLC subtraction in the second taxable year following the base year is \$9,012,  
727 which is the smallest of its PNOLC subtraction available for use, its maximum PNOLC  
728 subtraction to be deducted, and 50 percent of its PNOLC subtraction pool. Since its PNOLC  
729 subtraction exhausts the entire amount of its PNOLC subtraction available for use, Taxpayer C  
730 does not have an unused PNOLC subtraction carryforward.

731

PNOLC Subtraction Available for Use	9,012
Maximum Amount of PNOLC Subtraction to be Deducted	10,000
50% of PNOLC Subtraction Pool	9,012
PNOLC Subtraction	9,012
Difference between PNOLC Subtraction Available for Use and PNOLC Subtraction	\$0
Unused PNOLC Subtraction Carryforward	\$0

732

733

734 Section 3-9.10 Impact of certain corporate acquisitions on the PNOLC subtraction.

735 In a transaction to which section 381(a) of the Internal Revenue Code applies, the  
736 acquiring corporation shall succeed to the balance of the PNOLC subtraction allotments and  
737 unused PNOLC subtraction carryforward of the distributor or transferor corporation, subject to  
738 the same restrictions and limitations on the use of that PNOLC subtraction allotments and unused  
739 PNOLC subtraction carryforward to which the distributor or transferor corporation was subject.

740

741



742 Section 3-9.11 Record-keeping.

743 A taxpayer or combined group with a PNOLC subtraction pool must attach to its report,  
744 Form CT-3.3 and a detailed schedule showing the computation of the UNOL, amount of unused  
745 PNOLC subtraction allotment carryforward and, in the case of a combined group, each  
746 member's UNOL and amount of unused PNOLC subtraction allotment carryforward, together  
747 with all material and pertinent facts related to the taxpayer's or combined group's, if applicable,  
748 claim. Such records shall be retained during the period in which the statute of limitations for a  
749 change to the PNOLC subtraction may be made by the taxpayer or the Department.