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THE TAX COURT COMMITTEE ON OPINIONS

TAX COURT OF NEW JERSEY
DOCKET NO. 010001-2010

SPRINGS LICENSING GROUP, INC.	:
Plaintiff,	:
v.	:
DIRECTOR, DIVISION OF TAXATION,	:
Defendant.	:

Approved for Publication
In the New Jersey
Tax Court Reports

Decided: August 14, 2015[1]
Reissued for publication: September 23, 2015

Richard C. Kariss and Matthew C. Decker for plaintiff
(Alston & Bird, L.L.P., attorneys).

Michael J. Duffy for defendant (John Jay Hoffman,
Attorney General of New Jersey, attorney).

SUNDAR, J.T.C.

This is the court's opinion as to the parties' partial summary judgment motions. The issue is whether defendant properly demanded that plaintiff, a non-domestic company, file Corporation Business Tax ("CBT") returns for tax years 2002 and 2003 to report and pay tax on royalty income received from its parent, a foreign company authorized to, and doing business in this State, even if the parent had added-back the deducted royalty payments on the parent's CBT returns. Plaintiff argues that the add-back was authorized by N.J.S.A. 54:10A-4.4 and was effectively a capture of,

[1] The matter was decided by issuance of a letter opinion dated August 14, 2015, which is being re-issued into this format for purposes of publication. Inclusion of this footnote will alter only the numbering of the footnotes in the letter opinion.

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and a tax upon, its royalty income, therefore defendant's assessments are an unconstitutional dual taxation. Defendant argues that plaintiff is undisputedly subject to CBT on royalty income pursuant to Lanco, Inc. v. Director, Div. of Taxation, 21 N.J. Tax 200 (Tax 2003), rev'd, 379 N.J. Super. 562 (App. Div. 2005), aff'd, 188 N.J. 380 (2006), cert. denied, 551 U.S. 1131 (2007). Therefore, plaintiff should have reported such income and paid tax regardless of the parent's add-back, which was free to, but did not claim a refund.

The court finds defendant's argument persuasive. N.J.S.A. 54:10A-2 subjects a foreign corporation to CBT if, among others, it derives receipts from this State and has business activities which suffice to give New Jersey jurisdiction to tax it (limited only by federal constitutional limits). Although N.J.S.A. 54:10A-4.4 was enacted to prevent tax avoidance from income shifting amongst members of a corporation by denying an otherwise allowable deduction for expenses paid to a related member, the court does not read the deduction denial as the payee member's immunity to the subjectivity provisions of N.J.S.A. 54:10A-2. Therefore, the payor entity's add-back of royalty payments does not foreclose defendant from requiring the out-of-State payee entity to file CBT returns and report any income allocable to the State. Any issues of alleged double taxation of the same item, i.e., an intangible expense (here, royalty payments), are addressed by N.J.S.A. 54:10A-4.4 (at the payor level) and/or N.J.S.A. 54:10A-8 (at the payor or payee level). The court therefore grants defendant's motion for partial summary judgment.

FACTS

Plaintiff ("Springs") is a foreign company incorporated in South Carolina. It is in the business of licensing trademarks which it owns. Its parent, Springs Industries, Inc., ("SII"), is a licensee. SII is also incorporated in South Carolina but authorized to do business in New Jersey.

For tax years 2000 and 2001, Springs filed CBT returns showing it had no offices, employees or property in the State, but had receipts from royalties. It reported and paid tax on the New Jersey allocated portion of such income.

In 2002, the Legislature amended the CBT law by enacting the Business Tax Reform Act ("BTRA"), L. 2002, c. 40. One change was a denial of deduction for royalty payments made to a related corporate member by requiring the payee to "add back otherwise deductible . . . intangible expenses and costs." N.J.S.A. 54:10A-4.4(b).[2] Exceptions to the add-back were provided under certain circumstances. N.J.S.A. 54:10A-4.4(c).

Springs then filed a 2002 CBT return marked "Final" on September 15, 2003. The return was blank on all line items of income or expenses except for a refund claim of $165,747. Springs explained that pursuant to the BTRA, "income generated by [Springs] on intercompany transactions will be added back to" SII's income on SII's CBT return. Springs also asserted that under new N.J.A.C. 18:7-5.18(b), a regulation promulgated to interpret the BTRA, its prior CBT filings under N.J.A.C. 18:7-1.9(b) (which subjected to CBT, a foreign entity "doing business" in the State), were "technically incorrect." Therefore, it noted, its 2002 return was being filed as final, with "future intercompany royalty payments" to be reported on SII's CBT returns.

In conformance with the above decision, SII's 2002 CBT return added back royalty payments of $40,578,418 made to Springs in computing SII's New Jersey Entire Net Income ("ENI"). In the same vein, only SII filed a 2003 CBT return adding back $41,866,667 royalty payments made to Springs.[3]

[2] This provision became effective July 2, 2002 and applied for tax years beginning on or after January 1, 2002.
[3] For 2002, SII had net income (based on an allocation factor of 0.29%) and paid tax of $121,505, the higher amount of the Alternative Minimum Tax ("AMT"). For 2003, SII's allocation factor was 0.23%, reported a net loss, thus had the minimum CBT of $500 but paid AMT which was higher.

In January of 2004, defendant ("Taxation") issued Springs a CBT refund of $165,243 for tax year 2002.

A year later, by letter of January 3, 2005, Taxation advised Springs that the refund was erroneous and sought its repayment. The letter stated that since Springs' refund claim was "based upon the recent Lanco Inc. v. Director court decision," Taxation required further information (such as details of the transaction generating the royalty payments and the nature/extent of contacts that Springs had with/in New Jersey), before the claim could be granted. Upon review of the information Taxation would "issue a denial of Lanco type refund claims and advise the taxpayer accordingly." Taxation also advised Springs that the add-back of "intercompany royalty expenses" under the BTRA "does not have any impact on the subjectivity or taxability of the intangible holding company."

Springs refused to repay the refund until Lanco was reversed or modified (in 2005, when Taxation sought repayment of the refund, the Tax Court's decision in favor of the taxpayer was still pending appeal at the Appellate Division). It also filed refund claims for 2000 and 2001.[4]

Taxation then audited Springs' CBT returns for years 2000-2003. An Office Audit Narrative dated January 11, 2006 recited the above facts and in the "Findings" portion, noted that Springs "should have filed" a 2002 CBT return reporting royalty income and allocating the same, while SII "should have claimed an exception" to the royalty payment add-back on Schedule G, part II. It also noted that if this had been done, SII would be entitled to a refund of $108,586 for tax year 2002, and an increase in its net operating losses for 2003 by $41,866,667 (thus, the 2003 add-back would have no tax refund).

[4] On July 20, 2007, Taxation issued a final determination denying Springs' refund claims for tax years 2000 and 2001 on grounds Springs had nexus to New Jersey and therefore was subject to CBT. There does not appear to be any appeal from this determination.

On February 1, 2006 Taxation sent a Notice of Assessment demanding $815,198 as tax, plus interest and penalties for a total of $1,139,691.67.[5] The tax was due to (1) the determination that Springs was "doing business" in New Jersey, thus subject to CBT, due to royalty income from its intangibles, the use of which resulted in sales in New Jersey by the licensees; and (2) an adjusted allocation factor. For tax years 2000 and 2001, Taxation used the adjusted allocation factor to the reported entire net income and demanded additional tax.[6] For 2002 and 2003, Taxation used the federally reported ENI as Springs' royalty income for those years at $39,254,253 and $42,635,089.

An administrative conference was held March 5, 2010. The conferee noted that Taxation had reached out to Springs' counsel during the 2009 Amnesty period and advised that Springs' 2002 and 2003 CBT returns would qualify for amnesty (0% penalty, 50% interest) and could be filed "based on [Taxation's] Section 8 relief policy allowing IHC [("Intangible Holding Companies")] to pay tax on 9% of their New Jersey gross receipts." The same offer was made after amnesty but without any waivers of interest and penalties. Both were rejected by Springs' counsel. The conferee then requested a State-by-State breakdown of royalty receipts for 2002 and 2003. Springs requested an affirmance of the February 2006 audit since it wanted to file an appeal to this court.

Taxation issued a final determination on March 30, 2010. It noted that on October 12, 2006, the New Jersey Supreme Court had affirmed Lanco, and in 2007 the U.S. Supreme Court

[5] The audit determination superseded a March 16, 2005, estimated tax assessment for tax year 2002 which was imposed due to Springs' refusal to return the refund.

[6] For tax year 2000, the audit allocated income lesser than what was reported ($1,536,553 versus $2,784,710), which therefore resulted in a lesser tax due than reported ($138,290 versus $250,624). The auditor however noted that the "tax reported" was $125,314. If Springs paid the reported tax of $250,624, then no balance would be due for this year despite the adjusted allocation factor. However, this issue (correctness of the allocation) is not before this court at this juncture.

had denied further review, therefore, New Jersey could constitutionally tax a foreign company despite its lack of physical presence in the State. The audit was upheld and CBT of tax interest and penalty (as updated) of $1,671,521.75 for tax years 2000 to 2003 was demanded.

ANALYSIS

(*A*) *Appropriateness of Summary Judgment*

Summary judgment will be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995).

The issue here is whether Springs must file CBT returns and pay tax on royalties received from SII for 2002 and 2003, even if SII added-back those royalty payments on its CBT returns in calculating SII's ENI and consequent CBT. Springs claims Taxation is improperly imposing duplicative tax. Taxation argues that this case is all about compliance, i.e., Lanco requires Springs to file CBT returns and pay taxes, thus, any tax duplication is a result of Springs' non-compliance, especially where Taxation did not prevent SII from claiming a deduction for royalty payments. Since there are no facts in dispute and the issue is one requiring an interpretation of the legislative intent underlying the BTRA, summary judgment on this issue is appropriate.

(*B*) *Is Springs Subject to CBT?*

N.J.S.A. 54:10A-2 subjects foreign corporations to the CBT if they were, among others, "doing business" in New Jersey, unless the company is exempted. In 2002, the BTRA expanded the reach to a foreign corporation which was deriving receipts from New Jersey, and additionally, "if the taxpayer's business activity in this State is sufficient to give [New Jersey] jurisdiction to

impose the tax under the" United States Constitution. Ibid. The intent was to have the CBT "extend" its "reach . . . to a corporation that derives any income from New Jersey sources" instead of limiting the same to the concepts of "doing business, employing or owning capital property, or maintaining an office in the State." Assembly Budget Committee, Statement to Assembly No. 2501 (June 27, 2002). "By extending the reach of the CBT to the income of all corporations that derive income from New Jersey, New Jersey extends the reach of the CBT to the full extent permitted under the United States Constitution and federal statute." Ibid. Taxation promulgated and amended its regulations accordingly. See N.J.A.C. 18:7-1.6; 18:7-1.9.

In Lanco, supra, which was decided after the 2002 BTRA's amendment to N.J.S.A. 54:10A-2, the court ruled that the CBT "may be constitutionally applied to . . . licensing fees attributable to New Jersey," and earned by a foreign corporation that has no physical presence, employees or property in the State. 379 N.J. Super. at 573. As a corollary to this ruling, the entity would be subject to filing CBT returns. See id. 21 N.J. Tax at 203 (summarizing the issue and noting that "[i]t is the determination that Lanco is obliged to file under the CBT, rather than the calculation of tax claimed to be due, that is contested.").[7]

Springs' complaint did not allege that royalty payments it received from SII were immune from the ruling in Lanco, or that it was otherwise constitutionally protected from being subject to CBT. It did not reply to, or oppose Taxation's brief which argued that Springs was subject to CBT pursuant to Lanco. It did not deny or respond to Taxation's Statement of Undisputed Material Facts and documents in support thereof, which asserted that Lanco squarely applied to Springs'

[7] Even prior to the Lanco decision, Taxation's regulations included foreign companies receiving royalty income as being subject to the CBT. See N.J.A.C. 18:7-1.9(a), Example 1 (a foreign entity which "holds trademarks that were assigned to it by its parent corporation" and which "receives fees" from " licensing those trademarks to certain New Jersey companies for use in New Jersey" is subject to CBT "on its apportioned income as a result of its licensing activities").

income from New Jersey for purposes of CBT. As noted earlier, Springs did not file an appeal from Taxation's denial of its refund claims for tax years 2000 and 2001, which was based on a determination that Springs had nexus to the State for purposes of the CBT Act. Therefore, Springs should have filed duly completed CBT returns for 2002 and 2003, and paid tax on the portion of royalty income allocated to New Jersey.

(C) Does the BTRA Permit Springs' Non-Filing of CBT Returns[8]

The BTRA was enacted to address declining revenues despite economic expansion based on "evidence that large corporations with apparently substantial economic activity in this State and substantial profit have managed to avoid having any of this income become taxable by New Jersey." Statement to Assembly No. 2501, supra. This was a "trend . . . in 'separate entity' states like New Jersey, where each corporate entity within an affiliated group computes its tax separately, and corporations may structure transactions between affiliates in various states to avoid tax." Id. The BTRA was intended to effectuate "loophole closers" so that there is "equity between the corporations" which use tax reduction or avoidance "methods and those that cannot, or do not." Id.

One such "loophole closer" was the "disallowance of deduction of intangible expenses paid to a related party," to be achieved by:

> limit[ing] the ability of a taxpayer to deduct royalties . . . when paid to affiliates. The provision addresses . . . a tax avoidance device that allows a multicorporate structure to export income from a state where the income is generated as a form of expense (for example, as a royalty payment to an out-of-state affiliate that the paying corporation deducts from its income) and then import the income back (for example as a tax-free dividend or as a loan).
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> [Id.]

[8] As noted above, Springs decided to stop filing CBT returns after and due to passage of the BTRA. When it had filed its final 2002 CBT return in September 2003, the Tax Court had not yet issued its decision in Lanco that foreign IHC's need not file CBT returns. Relative to the 2003 tax year, the Tax Court's decision was on appeal.

See also Senate Budget & Appropriations Committee, Statement to Senate No. 1556 (June 27, 2002) (same); 35 N.J.R. 1572 (April 7, 2003) ("social impact" of the BTRA and implementing regulations will restore "an even playing field" among corporations since "good tax policy . . . should not reward taxpayers simply because they are capable of" inter-corporate structuring).[9] Thus, N.J.S.A. 54:10A-4.4(b) presumptively denies a deduction of "otherwise deductible" royalty payments made by a "taxpayer" to a related member.

There is no indication in the plain language of N.J.S.A. 54:10A-2 (the subjectivity provision), or in N.J.S.A. 54:10A-4.4 (the add-back provision), that either statute applies in the alternative. There is no cross-reference of one statute in, or to, the other, nor an exception of the application of one statute from the other. The provision exempting corporations from the requirement of the CBT statute, N.J.S.A. 54:10A-3, does not include foreign corporations which are in the business of licensing trademarks or other intangible property, foreign entities which receive New Jersey sourced royalty income from related corporate members, or foreign companies whose affiliates or related members add-back royalty payment deductions. The Legislature could have, but did not limit the scope of subjectivity to the CBT because of the enactment of the add-back statute.[10]

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[9] As noted in Surtees v. VFJ Ventures, Inc., 8 So.3d 950, 958, n.3 (Ala. Civ. App.) aff'd, 8 So.3d 983 (Ala. 2008), cert. denied, 556 U.S. 1207 (2009) "separate reporting" jurisdictions which have an add-back provision include Alabama; Arkansas; Connecticut; District of Columbia; Georgia; Illinois; Indiana; Kentucky; Maryland; Massachusetts; Michigan; Mississippi; New York; North Carolina; Ohio; South Carolina; Tennessee; and Virginia.

[10]For instance, North Carolina deems royalty payments "received for the use of intangible property in" the State as taxable income. N.C. Gen. Stat. §105-130.7A. In a related member situation, the royalty payments should be "either (i) deducted by the payer and included in the income of the recipient, or (ii) added back to the income of the payer and excluded from the income of the recipient." Ibid. See also 830 Code Mass. Regs. §63.31.1(10) (explaining the add-back provisions in cases of related members do not "impact the taxation of a related member to which a taxpayer pays" an intangible expense, "including the analysis whether the related member is subject to Massachusetts tax" since sometimes "in-state ownership and use of intangible property may subject a foreign corporation to Massachusetts tax." However, if the related member is "taxed on the corresponding income, either by Massachusetts or some other state" then the payor taxpayer can claim an add-back exception. Ibid.

Notably, Taxation addressed the issue of payee reporting when promulgating regulations implementing the BTRA. A commentator queried "about related party transactions, payments such as royalty and interest," that since the "rules are intended to prevent the shifting of income, . . . why a payee must include the payment in New Jersey income even though a deduction was denied." Taxation responded:

> In a multi-state context, a fundamental factor to consider in evaluating income shifting is whether or not the payee has nexus with New Jersey. If it does have nexus, another issue must be considered before deciding whether or not a proper tax is being paid, and that is the allocation factor.
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> [35 N.J.R. 4310(a) (Sep 15, 2003).]

Taxation's above explanation is far from arbitrary since it is in keeping with Lanco; N.J.S.A. 54:10A-2; and N.J.S.A. 54:10A-4.4.

Springs highlights the Tax Court's comments in Lanco in support of its argument that it need not file CBT returns:

> This decision determines that the state may not assert nexus, absent physical presence, against a corporation that receives income from the use of trademarks or other intangibles employed in a New Jersey business conducted by an affiliated corporation. The particular technique of tax avoidance can, however, be addressed by other measures. Certain jurisdictions require combined reporting by all corporate components of an enterprise engaged in a unitary business conducted in part within the taxing state. Combined reporting would, as Professor Pomp noted, return to taxable income the royalty payment received by the holding company. Other jurisdictions have elected to disallow the deduction by the operating company. New Jersey is not a combined reporting jurisdiction, but a recent amendment to the CBT disallows deductions for royalty payments made to a related entity for use of intangible property, as those terms are defined in the statute. N.J.S.A. 54:10A-4.4. (enacted as L. 2002, c. 40, §33, effective July 2, 2002). This opinion, of course, does not address the interpretation of the amendment in any particular factual situation. **In circumstances when the amendment does apply, however, jurisdiction to tax the company receiving royalty income from use of its intangibles in New Jersey is not essential to capture that income in this state's tax base.**
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> [Lanco, supra, 21 N.J. Tax at 218-220 (emphasis added)]

Springs argues that the highlighted language shows that the BTRA did not contemplate taxability of the foreign payee, since by capturing the income shifted out-of-State via the add-back, New Jersey is made whole.

The highlighted language is dicta since the Tax Court was addressing the power and authority of New Jersey to tax royalty income of foreign companies based on the lack of physical presence, and eschewed interpretation of the BTRA. The higher courts did not rule or comment upon the application of N.J.S.A. 54:10A-4.4, or upon the Tax Court's observation in this regard.

The dicta no doubt echoes the thrust of the BTRA as evidenced by the legislative intent. See Statement to Assembly No. 2501, supra. However, it does not broadly exempt a foreign IHC from filing a CBT return or paying tax on the same, or relieving a foreign IHC from its obligation to do so when it receives income from its intangible assets used by a related member. In the context of a jurisdictional nexus issue, the dicta affirms that denying the payor an otherwise allowable deduction for royalty payments will allow New Jersey to capture the CBT which the IHC escaped/avoided. It did not bless the corporate family's attempt to avoid the CBT or sanction the out-of-State related member entity's refusal to file CBT returns.[11]

Springs points out that Taxation's application of Lanco is in complete disregard of the add-back statute, thus, the CBT is paid twice: once from the foreign payee related entity/member which does not have the ability to deduct the royalty income added-back, claim an "exception" as would the payor, or exclude reporting of the royalty income; and once from the payor member which must pay first then claim a timely refund (citing to Statement to Assembly No. 2501, supra, that

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[11] The Tax Court's dicta was used as support to assert that by denying a deduction to the payor related member, "though the taxing authority does not directly pursue the out-of-state [Intellectual Property] holding company, the result is the same: Apportioned royalty income is subject to state taxation." Xuan-Thao N. Nguyen, Holding Intellectual Property, 39 Ga. L. Rev. 1155, 1192-1194, n.198 (Summer 2005). However, there was no analysis of the obligation of the payee entity to file returns, and the impact of the statutorily available remedies under the CBT to alleviate issues of potential double taxation.

since the "rule" is a denial of deduction for intangible expenses, the "effect" of the add-back statute is to "require[e] the taxpayer to secure prior approval (through general regulation or case-by-case determination) for the deduction before departing from the general rule.").

As noted above, New Jersey is a separate entity state. Duplication of reporting by corporate family members for an item such as here, as royalty payments, as income for one and a corresponding expense for the other, is not out of the realm of normalcy. See e.g. Richard D. Pomp, State and Local Taxation, 10-50 (Vol. II, 11th ed. 2011) (in separate entity States, related members are "unelated strangers" so that the "income and factors" of one has "no effect" on the other, thus, "the existence of the subsidiary has no bearing on calculating the parent's apportionable taxable income" and vice-versa). Thus, a CBT return filed by a foreign IHC pursuant to Lanco while the related member files an independent CBT return, is not a necessarily extraordinary event. See also Technical Advisory Memorandum 2011-6 (N.J. Div. of Taxation, January 10, 2011) (pursuant to N.J.S.A. 54:10A-4.4, as well as court decisions, including Lanco, supra, "taxpayers . . . domiciled outside the State that . . . derive receipts from sources within the State must file a [CBT] return and pay the applicable tax to New Jersey").

Further, the Legislature's response to the specter of double-taxation is the ability of the payor to claim an exception to the add-back as being "unreasonable." N.J.S.A. 54:10A-4.4(c)(1)(b). The payor and Taxation may enter into a written agreement to apply or use "an alternative method of apportionment" under N.J.S.A. 54:10A-8 (or "Section 8").[12] N.J.S.A. 54:10A-4.4(c)(1)(c). Taxation can also negotiate agreements or compromises "otherwise allowed

[12] Section 8 authorizes Taxation, on its own or at the urging of a taxpayer, to adjust the allocation factor so that it reflects a "fair and proper" allocable ENI attributable to the State.

by law." N.J.S.A. 54:10A-4.4(c)(1)(c). Finally, Taxation can make necessary adjustments to the ENI or under Section 8 to achieve a fair result under the CBT law. N.J.S.A. 54:10A-4.4(e).

In interpreting the BTRA, Taxation was also cognizant of the possibility of dual taxation. When proposing the BTRA regulations, Taxation explained that the rules "include instances where tax reporting methodologies have been created (such as portions of N.J.A.C. 18:7-5.18 dealing with related party transactions) to prevent unreasonable taxation upon transactions from occurring simply because of the way the transactions may have been structured." 35 N.J.R. 1573(a) (April 7, 2003). Thus, "the rules address instances in which taxing the interest received by one taxpayer while denying a corresponding deduction to the related party paying the interest would create an economic distortion." Ibid. In this vein, Taxation allows an exception to the add-back situations where the "payee pays tax to New Jersey on the income stream." N.J.A.C. 18:7-5.18(b)(3).[13]

Specifically, and as to this issue raised here as to the payee reporting income for which a deduction is presumptively disallowed by N.J.S.A. 54:10A-4.4, Taxation explained:

> It should be noted that the Schedule G-2 of CBT-100 contains exceptions to the add back of intangible expenses including Exception 2 of Part II, which relates to intangible Expenses and Costs Paid, Accrued, or Incurred to related corporations filing in New Jersey. This exception implements a discretionary exception to prevent the double payment of tax, and thus addresses this issue . . . .
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> [35 N.J.R. 4310(a).][14]

[13] See also Instructions to Schedule G-1 of the CBT return, under "Part II, Exception 2" which notes that an exception from the add-back can be requested if "intangible expenses and costs were directly or indirectly paid, accrued or incurred to a related member that is a corporation that files a Corporation Business Tax return in New Jersey, and such member has included those amounts in its entire net income". If the related member's tax liability was not greater than the statutory minimum tax, then the taxpayer (i.e., payor of the royalty income), is not entitled to the deduction (i.e., the add-back will be required). Ibid. Other states have similar exceptions. See e.g. Va. Code Ann. §58.1-402(8)(a)(1) (no need to add back intangible expenses and costs if "[t]he corresponding item of income received by the related member is subject to a tax based on or measured by net income or capital imposed by Virginia" or another state).

[14] The Instructions to Schedule G-1 of the CBT return requires a taxpayer to file "a separate refund claim (Form A-3730) stipulating all the facts" with proof in support of an exception from the add-back.

Importantly, there is nothing in the add-back statute that prevents a payee from obtaining relief under Section 8. That statute allows several options to prevent unfair results of multi-state apportionable income, including, for instance, excluding "one or more of the factors" which are used to ascertain the allocation factor. See N.J.S.A. 54:10A-8(a). If Taxation is aware that inclusion of certain income results in, or effectively produces, some form of dual taxation, it "not only has the authority but also the obligation to consider [CBT Section 8] adjustment[s]" because "taxation of multi-state businesses should be administered on a basis which is equitable, and not merely constitutional, to the corporate taxpayer as well as to the State." F.W. Woolworth Co. v. Director, Div. of Taxation, 45 N.J. 466, 497, 499 (1965).[15] See also N.J.A.C. 18:7-10.1 (Taxation can adjust allocation factor on its own initiative or at taxpayer's urging, but taxpayer applying to adjust its business allocation factor must file returns and pay the CBT, and "attach a rider to the return with a Form A-3730" with supporting data and calculation of CBT owed under "proposed method.); N.J.S.A. 54:49-16 (four years to claim refund); N.J.A.C. 18:7-13.8(h) ("[i]f a taxpayer believes that it is entitled to relief" under Section 8 and that "a remedy based upon the rationale explicitly addressed by N.J.A.C. 18:7-8.3(b) is not adequate, such relief request is deemed a refund claim . . . and is subject . . . to the same period of limitations as any other claim for refund").

Nothing here prevented a claim for an exception to the add-back. Nothing foreclosed Springs from filing a return with refund claim (or a protective refund claim) for relief under Section 8 on grounds that SII's add-back plus Springs' CBT on royalty income is unfair or unreasonable dual apportionment. The facts here indicate that Springs was well aware of SII's ability to file

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[15] Massachusetts permits a "non-filing corporation" which seeks to file income tax returns under the Taxpayer Information Report where it "may have received licensing fees" for use of its intangible assets "from an in-state corporate affiliate (i.e., a corporate affiliate that filed a return in Massachusetts)." If so, the out-of-state entity can "propose appropriate adjustments, where applicable, to take into account circumstances where the affiliate corporation was denied an expense deduction in whole or part for such licensing fees and thereby avoid double taxation of such fees." 2009 Mass. Tax LEXIS 42, 5-6 (Mass. Tax 2009) (citing to 830 Code Mass. Regs. §63.31.1(10)).

amended CBT returns for 2002 and 2003 to claim an exception to the add-back on grounds Springs paid the CBT. Taxation offered to examine relief under Section 8 under its "policy" for IHC's. Springs however decried these avenues.

Springs' argument that the add-back statute allows the payee to cease filing CBT returns presupposes that the payee foreign company has only one New Jersey based/sourced income, viz. royalty income, which is received only from a related member. This may not necessarily be the case each tax year or even in the same tax year.[16] Would Springs not file a CBT return if it receives other income in the same year it receives royalty payments from a related member? Would it file a partial return if it received the same type of, or any other type of intangible-generated income from non-related taxpayers (domestic or foreign) doing business and having nexus in the State for CBT purposes? Surely the Legislature would not intend such a result in its attempt to close loopholes. See e.g. State and Local Taxation, supra, at 10-60, 10-56 (explaining that add-back statutes should not be too broad or too narrow, thus, for instance, a provision that addresses "only intercorporate royalties, . . . would not reach the use of management fees to shift profits" and that in a separate reporting State, the "tax base" is controlled by "tax planners").

Springs' argument implies that by resorting to income reporting pursuant to Lanco, Taxation has rendered the add-back provision for intangible expenses as superfluous, and further that Lanco must cede to N.J.S.A. 54:10A-4.4. This is not necessarily true. Lanco only decided that physical presence is not required to establish nexus for income taxation for purposes of the Commerce Clause analysis. Thus, a State may have other constitutional barriers depending on the facts and issues raised (although attacks on grounds of Due Process violations may not be effective, see Lanco, supra, 21 N.J. Tax at 214-14, accepted as "thorough and well-reasoned" by the

[16] Discovery between the parties is not complete.

Appellate Division, see 379 N.J. Super. at 564 and n.1). To that extent then the add-back statute cannot be deemed as superfluous.

In sum, by its terms, the BTRA does not exclude or exempt Springs from filing CBT returns to report its royalty income (presuming that is its only allocable taxable New Jersey income). The thrust of the BTRA was to close the loopholes of tax avoidance schemes or mechanisms whereby legitimate New Jersey sourced income escaped tax to the detriment of New Jersey and other small businesses unable to use such corporate shields. This goal however did not render foreign members of a corporate family effectively exempt from subjectivity to, and imposition of, the CBT, or imply that the Legislature encouraged such non-compliance. N.J.S.A. 54:10A-4.4 does not limit the applicability or reach of N.J.S.A. 54:10A-2. Rather, the latter statute is explicitly limited only by the mandates of the federal Constitution and statutes. In Lanco, supra, the Court held that subjecting foreign IHC's to the CBT on intangible-asset based income generated by using that asset in New Jersey passed constitutional muster. Exempting or excluding a foreign payee from filing CBT returns and reporting New Jersey sourced intangible income because the BTRA enacted the add-back statute disregards the highest court's ruling in Lanco; expands the holding of that case to issues not decided upon by our Supreme Court; and adds to the BTRA issues that were not considered or blessed by the Legislature.

Law allows alleviation of a potential double taxation by the payor having to seek an exception from the add-back, or the payor and/or payee seeking relief under Section 8. Taxation must ensure that income is taxed only once, but it cannot do so if it has no returns to even consider Section 8 adjustments. Where, as here, a foreign IHC chooses not to use the statutorily available remedies to alleviate issues of double taxation, but instead opts to simply not file CBT returns, claims of unconstitutional double taxation are questionable. While it would be most efficient for

Taxation to audit the payee and payor entity simultaneously to address issues relative to income inclusion under Lanco (at the payee level) vis-à-vis the mandated add-back of that expensed item (at the payor level), to minimize duplication of efforts in their resolution, Taxation is not legally foreclosed in its present actions. Thus, here, Taxation's actions in requiring Springs to file CBT returns to report the royalty income from its in-state related member is not arbitrary or unlawful.

CONCLUSION

For the foregoing reasons, an Order granting Taxation's motion for partial summary judgment will accompany this memorandum opinion.