NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE TAX COURT COMMITTEE ON OPINIONS

KRAFT FOODS GLOBAL, INC., a Delaware corporation, Plaintiff, v. DIRECTOR, DIVISION OF TAXATION, Defendant.	)	TAX COURT OF NEW JERSEY DOCKET NO. 017974-2009 Approved for Publication In the New Jersey Tax Court Reports

Decided: April 25, 2016

Craig B. Fields, admitted pro hac vice, for plaintiff (Morrison & Foerster, LLP, attorneys, Mitchell A. Newmark, on the briefs).

Marlene G. Brown for defendant (Robert Lougy, Acting Attorney General of New Jersey, attorney).

DeALMEIDA, P.J.T.C.

Before the court are the parties' cross-motions for partial summary judgment with respect to the validity of the Director, Division of Taxation's determination that plaintiff did not establish by clear and convincing evidence that it is entitled to deduct from its taxable income interest payments it made to its parent company during tax years 2005 and 2006. In 2002, the Legislature eliminated a number of what it considered to be "loopholes" in the New Jersey corporation business tax ("CBT") statutes allowing profitable companies to avoid taxation in this State. One such loophole eliminated was the deduction from taxable income of interest payments a New Jersey corporate taxpayer made to a related company. The Business Tax Reform Act, L. 2002, c. 40, §3, provided that related-company interest payments, deducted for federal income tax purposes, must be added back to the company's income subject to tax in New Jersey. The

*

Legislature established five exceptions to the interest add-back requirement, four of which plaintiff concedes are not applicable here. The remaining exception, to which plaintiff claims entitlement, is that deducted related-company interest payments need not be added back to taxable income where "the taxpayer establishes by clear and convincing evidence, as determined by the director, that the disallowance of a deduction is unreasonable . . . ." N.J.S.A. 54:10A-4(k)(2)(I).

Here, the Director determined that the taxpayer did not satisfy the evidentiary burden set forth in the statute to establish entitlement to an exception from the interest add-back requirement. The court finds that there is insufficient evidence in the motion record upon which to conclude that the Director abused his discretion. As a result, the court denies plaintiff's motion for partial summary judgment and grants the Director's cross-motion for partial summary judgment.

I. Findings of Fact

Plaintiff Kraft Foods Global, Inc. is a Delaware corporation with its principal office in Illinois. During the relevant tax years, plaintiff was engaged in the business of processing and marketing retail packaged foods, such as cheese, processed meat products, coffee, and other groceries throughout the United States, including in New Jersey. Plaintiff is a direct subsidiary of its parent corporation, Kraft Foods Inc. Plaintiff's parent corporation is a direct subsidiary of Philip Morris Companies Inc. ("Philip Morris").[1]

Philip Morris formed Kraft Foods Inc. on December 7, 2000 and shortly thereafter transferred its ownership interest in plaintiff to Kraft Foods Inc. At the time, Philip Morris held

[1] Plaintiff and its parent underwent corporate name changes not relevant to the legal issues before the court, but which could cause confusion when reviewing the documents memorializing the relevant transactions. From January 4, 1995 to March 11, 2001, plaintiff was known as Kraft Foods, Inc. (comma before "Inc."). On March 12, 2001, plaintiff's name was changed to Kraft Foods North America, Inc. to allow plaintiff's parent to change its name to Kraft Foods Inc. (no comma before "Inc."). On March 19, 2004, plaintiff's name changed to Kraft Foods Global, Inc.

three notes in the aggregate amount of $20 billion issued to it by plaintiff. The interest rate on the notes ranged between 7% and 7.75%. In December 2000, Philip Morris assigned the notes to one of its wholly owned subsidiaries, PM Holdings of Delaware, LLC. ("PM Holdings").

Beginning in 2001, Kraft Foods Inc. periodically issued public debt in the form of bonds in an aggregate amount of $9.5 billion. Shortly after issuance of the bonds, Kraft Foods Inc. transferred amounts equal to the proceeds of the bonds to plaintiff. Plaintiff, in turn, used those funds to pay off a portion of its debt to PM Holdings.

Shortly after each transfer of funds to plaintiff from Kraft Foods Inc., plaintiff executed a Promissory Note in favor of Kraft Foods Inc. in an amount equal to the funds transferred to it by its parent. Plaintiff agreed to pay Kraft Foods Inc. interest on the loans in amounts equivalent to the interest Kraft Foods Inc. was obligated to pay on its bonds. It is undisputed that Kraft Foods Inc. was able to secure more favorable interest rates on its debt than plaintiff would have been able to secure. The transactions are summarized as follows:

Kraft Food's Third Party Borrowing				Kraft Global's Notes to Kraft Foods		
	Date	Amount	Weighted Average Interest	Date	Amount	Interest Rate
1.	10/30/2001	$4.00B	5.477%	11/2/2001	$4.00B	5.640%
2.	5/15/2002	$2.50B	5.850%	5/20/2002	$2.50B	5.850%
3.	11/20/2002	$750M	1.62625% FRN*	12/1/2002	$750M	1.62625%FRN
4.	9/22/2003	$700M	4.000%	9/25/2003	$700M	4.000%
5.	9/22/2003	$800M	5.250%	9/25/2003	$800M	5.250%
6.	11/8/2004	$750M	4.125%	12/1/2004	$750M	4.125%

*FRN refers to floating rate note

The Promissory Notes do not contain a guarantee to pay Kraft Foods Inc.'s bondholders. Nor do the Promissory Notes contains payment terms or a payment schedule for principal. The Promissory Notes provide only an annual interest rate to be paid on principal amounts outstanding from time to time, with interest payable periodically. The Promissory Notes do not provide for any recourse against plaintiff in the event that plaintiff does not make interest payments on the Promissory Notes. Kraft Foods Inc.'s debt obligations are not mentioned in the Promissory Notes. The bondholders of Kraft Foods Inc.'s bonds are not third-party beneficiaries of the Promissory Notes and have no recourse against plaintiff in the event that plaintiff does not make payments on the Promissory Notes, or if its payments on the Promissory Notes are not used by Kraft Foods Inc. to pay its bondholders.

During tax years 2005 and 2006, plaintiff made interest payments to Kraft Foods Inc. on the Promissory Notes. Kraft Foods Inc. used the proceeds received from plaintiff to pay interest to its bondholders on its public debt. Plaintiff alleges that Kraft Foods Inc. would not have had sufficient funds to pay its bondholders had it not received interest payments on the Promissory Notes from plaintiff.

Plaintiff filed CBT returns for tax years 2005 and 2006. As is required by statute, plaintiff began the calculation of its taxable income for CBT purposes by using its federal taxable income. N.J.S.A. 54:10A-4(k). Plaintiff's federal taxable income was determined after deduction of plaintiff's interest payments to Kraft Foods Inc. According to N.J.S.A. 54:10A-4(k)(2)(A) through (J), a taxpayer must make certain adjustments to its federal taxable income to determine its entire net income subject to CBT. One such adjustment is to add back to its income interest payments the taxpayer made to a related company and deducted for federal tax purposes, unless one of five exceptions are met. N.J.S.A. 54:10A-4(k)(2)(I). Plaintiff did not add back to its federal taxable

income the interest payments it made to Kraft Foods Inc., based on its contention that it satisfied the "unreasonable" exception to the interest add-back rule, i.e., that it would be unreasonable for plaintiff to be required to add back the interest payments.[2]

The Division of Taxation thereafter conducted an audit of plaintiff's CBT returns. On October 5, 2009, the Division issued a Notice of Assessment Related to Final Audit Determination. The Notice reflected several adjustments to plaintiff's 2005 and 2006 CBT returns, including an adjustment adding back to plaintiff's taxable income $472,787,500 in interest payments it made to Kraft Foods Inc. in tax year 2005 and $462,062,500 in interest payments it made to Kraft Foods Inc. in tax year 2006. The Notice provides a summary explanation of the Division's reasoning for the adjustment: "The debt between Kraft Foods Global, Inc. and Kraft Foods Inc. is not at arm's length as Kraft Foods Inc. is charging the same interest as it is paying. Also, Kraft Foods Global, Inc. is not a legal guarantor of the debt."

As a result of the various adjustments made during the audit, the Notice assessed $7,632,995 in CBT, penalties and interest against plaintiff for tax year 2005 and $6,963,746 in CBT, penalties and interest against plaintiff for tax years 2006. The portion of the assessment attributable to the interest add-back adjustment is not specifically identified in the Notice.

On December 18, 2009, plaintiff filed a Complaint in this court challenging the Notice. The Complaint alleges four Claims for Relief, including a challenge to the validity of the Director's determination that plaintiff is not entitled to an exception to the interest add-back requirement.

---

[2] Plaintiff also made interest payments to two other related entities, Nabisco Int'l Inc., and Kraft Puerto Rico. Plaintiff added those interest payments back to it taxable income and does not claim an exemption for those payments.

On August 4, 2014, the court entered an Order and Partial Judgment resolving plaintiff's claims with respect to its requirement to add back royalty payments it made to related entities for tax years 2004 through 2006. See N.J.S.A. 54:10A-4.4(b). This issue is not before the court.

The parties thereafter cross-moved for partial summary judgment with respect to the related party interest add-back requirement. Plaintiff reserved the right to address, at a later date, other unresolved claims raised in its Complaint, including its challenge to the Director's assessment of penalties against plaintiff.

The court heard oral argument from counsel on April 11, 2016.

III. Conclusions of Law

Summary judgment should be granted where "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). In Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995), our Supreme Court established the standard for summary judgment as follows:

> [W]hen deciding a motion for summary judgment under Rule 4:46-2, the determination whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.

"The express import of the Brill decision was to 'encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves.'" Township of Howell v. Monmouth County Bd. of Taxation, 18 N.J. Tax 149, 153 (Tax 1999)(quoting Brill, supra, 142 N.J. at 541). The court concludes that plaintiff's claims relating to the add back of related party interest payments are ripe for decision by summary judgment. There are no material facts

genuinely in dispute between the parties and the validity of the Director's decision to deny an exception to the add-back requirement can be decided by application of the law to the facts.

The CBT Act imposes a tax on each non-exempt domestic corporation and foreign corporation "for the privilege of having or exercising its corporate franchise in this State, or for the privilege of deriving receipts from sources within this State, or for the privilege of engaging in contacts within this State, or for the privilege of doing business, employing or owning capital or property, or maintaining an office, in this State." N.J.S.A. 54:10A-2. The tax is imposed on a corporation's "entire net income," which is defined as follows:

> "Entire net income" shall mean total net income from all sources, whether within or without the United States, and shall include the gain derived from the employment of capital or labor, or from both combined, as well as profit gained through a sale or conversion of capital assets.
>
> [N.J.S.A. 54:10A-4(k).]

This broad definition of entire net income is limited in the following paragraph of the statute:

> For the purpose of this act, the amount of a taxpayer's entire net income shall be deemed prima facie to be equal in amount to the taxable income, before net operating loss deduction and special deductions, which the taxpayer is required to report . . . to the United States Treasury Department for the purpose of computing its federal income tax . . . .
>
> [N.J.S.A. 54:10A-4(k).]

This provision of the statute couples entire net income under the CBT Act to line 28 of the federal income tax return which is entitled "Taxable income before net operating loss deduction and special deductions."

After linking entire net income for CBT purposes to line 28 of the federal return, the statute provides that "[e]ntire net income shall be determined without the exclusion, deduction or credit

of" and lists several exceptions to federal tax statutes that define federal taxable income. See N.J.S.A. 54:10A-4(k)(2)(A) through (J). It is at this point that a partial decoupling from federal taxable income takes place. Duke Energy Corp. v. Director, Div. of Taxation, 28 N.J. Tax 226, 233-234 (Tax 2014); International Business Machines Corp. v. Director, Div. of Taxation, 26 N.J. Tax 102, 110 (Tax 2011).

The related party interest payment add-back provision is found at N.J.S.A. 54:10A-4(k)(2)(I). The statute sets forth the general rule that a taxpayer's interest payments to a related company, deducted from federal taxable income, must be added back to the taxpayer's entire net income subject to CBT. The statute provides:

> Entire net income shall be determined without the exclusion, deduction or credit of . . . [i]nterest paid, accrued or incurred for the privilege period to a related member . . . .
>
> [N.J.S.A. 54:10A-4(k)(2)(I).]

The statute then provides five exceptions to the related party interest add-back requirement, summarized as follows:

(1) The 3% Exception. Where the taxpayer "establishes by clear and convincing evidence, as determined by the director, that" a principal purpose of the transaction giving rise to the interest payment was not to avoid taxes under New Jersey law, the interest rate is paid through an arm's length contract at an arm's length rate, and the related member is subject to tax, here or elsewhere, on its net income, including the interest payments, at a rate equal to or greater than 3 percent less than the tax rate applicable to the interest income in this State. Ibid.;

(2) The Foreign Treaty Exception. Where the taxpayer "establishes by a preponderance of the evidence, as determined by the director, that the interest is directly or

indirectly paid, accrued or incurred to . . . a related member in a foreign nation which has in force a comprehensive income tax treaty with the United States . . . ." Ibid.;

(3) The Alternative Method of Apportionment Exception. Where the taxpayer "establishes by clear and convincing evidence, as determined by the director, that . . . the taxpayer and the director agree in writing to the application or use of an alternative method of apportionment under" N.J.S.A. 54:10A-8. Ibid.;

(4) The Guarantee Exception. Where the taxpayer "establishes by a preponderance of the evidence, as determined by the director, that the interest is directly or indirectly paid, accrued or incurred to . . . an independent lender and the taxpayer guarantees the debt on which the interest is required." Ibid.; and

(5) The Unreasonable Exception. Where the taxpayer "establishes by clear and convincing evidence, as determined by the director, that the disallowance of a deduction is unreasonable." Ibid.

Plaintiff concedes that it does not satisfy the statutory requirements for four of the exceptions and claims only that it has established an entitlement to a deduction under the Unreasonable Exception. The substance of plaintiff's argument is that for all intents and purposes the debt issued by Kraft Foods Inc. is plaintiff's debt, thereby rendering the interest payments by plaintiff to its parent legitimate business expenses from a transaction that is, in effect, between plaintiff and Kraft Foods Inc.'s bondholders. According to plaintiff, it was laboring under a significant amount of debt to PM Holdings and wished to move away from the Philip Morris group of companies. A business decision was made to have Kraft Foods Inc. borrow the funds necessary to satisfy a portion of plaintiff's debt to PM Holdings because Kraft Foods Inc. was able to secure more favorable interest rates in the public debt market than would have plaintiff. In addition, the

interest rates Kraft Foods Inc. could secure in the public debt market were below the existing interest rates on plaintiff's debts to PM Holdings.

Plaintiff points out that each time Kraft Foods Inc. borrowed funds through the issuance of bonds it shortly thereafter transferred amounts equal to the borrowed amounts to plaintiff. In each instance, plaintiff shortly thereafter executed a Promissory Note in favor of Kraft Foods Inc. in an amount equal to the funds transferred to it by Kraft Foods Inc. Each Promissory Note carried an interest rate substantially equivalent to the interest rates on Kraft Foods Inc.'s bonds. Plaintiff thereafter made periodic interest payments on the Promissory Notes in amounts equivalent to the interest due on Kraft Foods Inc.'s bonds. Kraft Foods Inc., which would have had insufficient funds to make interest payments on its bonds without having received interest payments from plaintiff, made interest payments to it bondholders. From plaintiff's point of view, Kraft Foods Inc.'s bonds are effectively plaintiff's debt, on which it pays a legitimate rate of interest.

The Director, on the other hand, argues that the statute explicitly requires a written guarantee to establish that a related company is merely serving as a conduit for a taxpayer's payment of what is, in effect, interest on the taxpayer's debt. While the Director acknowledges that the Unreasonable Exception might encompass situations in which a taxpayer is, for all intents and purposes, using a related company solely as a conduit for the payment of interest on the taxpayer's debt, even in the absence of a written guarantee, it is incumbent on the taxpayer to produce clear and convincing evidence of such an arrangement. The Director argues that he did not abuse his discretion by determining that plaintiff failed to satisfy that burden here.

The Director views Kraft Foods Inc.'s issuance of bonds and plaintiff's execution of Promissory Notes in favor of Kraft Foods Inc. as distinct transactions. The Director points to the fact that the Promissory Notes do not contain a schedule for the payment of principal, do not

reference Kraft Foods Inc.'s bonds, do not contain provisions making Kraft Foods Inc.'s bondholders third-party beneficiaries of the Promissory Notes, and have no recourse provisions for Kraft Foods Inc. or its bondholders in the event that plaintiff does not make interest payments. The bondholders also have no recourse against plaintiff in the event that Kraft Foods Inc. receives interest payments from plaintiff but does not make interest payments to the bondholders.

The Director's regulation interpreting the interest add-back provision of N.J.S.A. 54:10A-4(k)(2)(I) appears at N.J.A.C. 18:7-5.18. The portion of the regulation concerning the Unreasonable Exception is succinct:

> (a) Interest paid, accrued or incurred to a related member shall not be deducted in calculating entire net income, except that a deduction shall be permitted:
>
> * * *
>
> 2. If the taxpayer establishes that the disallowance of a deduction is unreasonable by showing the extent the related party pays tax in New Jersey on the income stream . . . .
>
> [N.J.A.C. 18:7-5.18(a)(2).]

The regulation identifies only one circumstance in which a taxpayer might satisfy the Unreasonable Exception – where the taxpayer demonstrates the extent to which the related party that receives the interest payments pays tax to this State on those payments. It is not clear how the circumstance noted in the regulation differs from the 3% Exception provided in the statute, which expressly addresses the payment of tax to New Jersey by the related company and sets a specific tax rate at which the exception is triggered. Notably, this court has held the related party's payment of tax cannot be the sole factor considered by the Director when determining whether the Unreasonable Exception has been met.

In Morgan Stanley & Co. v. Director, Div. of Taxation, 28 N.J. Tax 197 (Tax 2014), Judge Fiamingo reviewed, among other things, the Director's decision that the taxpayer had not established an entitlement to deduct related party interest payments under the Unreasonable Exception. The court made two pertinent holdings. First, the court held "that something more than a valid non-tax business purpose and economic substance need be demonstrated in proving the 'unreasonableness' of the interest add-back." Id. at 219. "To do otherwise would be to completely disregard the statute's disallowance of the interest deduction for transactions between related parties." Ibid. This is so because a deduction for an interest payment related to a transaction without a business purpose or economic substance would not be permitted for federal income tax purposes. Id. at 220 (citing 26 U.S.C. §162(a)). Thus, those interest payments would not be deducted from the taxpayer's federal taxable income, the starting point for calculating taxable income under the CBT Act, and could not, therefore, be added back to the taxpayer's taxable income for CBT purposes. Ibid.

Second, Judge Fiamingo held that the Director cannot base a determination of whether the Unreasonable Exception has been established solely on whether the related entity to whom interest payments were made paid tax on the interest payments. Id. at 224-226. Indeed, the court suggested that the payment of tax by the related party is not likely a relevant consideration at all under the Unreasonable Exception. Id. at 225. The court suggested, instead, that the Legislature intended to include in the Unreasonable Exception circumstances in which the other four exceptions were not satisfied, but in which a deduction was nevertheless warranted to avoid an unreasonable result. By way of illustration, the court noted that the Unreasonable Exception might obtain where the taxpayer establishes:

> unfair duplicative taxation; a technical failure to qualify the transactions under the statutory exceptions; an inability or

> impediment to meet the requirements due to legal or financial constraints; an unconstitutional result; a demonstration that the transaction for all intents and purposes is an unrelated loan transaction.
>
> [Id. at 220 (footnote omitted).]

A footnote following the quoted language indicates that the "list is by no means intended to be exhaustive." Id. at 220 n.13.

On February 24, 2016, the Director issued Technical Advisory Memorandum TAM-2011-13(R) concerning exceptions to the related party interest add-back requirement. The Memorandum, which is not binding on the Director, but provides guidance to taxpayers, discusses the Unreasonable Exception. The Memorandum indicates that the Director "will recognize the following fact patterns as examples of situations where a disallowance of the deduction would be 'unreasonable' . . . ." There are four "examples of situations" listed in the Memorandum.

The first two do not apply here: (1) where the "taxpayer has both a receivable and a payable from the exact same entity which results in both interest income and interest expense;" and (2) where there "exists a 'cash sweep' case management system with related members."

The third example is a summary of the holding of this court in an unpublished opinion. The Memorandum explains that in that case, a corporate taxpayer borrowed funds from its parent. The parent borrowed funds from unrelated third parties in order to lend that money to its subsidiary. The parent, who obtained better interest rates in the debt market than could the subsidiary, charged its subsidiary interest on the loans at the maximally allowable rate, generating a profit for the parent. The subsidiary made interest payments to the parent, who used those funds to pay the more favorable interest rate on its debt, and retained the balance as profits. The parent paid tax in seventeen jurisdictions on the income it made from the subsidiary's interest payments. The court found that the Director should have allowed the subsidiary to deduct the interest

payments under the Unreasonable Exception because the transactions between the parent and the subsidiary had economic substance, the subsidiary was charged an interest rate above that secured by the parent, and the parent paid tax on its income from the subsidiary's interest payments.

Although the Memorandum describes the summary of the unpublished opinion as a "fact pattern[] . . . where a disallowance of the deduction would be 'unreasonable,'" it also notes that the unpublished opinion "'in no way creates a general rule of applicability" and that decisions with respect to the applicability of the Unreasonable Exemption will "be made on a case-by-case basis, based on the totality of the circumstances." It is not clear what effect the Director believes the unpublished opinion, which is not binding on this court, R. 1:36-3, has on the Director's evaluation of evidence proffered by a taxpayer in an effort to establish entitlement to an exception to the interest add-back requirement.

The fourth example in the Memorandum summarizes the holding in Morgan Stanley, supra, noting in particular the five circumstances the court listed as illustrations of when the Unreasonable Exception might be satisfied, including where the transaction between the related entities is "for all intents and purposes . . . an unrelated loan transaction."

With these authorities in mind, the court turns to an analysis of the validity of the Director's decision that an entitlement to an exception from the add-back requirement was not established here. The parties dispute the correct standard by which this court is to review the Director's determination. Plaintiff contends that the meaning and application of the Unreasonable Exception in N.J.S.A. 54:10A-4(k)(2)(I) are legal questions to be decided de novo by this court. N.J.S.A. 2B:13-3(b)("The Tax Court shall determine all issues of fact and of law de novo."). According to plaintiff, the Director's interpretation of the statute is not entitled to deference. American Fire & Cas. Co. v. Director, Div. of Taxation, 189 N.J. 65, 79 (2006)(holding that where "the core

question is one of statutory interpretation" an "'appellate tribunal is . . . in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue.'")(quoting Mayflower Sec. Co. v. Bureau of Securities, 64 N.J. 85, 93 (1973)).

The Director, on the other hand, argues that the court's analysis should be influenced by the familiar principle that the Director's interpretation of tax statutes is entitled to a presumption of validity. "Courts have recognized the Director's expertise in the highly specialized and technical area of taxation." Aetna Burglar & Fire Alarm Co. v. Director, Div. of Taxation, 16 N.J. Tax 584, 589 (Tax 1997)(citing Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 313, 327 (1984)). The scope of judicial review of the Director's decision with respect to the imposition of a tax "is limited." Quest Diagnostics, Inc. v. Director, Div. of Taxation, 387 N.J. Super. 104, 109 (App. Div.), certif. denied, 188 N.J. 577 (2006). The Supreme Court has directed the courts to accord "great respect" to the Director's application of tax statutes, "so long as it is not plainly unreasonable." Metromedia, supra, 97 N.J. at 327. See also GE Solid State, Inc. v. Director, Div. of Taxation, 132 N.J. 298, 306 (1993)("Generally, courts accord substantial deference to the interpretation an agency gives to a statute that the agency is charged with enforcing.").

Of course, an administrative agency's interpretation of the law that is plainly at odds with the statute will not be upheld. See Oberhand v. Director, Div. of Taxation, 193 N.J. 558, 568 (2008). Nor may the Director "extend the [corporation business] tax to income not within the fair contemplation of the Legislature as derived from the text of the statute imposing the tax." International Bus. Machines Corp., supra, 26 N.J. Tax at 116.

Of particular note here are the express provisions of the controlling statute. N.J.S.A. 54:10A-4(k)(2)(I) provides that in order to establish entitlement to an exception from the interest add-back requirement a taxpayer must "establish[] by clear and convincing evidence, as

determined by the director, that the disallowance of a deduction is unreasonable." (emphasis added). It is evident that the Legislature intended to delegate to the Director in the first instance the authority to evaluate the evidence produced by the taxpayer and to determine whether it would be unreasonable to deny an exception to the interest add-back provision. His decision with respect to whether a taxpayer has established an entitlement to an exception is not a "core question of statutory interpretation" or a decision on "a strictly legal issue," but instead is the result of the exercise of the Director's judgment and expertise when evaluating evidence and applying a tax statute to a particular set of facts. The Director's determination, therefore, is entitled to deference by this court and will not be overturned "so long as it is not plainly unreasonable." Metromedia, supra, 97 N.J. at 327.

The sole guidance provided by the Legislature is that an exception to the add-back requirement must be granted if it is proven that disallowance of the deduction would be "unreasonable." Statutory construction begins with the statute's plain language. Merin v. Maglaki, 126 N.J. 430, 434 (1992). "A statute should be interpreted in accordance with its plain meaning if it is clear and unambiguous on its face and admits of only one interpretation." Board of Educ. v. Neptune Twp. Educ. Ass'n, 144 N.J. 16, 25 (1996)(quotations omitted). "[T]he best approach to the meaning of a tax statute is to give to the words used by the Legislature their generally accepted meaning, unless another or different meaning is expressly indicated." Public Serv. Elec. & Gas Co. v. Township of Woodbridge, 73 N.J. 474, 478 (1977)(quotations omitted). "'The duty of the Director, and this court, is to give meaning to the wording of the statute and, where the words used are unambiguous, apply its plain meaning in the absence of a legislative intent to the contrary.'" Vassilidze v. Director, Div. of Taxation, 24 N.J. Tax 278, 291 (Tax

2008)(quoting Sutkowski v. Director, Div. of Taxation, 312 N.J. Super. 465, 475 (App. Div. 1998)).

The dictionary definition of unreasonable is "[n]ot guided by reason; irrational or capricious." Black's Law Dictionary 1537 (7th Ed. 1999). The motion record does not support a conclusion that the Director acted unreasonably when he determined that plaintiff did not produce clear and convincing that disallowance of the interest deduction would itself be unreasonable. The purpose of the related party interest add-back requirement is to close what the Legislature identified as a loophole in the CBT statute and to raise revenue. See Legislative Fiscal Statement A-2501 (Sep. 13, 2002)(projecting $1 billion increase in tax revenue for fiscal year 2003 as a result of amendments to CBT Act). As the Assembly Budget Committee explained when considering the bill that ultimately was enacted into the law creating the interest add-back requirement and exceptions:

> Assembly Bill No. 2501, as amended, is designated the Business Tax Reform Act. The Business Tax Reform Act is intended to reform New Jersey's system of taxation of corporations and other business entities, through revision of the corporation business tax and other changes of law.
>
> The bill updates the law to increase equity among business taxpayers and closes numerous loopholes that allow many profitable companies to reduce their taxable New Jersey income.
>
> * * *
>
> "Loophole Closers" and Tax Base Changes.
>
> Revenues from the corporation business tax (CBT), the State's main income-measured business tax, have been declining in the face of apparent economic expansion; there is 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. Some large and apparently expanding corporations have managed to avoid having any taxable income. New Jersey's experience is part of a national

> trend, especially in so-called "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.
>
> * * *
>
> Disallowance of deduction of interest paid to a related party. The bill also restricts deductibility of inter-affiliate interest expenses. However, the bill again continues to such (sic) deductions in areas that are established as "non-tax avoidance" situations.
>
> * * *
>
> The second exception is permitted when the taxpayer establishes that the disallowance of the deduction is unreasonable. [T]he disallowance is unreasonable if it would violate the policy goals of the disallowance. For example, the bill permits a taxpayer to keep the deduction if the interest paid is ultimately paid to a third-party unrelated lender, as evidenced by a guarantee provided by the taxpayer to the outside lender. If a taxpayer can demonstrate that, despite the absence of a guarantee, interest is being paid on a loan that was simply "pushed down" from a third party lender, then it would be unreasonable to disallow the interest deduction. As the deduction is retained by exception to a general rule that disallows the deduction, the effect is to require the taxpayer to secure prior approval from the director (through general regulation or case-by-case determination) before departing from the general rule of nondeductibility.
>
> [Assembly Budget Committee Statement to A-2501, p. 1-3 (June 27, 2002); see also Senate Budget and Appropriations Committee Statement to S-1556 (June 27, 2002).]

This legislative history assists the court in fulfilling its obligation to determine the intent of the Legislature when amending N.J.S.A. 54:10A-4(k)(2)(I). The Reuben H. Donnelly Corp. v. Director, Div. of Taxation, 128 N.J. 218, 227 (1992); AMN, Inc. v. South Brunswick Twsp. Rent Leveling Bd., 93 N.J. 518, 525 (1982).

One can see the logic in permitting the deduction of interest payments where the taxpayer is the ultimate obligor on the underlying debt and is using a related entity as a mere conduit to

benefit from a more favorable interest rate obtained by the related entity than could be secured by the taxpayer. In such circumstances, the taxpayer is the actual debtor paying interest to the unrelated third party lender, either directly or indirectly. The Legislature recognized the wisdom of allowing an interest deduction in these circumstances with its enactment of the Guarantee Exception. To satisfy that exception the taxpayer need provide only a preponderance of evidence that it has guaranteed the underlying loan.

With the Unreasonable Exception, the Legislature also appears to have recognized that there may be circumstances in which, even in the absence of evidence of a guarantee, the taxpayer may establish that it is ultimately responsible for paying interest to a third-party lender directly or through a related entity. The Legislature provided, however, that the taxpayer has a higher burden of proof in these circumstances. It must produce clear and convincing evidence that disallowance of the interest deduction is unreasonable. This is consistent with the general propositions that a taxpayer bears the burden of establishing its entitlement to a claimed statutory exception from a general rule of taxability, Princeton Univ. Press v. Borough of Princeton, 35 N.J. 209, 214 (1961), and that deductions under the CBT Act must be narrowly construed. Fedders Financial Corp. v. Director, Div. of Taxation, 96 N.J. 376, 386 (1984).

Here, the Director acted reasonably when he determined that plaintiff did not meet its evidentiary burden. Plaintiff produced no document suggesting that it is ultimately responsible for Kraft Foods Inc.'s debts to its bondholders. Plaintiff has no obligation to Kraft Foods Inc. or to its bondholders to make interest payments on Kraft Foods Inc.'s debts. Plaintiff's only legal obligation is to make periodic interest payments to Kraft Foods Inc. on the Promissory Notes plaintiff signed in favor of Kraft Foods Inc. Those Promissory Notes do not in any way refer to Kraft Foods Inc.'s bonds. There is no provision in the Promissory Notes requiring that the interest

payments made by plaintiff be forwarded, directly or indirectly, to Kraft Foods Inc. bondholders. In the event that plaintiff fails to make interest payments on the Promissory Notes or Kraft Foods Inc. fails to use funds paid by plaintiff on the Promissory Notes to pay its bondholders, those bondholders have no recourse against plaintiff.

It was reasonable for the Director to determine that Kraft Foods Inc.'s debt was not, legally or effectively, "pushed down" to plaintiff. Although Kraft Foods Inc. may have made the business decision to incur debt through the issuance of bonds, and to thereafter lend the funds generated by those bonds to plaintiff, Kraft Foods Inc. also made the business decision not to make plaintiff a guarantor of Kraft Foods Inc.'s bonds. Kraft Foods Inc. alone is responsible for interest payments to its bondholders. The Promissory Notes executed by plaintiff in favor of Kraft Foods Inc. represent financial transactions entirely independent from Kraft Foods Inc.'s debt to its bondholders. Although Kraft Foods Inc. is using the interest payments it receives from plaintiff on its Promissory Notes to raise the funds to pay interest to its bondholders, it is under no legal obligation to do so. Plaintiff's obligations to Kraft Foods Inc. and Kraft Foods Inc.'s obligations to its bondholders are distinct.

Plaintiff does not argue that it was unable financially, legally, or technically to borrow funds on its own in the capital markets or to guarantee Kraft Foods Inc.'s bonds. Business decisions resulted in plaintiff borrowing funds from Kraft Foods Inc. and in the structuring of the transactions between plaintiff and Kraft Foods Inc. Of course, plaintiff and Kraft Foods Inc. are free to organize their business relationships in any way they see fit. The must, however, accept the tax consequences of those business decisions, whether those consequences were or were not anticipated. General Trading Co. v. Director, 83 N.J. 122, 136-137 (1980).

The court's conclusion is not changed by plaintiff's suggestion that the Director's determination in this case conflicts with the provisions of his 2016 Technical Advisory Memorandum describing an unpublished opinion of this court in a different matter. As noted above, a Technical Advisory Memorandum is not binding on the Director. In addition, the Director's summary of the court's non-precedential opinion in the prior matter appears to be more in the nature of a description of the court's holding than a concession by the Director that he would in future cases reach the same conclusion as did the court in the unpublished opinion. As noted above, the Director included in his summary this court's acknowledgment in its unpublished opinion that it was "in no way creat[ing] a general rule of applicability" and that a determination of the applicability of the Unreasonable Exception would be made on a case-by-case basis.

Moreover, to the extent that the court's holding today may be viewed as conflicting with the unpublished opinion described in the Memorandum, the court notes that unpublished opinions lack precedential value, R. 1:36-3, that the opinions of trial court judges are not binding on other trial court judges, and that the determination of whether the Director acted within his statutory authority when deciding whether the Unreasonable Exception applies is fact sensitive.

The Director's cross-motion for partial summary judgment is granted. Plaintiff's motion for partial summary judgment is denied.