STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
C.V. STARR & CO., INC.	:	DETERMINATION DTA NO. 824121
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Period January 1, 2002 through December 31, 2004.	:	

Petitioner, C.V. Starr & Co., Inc., filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the period January 1, 2002 through December 31, 2004.

On July 10, 2012, petitioner, appearing by McDermott, Will & Emery, LLP (Arthur R. Rosen, Esq., and Lindsay M. LaCava, Esq., of counsel), filed a motion seeking summary determination pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b). Accompanying the motion were the affidavits of Roger W. Dinella, dated June 29, 2012, Edward Easton Matthews, dated June 28, 2012 and Kathleen E. Shannon, dated July 2, 2012, together with annexed exhibits and a memorandum of law in support of the motion. On October 1, 2012, the Division of Taxation, appearing by Amanda Hiller, Esq. (Clifford Peterson, Esq., of counsel), submitted an affirmation in opposition to petitioner's motion, together with annexed exhibits including the affidavit of Ely Yulman, dated September 25, 2012. On October 20, 2012, per permission granted, petitioner submitted a reply brief in support of the motion for summary determination, and the 90-day period for issuance of this order commenced on such October 20, 2012 date. By a

letter dated January 15, 2013, this 90 day period was extended for an additional three months (Tax Law § 2010[3]). After due consideration of the affidavits, annexed exhibits, affirmation, and all pleadings and proceedings had herein, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether petitioner has established that there are no material and triable issues of fact in dispute and that the law and the facts presented are sufficient to allow for a determination as a matter of law in its favor.

II. Whether, if so, petitioner, C.V. Starr & Co., Inc., properly reported, on its corporation franchise tax reports, income earned from its ownership of common stock of American International Group, Inc., as investment income derived from investment capital rather than as business income.

FINDINGS OF FACT

1. In 1919, Cornelius Vander Starr started his first insurance agency business, located in China. He continued to open insurance agency businesses in various places over the course of many subsequent years. In 1943, Mr. Starr formed Starr International Co., Inc. (SICO). In 1950, Mr. Starr formed petitioner, C.V. Starr & Co., Inc. (Starr). Starr was formed for the purpose of owning certain United States based insurance agencies and other assets, including real estate. Starr is the parent corporation of a group of entities engaged in the insurance agency business. From the dates of their respective incorporations through the period in issue, SICO and Starr were privately held corporations.

2. In 1967, Mr. Starr and a few other executives, including Maurice R. Greenberg, formed American International Group (AIG). In April 1969, AIG became a publicly-traded company.

3. Until June 30, 1970, Starr owned various foreign and domestic insurance agencies founded by Mr. Starr over the years.

4. As of May 28, 1970, Starr and AIG entered into an Agreement and Plan for Reorganization (Agreement). Pursuant to the Agreement, AIG acquired certain of Starr's assets, including land, a building, and certain insurance agencies engaged in Starr's foreign insurance agency business. In return, Starr received 232,000 shares of AIG's common stock. After the reorganization, Starr continued to own and operate certain insurance agencies, including its domestic insurance agency business. The Agreement allowed Starr to focus on its United States insurance and reinsurance business by exchanging assets unrelated to this business for the AIG common stock. In 1970, SICO also transferred assets to AIG in exchange for AIG's common stock.

5. At the time of the Agreement, Starr was owned by Maurice R. Greenberg and four other Starr executives. Under the terms of the Agreement, Starr stated that it intended not to sell, transfer, or otherwise distribute or dispose of the AIG stock.

6. At the time it received the AIG stock, Starr considered the market value of 70,083 shares of such AIG stock to represent the book value of the assets it transferred to AIG under the terms of the Agreement. In 1977, Starr transferred to a newly formed trust known as the C.V. Starr & Co. Trust (Starr Trust) the balance of the stock it owned in AIG.[1] Starr Trust was formed to receive and hold the stock, and Starr's owners agreed to the transfer because they intended future leaders of AIG to benefit from the AIG stock.

[1] The then-remaining number of AIG shares other than the number of shares representing the market value of the assets Starr transferred to AIG per the May 28, 1970 Agreement.

7. As a result of the foregoing, Starr owned some of the AIG stock directly, and some of the AIG stock indirectly through Starr Trust. Starr is the grantor and sole, noncontingent beneficiary of Starr Trust. For federal income tax purposes, Starr Trust has qualified since its formation as a grantor trust under Internal Revenue Code (IRC) §§ 673, 675 and 677, as amended. As a result Starr is treated as the owner of Starr Trust's assets. It must therefore, in computing its own tax liability for federal income tax purposes, include the income, deductions and credits of Starr Trust as if it had earned those items directly.[2]

8. On the following dates, Starr and Starr Trust were the record owners of the following number of shares of AIG common stock:

DATE	STARR SHARES	STARR TRUST SHARES	AGGREGATE SHARES
01/31/03	28,468,217	18,885,999	47,354,216
01/31/04	28,503,961	18,844,309	47,348,270
03/31/05	28,692,968	18,644,278	47,337,246

9. During the period at issue (01/01/02 through 12/31/04) Starr and Starr Trust's aggregate holdings of the common stock of AIG never exceeded 2.5 percent of the total outstanding common stock of AIG. During the period at issue, the only class of AIG stockholders entitled to vote for directors was AIG common stockholders.

10. The Division of Taxation (Division) audited Starr's combined franchise tax reports for the period spanning January 1, 2002 through December 31, 2004. During the audit, Starr explained that it and SICO have been affiliated with AIG since AIG's formation, and that, historically, Starr offered members of AIG's senior management the opportunity to purchase

[2] The Division of Taxation does not dispute that Starr Trust is a grantor trust for federal and New York tax purposes.

shares of Starr's common stock (Starr Plan). The auditor was also advised that SICO offered a Deferred Compensation Profit Participation Plan to specific employees of AIG, where SICO "set aside" shares of AIG stock for the benefit of such AIG employees.

11. The auditor states, by affidavit, that Starr's offer of this opportunity for AIG senior management to purchase shares of stock in Starr was described by Mr. Greenberg, as follows:

> [P]eople are invited to become Starr shareholders by Starr's board of directors . . . Starr's board chooses individuals within the AIG organization who share the values, integrity, and characters necessary to protect AIG's culture. Being a good executive is not enough. AIG's board has no role in the selection process. These individuals are invited to buy Starr stock at $300 per share and participate in the increase or decrease in the value of the AIG stock owned by Starr. Starr's shareholders own a pro rata share of Starr's interest in AIG, other investments, and the Starr agencies . . . .
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> . . . [a]s AIG stock's book value increases, the value of Starr preferred stock increases in lockstep. As a result, what is good for AIG shareholders is good for Starr shareholders. When a Starr shareholder leaves AIG, he or she is required to sell his or her Starr shares back to Starr. Shareholders are generally not entitled to redeem their shares until the age of 65 and that shareholders leaving the company before retirement under "unhappy circumstances" lose any appreciation that may have been gained.

12. AIG employees that participated in the Starr Plan often became employees of Starr. Starr paid dividends in cash, as well as dividends in the form of nonvoting preferred shares of Starr's stock, to those AIG executives that participated in the Starr Plan.

13. In 2005, Starr analyzed certain amounts it paid in 2002 to AIG employees who were nonvested stockholders in, and employees of, Starr. It originally classified and reported the amounts as dividends for federal income tax purposes. After its analysis, Starr determined that the payments were properly classified as compensation and, therefore, filed amended federal income tax returns to properly categorize and report these amounts paid to nonvested stockholders as compensation.

14. Two AIG executive employee agreements attached to AIG's SEC form 10-K for 2002 included the following language:

> Notwithstanding anything contained herein to the contrary, the Executive expressly understands and agrees that he will not initially be entitled to become a stockholder of [Starr], but that following the first anniversary of the Effective Time, [AIG] will recommend to the Board of Directors of Starr that the Executive be eligible to become a stockholder of Starr, consistent with similarly situated executives of subsidiaries of [AIG]. Any participation as a stockholder of Starr will require a mutually agreeable reduction in other compensation payable or provided to the Executive, including without limitation the Base Salary, the Annual Bonus and the Supplementary Bonus.

The Division thus noted its belief that but for the Starr (and SICO) Plans, AIG would have incurred additional compensation expenses for those executives that participated in the Plans.

15. In 2003, Mr. Greenberg opined that it is "clear on its face" that AIG has benefitted from the Starr and SICO plans, in part, because these plans "marry people to the [AIG] organization" guaranteeing the longevity and continuity of the senior staff of AIG.

16. A special litigation committee authorized by AIG concluded that, as of August 14, 2003, seven past or present AIG management directors and officers, including Mr. Greenberg, who was AIG's chief executive officer and chairman of its board of directors, collectively owned more than 50% of Starr's voting stock and more than 40% of SICO's voting stock. This committee also concluded that the dividends Starr paid to its stockholders resulted, in part, from the increases in the book value of the more than 47 million shares of stock Starr owned in AIG as of August 2003.

17. In its 2003 Annual Report, under the heading "Ownership and Transactions with Related Parties," AIG reported the following:

The directors and officers of AIG, together with [Starr], a private holding company, The Starr Foundation and [SICO], a private holding company, owned or otherwise controlled

approximately 20 percent of the voting stock of AIG at December 31, 2003. Five directors of AIG also serve as directors of Starr and SICO.[3]

AIG reported the same information for the 2002 and 2004 calendar years, except that the percentage of voting stock was 19% for 2004.

18. Mr. Greenberg retired as chairman and chief executive officer of AIG on March 14, 2005. After his retirement, Starr and SICO stopped offering the Starr and SICO Plans to AIG executives, and AIG adopted a plan to replace the benefits Starr (and presumably SICO) offered to such executives.

19. Starr eventually sold the AIG stock between 2006 and 2009 and realized significant aggregate gain on such sales due to the appreciation in the value of the AIG stock since its acquisition in 1970. Starr used the sales proceeds to make other investments.

20. Starr reported its New York franchise tax liability under Tax Law Article 9-A by filing combined reports including various subsidiaries. SICO was not included as part of Starr's combined reports. On its combined reports for the period in issue, Starr reported the income that it earned from its direct and indirect ownership of the AIG stock as investment income rather than as business income.

21. As the result of its audit, the Division concluded that Starr's stock in AIG did not qualify for treatment as investment capital and that, as a result, the income in dispute was not properly reported as investment income. On October 12, 2010, the Division issued to Starr a Notice of Deficiency (L-034714093-8) asserting additional tax due for the period in issue in the amount of $2,176,524.00, plus interest. This asserted deficiency resulted from the Division

[3] Mr. Greenberg was a trustee of The Starr Foundation.

reclassifying all of the dividend income Starr received from the AIG stock it held directly and indirectly during the period in issue as business income rather than investment income.

SUMMARY OF THE PARTIES' POSITIONS

22. The Division argues that Starr held the AIG stock for the benefit of AIG and its senior executives for purposes of compensating or providing a reward and performance incentive for such senior executives. The Division thus posits that petitioner's motive or intent in acquiring and holding the AIG stock was not to "invest in" such stock "for its own account," and that therefore Starr did not hold the AIG stock as investment capital. In response to petitioner's motion, the Division believes that an inquiry must be made into a taxpayer's intent or motive for acquiring or holding a stock, that such an inquiry clearly requires the development of a factual record at hearing, and that summary determination is, as a consequence, not appropriate.

23. Petitioner maintains that the law clearly defines "investment capital" by specifying what is not included therein. Petitioner points out that Tax Law § 208(5) provides that stock may not be treated as investment capital if it is held for sale to customers in the regular course of business (i.e., as inventory), or is subsidiary capital, or is issued by the taxpayer itself. Petitioner asserts that the statute imposes no other limitations or conditions. In simplest terms, petitioner maintains that the definition of investment capital is clear, unambiguous and does not require an examination of the taxpayer's intent or motive in acquiring and holding stock, that the AIG stock acquired and held by petitioner fell within the statutory definition of investment capital, and that summary determination in its favor is required.

CONCLUSIONS OF LAW

A. New York State imposes an annual franchise tax on corporations for the privilege of exercising a corporate franchise, doing business, employing capital, owning or leasing property or

maintaining an office in the state (Tax Law § 209[1]). The tax is usually, and in this case was, calculated upon the taxpayer's "entire net income" (ENI). ENI is, generally, the same as the taxpayer's federal taxable income with certain modifications, less income from investments in subsidiary corporations (Tax Law § 210[1][a]; § 208[9]; § 209[1]). Once ENI is determined, it is separated into two components, to wit, "investment income" and "business income" (Tax Law § 208[9]; § 210[3]). "Investment income" is defined as income from "investment capital" (Tax Law § 208[6]). "Business income," in turn, is comprised of ENI less investment income (Tax Law § 208[8]).

B. During the period in issue, Starr received dividend income from its ownership of AIG common stock, both directly as well as indirectly through Starr Trust. Starr reported this income as investment income. The Division, on audit, reclassified this income from investment income to business income. Since investment income is derived from investment capital, the only question presented is whether the AIG common stock owned by petitioner fell within the definition of "investment capital."

C. Tax Law § 208(5) defines "investment capital" in relevant part as follows:

> [t]he term 'investment capital' means investments in stocks, bonds and other securities, corporate and governmental, not held for sale to customers in the regular course of business, exclusive of subsidiary capital and stock issued by the taxpayer (Tax Law § 208[5]).

An analysis of the foregoing definition reveals three conditions that must be met in order for a particular capital item to qualify as "investment capital" per Tax Law § 208(5). First, the item must fall within the specified types of capital items, "stocks, bonds and other securities, corporate and governmental," set forth in the statute (Tax Law § 208[5]) and regulations (20 NYCRR 3-3.2[a][1], [2]). Second, an otherwise qualifying type of capital item will be

disqualified and ineligible to be treated as investment capital if it is: a) "held for sale to customers in the regular course of business," or, b) is subsidiary capital or, c) is stock issued by the taxpayer itself. Third, the qualifying capital item must be held by the taxpayer as an "investment."

D. In this case, two of the foregoing conditions are clearly met. First, the stock from which Starr received the dividend income in question was common stock issued by AIG, a publicly traded corporation. Second, Starr did not hold this stock for sale to customers in the regular course of business (i.e., as inventory), nor was the stock issued by Starr itself, nor was it subsidiary capital.[4] Thus, the AIG stock held by petitioner clearly fell within the defined types of capital items constituting "investment capital" per Tax Law § 208(5), and was not disqualified or ineligible under any of the limiting conditions set forth with respect thereto. Consequently, the dividends derived from the AIG stock constituted investment income, unless the stock was not held by Starr as an "investment," and thus failed to meet the third noted condition.

E. The Division maintains that the stock did not quality as an investment by Starr, as intended under Tax Law § 208(5), because Starr did not acquire and hold the stock "for its own account." The Division would thus ascribe a special meaning and an additional condition to the phrase "investments in" as set forth in Tax Law § 208(5). Specifically, the Division asserts that Starr's motive or intent in acquiring the AIG stock was to hold the stock and use the returns

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[4] "Subsidiary capital" is defined to mean "investments in the stock of subsidiaries" (Tax Law § 208[4]). A "subsidiary," in turn, is defined as "a corporation of which over fifty per cent of the number of shares of stock entitling the holders thereof to vote for the election of directors or trustees is owned by the taxpayer" (Tax Law § 208[3]). There is no claim that petitioner owned, either directly [or directly plus indirectly via Starr Trust], over fifty per cent of the voting stock of AIG such that AIG, a publically traded corporation, was a subsidiary of petitioner. In fact, petitioner itself never held more than 2.5% of the total outstanding common stock of AIG (***see*** Finding of Fact 9). Including "related parties" (Starr, SICO, The Starr Foundation, and certain individuals), this level did not exceed 20% of the voting stock of AIG (***see*** Finding of Fact 17). Furthermore, and notwithstanding the statement that "[Starr] and SICO have been *affiliated* with AIG since AIG's formation" (***see*** Findings of Fact 10, 16 and 17), there is no allegation that Starr, SICO and AIG were an "affiliated group" as that term is defined by 20 NYCRR 3-3.2(d)(2)(i).

thereon to compensate AIG's senior executives. In this regard, the Division maintains that but for the Starr Plan, AIG would have incurred additional compensation expense. In view of the foregoing, the question presented narrows in focus to the specific meaning of the phrase "investments in" as found in Tax Law § 208(5).

F. In cases of statutory interpretation,

> It is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning (***Majewski v. Broadalbin-Perth Cent. School Dist.***, 91 NY2d 577, 583 [1998]).

"Legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction (McKinney's Cons Law of NY, Book 1, Statutes § 94). "[W]ords of ordinary import . . . are to be given their ordinary and usual meaning" (McKinney's Cons Law of NY, Book 1, Statutes § 232), and "[t]erm[s], without condition or modification in the statue, should be given [their] ordinary meaning and significance" (***SIN, Inc. v. Dep't of Fin. of City of New York***, 71 NY2d 616, 620 [1988]; McKinney's Cons Law of NY, Book 1, Statutes § 94). "[N]ew language cannot be imported into a statute to give it a meaning not otherwise found therein" (McKinney's Cons Law of NY, Book 1, Statutes § 94).

G. For purposes of determining what constitutes "investment capital," the focus has largely been on determining what *types* of instruments or capital items fall within the definition of "investment capital," per Tax Law § 208(5), as opposed to determining whether the acquisition and holding of a particular instrument or item constituted an "investment in" that instrument or item. This may simply reflect the understanding that the acquisition and holding of an instrument

or item of a type that otherwise carries the attributes of and qualifies as an item of investment capital, per Tax Law § 208(5), presupposes (or begs the question) that the acquisition and holding of such an item is an investment therein. In addressing what *types* of capital items constitute "investment capital," the courts and the Tax Appeals Tribunal have regularly deferred to the Division's regulations with respect thereto (***see Matter of Xerox Corporation***, Tax Appeals Tribunal, January 12, 2012; ***citing Matter of Pohatcong Investors***, Tax Appeals Tribunal, December 1, 1988, ***confirmed*** 156 AD2d 791 [1989]). Thus, for instance, the term "other securities" in Tax Law § 208(5) has been held to be "patently ambiguous" on its face as to the specific instruments included within that category (***id., citing Matter of Howard Johnson Co. v. State Tax Commn.***, 105 AD2d 948 [1984] ***revd on other grounds*** 65 NY2d 726 [1985]). However, the Division's regulations provide significant detail and guidance concerning the issue (***see*** 20 NYCRR 3-3.2). In contrast, the phrase "investments in," per Tax Law § 208(5), is not further defined in the Division's related regulations (20 NYCRR 3-3.2[a][1],[2]). This contrast supports a conclusion that the phrase "investments in," as found in Tax Law § 208(5), is not ambiguous or in need of further or special definition, and therefore ought to be construed and applied according to its commonly understood meaning (***see Patrolmen's Benevolent Assn. v. City of New York***, 41 NY2d 205, 208 [1976]).

H. As to the commonly understood meaning of an investment in any given capital item, each of several dictionary definitions consistently describes an "investment" as the outlay of money or capital in return for property or some other possession from which a profit or return is expected.[5] Definitions for legal and financial purposes describe an "investment" in terms nearly

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[5] "Investment" is defined as "the conversion of money or circulating capital into some species of property from which an income or profit is expected to be derived in the ordinary course of business" (The Oxford-English Dictionary, Vol VIII, 48 [2d ed 1998]); "the outlay of money usually for income or profit; a capital outlay"

identical to the foregoing dictionary definitions.[6] In ***Matter of Anametrics, Inc.*** (Tax Appeals Tribunal, December 21, 1989), the Tribunal addressed whether certain precious metals contracts were "other securities" so as to constitute investment capital the gain from the sale of which was properly reported as investment income. The Tribunal concluded that the contracts at issue in ***Anametrics*** were not issued for the purpose of financing corporate enterprises and did not distribute any rights in or obligations of a corporate entity, and thus did not constitute "other securities" for purposes of Tax Law § 208(5). (***Id.,*** citing ***Matter of Carret & Co, Inc. v. State Tax Commn.***, 148 AD2d 40 [1989].) Relevant to the matter at hand, the Tribunal addressed whether the contracts were "designed as a means of investment." In so doing, the Tribunal stated:

> [i]nvestment is defined as '[a]n expenditure to acquire property or other assets in order to produce revenue . . . [t]he placing of capital or laying out of money in a way intended to secure income or profit from its employment' (Black's Law Dictionary 741 [5th ed. 1979]). It is clear that [Anametrics] purchased the metal contracts with the expectation of financial gain. As such, they are a means of investment. The transaction in this case is distinguishable from the one found in ***Matter of Pohatcong Investors, Inc., supra.***, where the petitioner's income did not come from the purchase of the instrument, but rather solely from the creation and sale of the option itself. (***Id.***)

I. In the present matter, the undisputed facts show that in 1970, Starr acquired the AIG common stock in exchange for its own capital (land, a building and certain foreign insurance agency businesses). Starr held the stock thereafter for some 35 years, receiving dividends during its period of ownership (including during the years at issue herein) as well as significant capital

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(Merriam-Webster Collegiate Dictionary 659 [11th ed 2007]); "property or another possession acquired for future financial return or benefit" (The American Heritage Dictionary of the English Language 922[5th ed 2011]).

[6] "Investment" for legal purposes is defined as "an expenditure to acquire property or assets to produce revenue" (Black's Law Dictionary 902 [9th ed 2009]). For financial purposes, "investment" has been defined as "the use of capital to create more money, either through income-producing vehicles or through more risk-oriented ventures designed to produce capital gains" (Barron's Dictionary of Finance and Investment Terms 366-367 (8th ed 2010]).

gain upon its sale of the stock during the period 2006 through 2009. By any reasonable view of the common, legal and financial definitions of the term "investment," Starr's acquisition and ownership of the AIG common stock under these circumstances was an investment therein, carrying with it both the expectation (or hope) of a return thereon as well as the risk of no return or a loss due to poor performance by the investee (AIG). Starr did not create the capital item it held, but rather acquired it in exchange for its own assets, and stood to gain or lose on such acquisition based upon the performance of the issuer of the capital item so acquired. Under this analysis, Starr clearly made and held an "investment in" AIG stock, a type of capital item qualifying as "investment capital" under Tax Law § 208(5). Neither the motive for making an acquisition of a given type of item otherwise qualifying as investment capital, nor the investor's subsequent use of the returns gained from that acquired item (i.e., dividends and capital appreciation over time) serve to negate the fact that such acquisition was an investment. Accordingly, the AIG stock held by Starr was investment capital, such that the dividends derived from Starr's ownership of AIG stock during the period in issue constituted investment income *to Starr* and were properly reported as such, per Tax Law § 208(5).

J. As noted earlier, the Division contends that the term "investment," for purposes of Tax Law § 208(5), carries with it the additional requirement that the stock (in this case) must be acquired and held by an investor "for its own account." Although the meaning of the phrase "for its own account" is not specifically explained, the Division apparently argues that a taxpayer's motive or intent, as shown by its use of the capital item and the return derived therefrom, determines whether or not it is an "investment." The Division argues that Starr acquired the AIG stock for the purpose of benefitting AIG by compensating its executives, i.e., using the return on the stock it held to compensate its stockholders, all of whom, were AIG senior executives. The

Divison seems to argue that such a plan removes what is otherwise clearly an item of investment capital from the realm of an investment held for one's own account.[7]

K. The difficulty with the Division's position is that the definition of investment capital under Tax Law § 208(5) specifies no limitation requiring that an investor or holder's motive or intent for acquiring and holding stock (or any other qualifying type of capital item) must be discerned. Further, the Division's regulations are entirely silent in this regard (20 NYCRR 3-3.2[a][1], [2]). In particular, the Division's regulations include no reference to a requirement that stock must be "held for a taxpayer's own account," nor any definition of that phrase, but rather only reiterates the statutory requirement that such stock cannot be held for sale to others in the regular course of business (i.e., as inventory). If the Division wished to impose an additional requirement on the meaning of the phrase "investments in" (including the requirement and phrase "for a taxpayer's own account"), it would seem that the same would be spelled out as part of the definitional detail of what does and does not constitute investment capital. Including such a requirement by implication gives rise to the inherent subjectivity and administrative difficulty presented in ascertaining how, and to what degree, an investment must be held for one's own account versus for the account of another.[8]

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[7] The phrase and requirement the Division seeks to include in Tax Law § 208(5) by implication, to wit, that stock must be held by an investor "for its own account," comes from the definition of an Investment Trust under Tax Law former § 208(4) (Ch 201, 1938 Session Laws, former § 208[4]). Under that former provision, an "Investment Trust" was defined, in relevant part, as "[a] corporation whose business consists principally of holding, investing in, and reinvesting in stocks, bonds, and other securities *for its own account* . . . " That provision was repealed and replaced by Tax Law § 208(5), without inclusion (or carryover) of the phrase "for its own account" in either Tax Law § 208(5) or in the Division's regulations issued with respect to investment capital.

[8] In fact, when promulgating and thereafter adopting its regulations concerning investment capital (20 NYCRR 3-3.2), the Division clearly considered further defining the phrase "investments in" per Tax Law § 208(5), but did not include any additional definitional criteria or factors. The Division was apparently concerned that to do so would lead to subjectivity and administrative difficulty. In this regard, a December 3, 1986 Technical Services Memorandum from the Division to the Investment Capital Task Force Consultants, apparently issued in connection with ongoing discussions regarding promulgating regulations concerning investment capital, noted the following:

L. The foregoing result is consistent as well with the current regime under which the franchise tax is imposed. That is, in 1944 the Legislature combined the separate franchise taxes on business corporations, holding companies, and investment trusts under Article 9-A of the Tax Law (L 1944, ch 15). Prior to the 1944 changes, the imposition and rate of tax was determined by the type of entity involved. Thus, for example, if an entity met the definition of an investment trust, its income was subject to tax under the provisions and at the rate of tax applicable to investment trusts. Among the purposes of the 1944 reform were to "[u]nscramble business income and investment income, and allocate each separately" (L 1944, ch 415, p. 26), with the focus on the types of capital held and income earned (i.e., business income, investment income and income from subsidiary capital), as opposed to determining taxability and the measure of tax on the basis of rigid definitions of the type of entity involved (***see generally*** Pomp, *Reforming a State Corporate Income Tax*, 51 Alb L Rev 375 [1987]). Business income is thus currently

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Investments in Stocks, Bonds and Other Securities

> In examining the statutory definition of investment capital, we discussed whether the regulation should define the phrase "investments in". We studied several approaches, including the one set forth by the United States Supreme Court in Corn Products Refining Co. v. Comm'r, 350 US 46. We rejected this approach as being subjective and very difficult to administer.

In ***Corn Products Refining Co. v. Commr. of Internal Revenue*** (350 US 46 [1955]), the Supreme Court held that corn futures acquired as business assets did not qualify as capital assets (i.e., in essence were treated as inventory rather than as capital assets), such that their sale resulted in ordinary income rather than capital gain income. By analogy, then, Starr's acquisition and use of the AIG stock and the income and gain therefrom would, in the Division's view, apparently represent an effort to incentivize and retain AIG's "inventory" of competent executives, a group necessary to the successful or optimal operation of AIG's business. Thus, the Division would seem to argue that petitioner held the stock for the benefit of AIG rather than as an "investment in" AIG for petitioner's own benefit. Such an analogy is strained, at best, and is rejected. Enhancing the value of AIG stock and, thus, petitioner's investment therein, by using the income and appreciation therefrom in conjunction with a plan to compensate and thereby incentivise the performance and retention of AIG senior management does not provide a basis for concluding that this use of the proceeds of holding the AIG stock somehow disqualifies the same from being an investment. Finally, and as petitioner notes, to the extent ***Corn Products*** stood for the proposition that assets held for a business purpose were not capital assets eligible for capital gain treatment for federal income tax purposes, the U.S. Supreme Court has since held that corporate stock purchased by another corporation was a capital asset, regardless of whether the buyer held the stock for investment or business purposes (***Arkansas Best Corp. v. Commr***, 485 US 212 [1988]).

defined by what does not constitute investment income, with investment income defined as income from investment capital. The determination of whether a revenue stream constitutes investment income or business income depends on the taxpayer's relationship to the specific item of capital (***see Matter of Custom Shop Fifth Ave. v. Tax Appeals Tribunal***, 195 AD2d 702 [1993]). Thus, as the cases have consistently held, the focus is on the nature of the capital item held and particularly on whether a particular *type* of item qualifies as an item of investment capital (e.g., as an "other security"). This approach minimizes subjectivity and administrative difficulties and is consistent with the manner in which the tax under Article 9-A is currently structured.

M. Even accepting that Starr's aim in acquiring the stock was to use the returns therefrom to benefit AIG's senior executives via the mechanism of inviting such executives to become Starr shareholders and thereby participate in the success of all of Starr's endeavors (including, but not limited to the success of AIG), there is no statutory prohibition against such aim or use in either Tax Law § 208(5) or in the Division's regulations concerning investment capital. Starr's conversion of its assets into stock from which it earned a return fits clearly within the definition of an investment. Starr used this return, together with the return on its other investments and the results of its own performance for the benefit of its own shareholders (***see*** Finding of Fact 11). The fact that Starr's shareholders were AIG senior executives, and that Starr intended to reward, retain and provide a continuing incentive for positive performance by such executives, does not remove Starr's ownership of the AIG stock from the realm of an investment. Rather, the same appears mainly to reflect careful planning and is entirely consistent with the aim of enhancing the performance of and hence the investor's ongoing and future return on an investment. AIG admittedly benefitted from the Starr Plan because the Starr Plan served to "marry people to the

AIG organization" (***see*** Finding of Fact 15). The retention of qualified executives within an entity in which one holds an investment is surely a legitimate aim. The fact that Starr held AIG stock as a means, based on the performance of the stock, of funding this aim does not somehow disqualify that stock from constituting investment capital as defined by Tax Law § 208(5). In sum, the statute and regulations include no bar by which these circumstances disqualify Starr's ownership of AIG stock from being an investment therein, notwithstanding that Starr's shareholders were all, apparently, AIG executives.[9] Thus, the AIG stock was properly categorized as investment capital, and the dividends it paid during the period at issue were properly reported by Starr as investment income.

N. Even if, as the Division asserts, there is a requirement properly read into the statutory definition of investment capital that the stock must be held "for one's own account," that requirement is clearly met in this case. That is, the AIG stock was held for the benefit of Starr and its shareholders, who received dividend income and, ultimately, capital gains income (assuming they remained with Starr). The stock was not held for sale to customers in the regular course of Starr's business, but rather Starr reaped the benefits of ownership and distributed the same to its shareholders, a result that is fully consistent with the aim of an investment. This conclusion respects both the clear and unambiguous definition of the term investment, as well as the separate identities of the two entities (Starr and AIG). It is noteworthy that stock held for sale to customers in the ordinary course of business (i.e., as inventory) is specifically excluded from being treated as investment capital, notwithstanding that holding such stock can result in both a return (during the period of such holding)

[9] If the stock was not held for Starr's own account, then the Division appears to be saying that it was held for the accounts of certain of AIG's executives. Even if true, it remains that such executives were Starr shareholders who received the benefit of AIG's positive performance via their ownership of Starr's shares. Thus, it remains that Starr held the shares for its own benefit and, in turn, that of its shareholders.

from its mere ownership as well as a return (fees or commissions) upon its transfer to customers as part of the holder's ordinary course of business. Rather than trying to distinguish such results, the statute (Tax Law § 208[5]) simply and specifically excludes stock held for sale in the regular course of business from qualifying as investment capital. If, as the Division appears to posit, stock held for any business reason or purpose (e.g., incentivizing or benefitting AIG executives) cannot constitute investment capital, then the disqualifying statutory "carve out" for stock "held for sale to customers in the regular course of business" per Tax Law § 208(5) would be unnecessary as superfluous, since holding stock for sale is clearly a business purpose.

O. There is no claim or indication that Starr was required, for operational or other reasons, to exchange its assets for AIG stock. Nor is there any claim or indication that the AIG stock held by Starr was in any manner restricted as to its voting rights or transferability, or otherwise. Furthermore, the Legislature used the phrase "investments in," in Tax Law § 208(5), as opposed to "all purchases, acquisitions or other holdings" of stocks, bonds and other securities, thus supporting the conclusion that the investment (here stock) must be held with the expectation of a return (i.e., dividends or capital appreciation) thereon. Such an expectation is a clear element in all of the definitions of an investment (***see*** Conclusion of Law F). The evidence supports the conclusion that petitioner expected a return and intended to (and did) use that return to reward its shareholders. Petitioner in fact held its AIG stock for a significant period of time and its expectation of a return thereon was clearly realized (***see*** Findings of Fact 12 and 19).

P. Finally, the foregoing reasoning is also consistent with the treatment of subsidiary capital under Article 9-A. Notably, the definition of both "investment capital," per Tax Law § 208(5), and "subsidiary capital," per Tax Law § 208(4), require that there be an "investment in" stock. If that investment in a given entity's stock exceeds 50 percent of the voting stock of the investee, it

constitutes subsidiary capital (Tax Law §208[4]). "Where the same word or group of words is used in different parts of the same statue there is a presumption that the Legislature intended to convey the same conception each time; and in the absence of anything indicating a contrary intention the same meaning will be attached to the similar expressions" (McKinney's Cons Law of NY, Book 1, Statutes, § 236). Since both definitions use the same phrase (i.e., "investments in"), it would be at best inconsistent to accept that the acquisition or holding of stock that is not treated as an "investment in," for purposes of investment capital under Tax Law § 208(5), somehow transforms into an "investment in," for purposes of subsidiary capital under Tax Law § 208(4), simply by virtue of the fact that the holder's ownership of such stock reaches the requisite 50% level per Tax Law § 208(3). Reading the phrase "investment in," as contained in both of these statutory sections in the same manner is entirely consistent with and supports Starr's position.

Q. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

> Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9[b][1]; ***see also*** Tax Law § 2006[6]). The motion shall be granted if, upon all papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefor, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact (20 NYCRR 3000.9[b][1]; ***see also*** Tax Law § 2006[6]).

R. The standard with regard to a motion for summary determination has been set forth numerous times. A motion for summary determination made before the Division of Tax Appeals is "subject to the same provisions as motions filed pursuant to section three thousand two hundred

twelve of the CPLR" (20 NYCRR 3000.9[c]; ***see also Matter of Service Merchandise, Co.***, Tax Appeals Tribunal, January 14, 1999). Summary determination is a "drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" (***Moskowitz v. Garlock***, 23 AD2d 943 [1965]; ***see Daliendo v. Johnson***, 147 AD2d 312 [1989]). Because it is the "procedural equivalent of a trial" (***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 AD2d 572 [1989]), undermining the notion of a "day in court," summary determination must be used sparingly (***Wanger v. Zeh***, 45 Misc 2d 93, ***affd*** 26 AD2d 729 [1966]). If any material facts are in dispute, if the existence of a triable issue of fact is "arguable," or if contrary inferences may be reasonably drawn from the undisputed facts, the motion must be denied (***Gerard v. Inglese***, 11 AD2d 381 [1960]).

S. On this motion, it is clear that there is no material or triable issue of fact presented, but rather there is only a question of statutory construction at issue. Under such circumstances, summary determination is appropriate. In turn, as explained above, petitioner's acquisition and holding of AIG stock was an investment in such stock, and thus constitutes investment capital per Tax Law § 208(5). The income received by petitioner was thus appropriately reported as investment income. Accordingly, the Division's proposed reclassification of such income from investment income to business income is rejected and petitioner's motion for summary determination is granted.

T. The petition of C.V. Starr & Co., Inc. is hereby granted and the Notice of Deficiency dated October 12, 2010 is cancelled.

DATED: Albany, New York
April 18, 2013

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE