The State of New Hampshire

MERRIMACK COUNTY **SUPERIOR COURT**

Hologic, Inc. and Subsidiaries

v.

Lindsey M. Stepp, et al.

Docket No.: 217-2023-CV-282

ORDER

The plaintiff, Hologic, Inc. and Subsidiaries, brings this civil action against the defendants, Lindsey M. Stepp, the Commissioner of the New Hampshire Department of Revenue and the New Hampshire Department of Revenue Administration ("DRA") appealing a final decision issued by DRA. (Compl.) The Court held a bench trial on December 19, 2024. Having considered the parties' pleadings and arguments, the evidence, and the applicable law, the Court finds in favor of Hologic and GRANTS prayers a, b, and c of the Complaint.

I. Standard

A taxpayer may appeal an adverse decision made by the DRA after submitting a petition for redetermination or reconsideration. See RSA 21-J:28-b. When reviewing the administrative decision, the superior court's standard of review is de novo. RSA 21-J:28-b, IV. Legal issues brought before the superior court "shall be limited to those raised before the commissioner, with the exception that the taxpayer may raise additional legal claims addressing constitutional issues, and either party may raise additional legal claims upon a showing of good cause." Id. Because the standard of

review is de novo, the Court is not bound by the hearing officer's previous findings and rulings. See In re Currin, 149 N.H. 303, 306 (2003).

II. Background

The Court derives the following facts from the parties' Joint Stipulation of Facts and from the December 19, 2024 trial. (See Ex. 5.) Hologic, Inc. is the parent company of a group of affiliated companies filing one combined group tax return as a water's edge group for New Hampshire Business Profits Tax ("BPT") purposes using Form NH-1120-WE. (Id. ¶ 3.) The plaintiff, a Delaware corporation whose principal offices are located in Massachusetts, has a registered agent, CT Corporation System, located in Concord, New Hampshire. (Id. ¶¶ 1–2.)

On or about September 7, 2021, the plaintiff filed an Amended Business Tax Return for the fiscal year ending on September 30, 2017 ("FYE 17 Amended Return"), relating to a long-term capital loss carryback generated by one member of the plaintiff's water's edge combined group from the fiscal year ending on September 26, 2020 ("FYE 20"). With the FYE 17 Amended Return, the plaintiff sought to offset net capital gains to the plaintiff's combined net income for the fiscal year ending September 30, 2017 ("FYE 17").[1] (Id. ¶¶ 11, 51–54.)

On or about June 5, 2020, DRA's Audit Division began an audit of the plaintiff's Business Tax Returns for FYE 17 and for the fiscal year ending September 29, 2018 ("FYE 18"). (Id. ¶ 10.) As a result of this audit, on November 10, 2021, DRA issued a

[1] The parties do not dispute the numerical figures claimed by the plaintiff in its FYE 2017 Amended Return but rather dispute DRA's interpretation and application of the water's edge method and dispute the hearing officer's interpretation of BPT rules promulgated by DRA regarding its capital gains and losses. (See Compl. at 6–8.) The Court therefore need not address any potential discrepancies in the capital gains and losses and will instead focus on DRA's interpretation and application of the rules and statute.

Proposed Audit Adjustment imposing additional BPT on the plaintiff for FYE 17. (Id. ¶ 12.) This Proposed Audit Adjustment relates to the plaintiff's capital loss FYE 20 carryback to the FYE 17 BPT return. (Id. ¶ 13.) Specifically, DRA denied the application of the capital loss carryback to the plaintiff's combined net income on the basis that the member of the water's edge group that generated the capital loss was not the same member of the water's edge group that generated the capital gain. (Id. ¶¶ 55–57.)

The plaintiff thereafter timely filed a Petition for Redetermination of the Assessment with DRA's Hearings Bureau in accordance with RSA 21-J:28-b. (Id. ¶ 15.) On November 10, 2022, a DRA hearing officer held a hearing on the matter, and on April 25, 2022, a Final Order was issued. (Id. ¶ 21.) In its Final Order, the hearing officer concluded that the plaintiff's water's edge group was entitled to the capital loss carryback from the 2020 Tax Year as reported on the plaintiff's FYE 17 Amended Return. (Id. ¶ 55.) However, the hearing officer agreed with the DRA Audition Division's conclusion that the capital loss carryback could not be applied to the plaintiff's "combined net income" because the capital loss was generated by a different member of the water's edge group. (Id. ¶ 56.)

III. Analysis

This appeal concerns the plaintiff's BPT liability for FYE 17, specifically in regard to the plaintiff's water's edge combined group return for FYE 17. (Id. ¶¶ 7–8.) The plaintiff disputes DRA's application of the water's edge method, requiring member companies of a water's edge group to first silo capital loss and gains prior to combining group members net incomes.

The plaintiff now appeals the Final Order, making four arguments. First, it claims that the analysis and conclusion in the Final Order directly contradict the plain language of RSA chapter 77-A's combined reporting provisions as applied to water's edge combined groups. (See Compl. at 6–8 (Count I).) The plaintiff asserts that, to the extent that BPT law is ambiguous, the hearing officer failed to interpret ambiguity in the plaintiff's favor, which is contrary to New Hampshire caselaw. (Id. ¶ 51.) Second, the plaintiff claims that the hearing officer erroneously interpreted DRA's rules in denying its capital loss carryback position. Id. at 8–10 (Count II). The plaintiff asserts that the hearing officer erroneously interpreted the DRA's rules in light of DRA's enabling statute, because RSA 77-A:6, IV provides that "combined net income" is not calculated by an individual member of a water's edge group but by the water's edge group as a whole and because the statute expressly requires the "combined net income" of a water's edge combined group to be taxed as though it "was that of one business organization." (Id. ¶¶ 55.) In the alternative, it argues that the rules are void for either being impermissibly in conflict with statutory law or impose unwritten administrative rules. (Id. ¶¶ 60.) Third, the plaintiff asserts that the DRA has directly violated the New Hampshire Administrative Procedure Act's ("NHAPA") by impermissibly adding words to N.H. Admin. R., Rev 302.09 and N.H. Admin. R., Rev. 302.10 in assuming that the capital losses of one member of a combined group may only be applied against the capital gains of that same member.

The plaintiff brings its fourth and fifth claims under the New Hampshire and United States Constitutions. (Id. at 10–17.) Under the State Constitution, the plaintiff argues that the Final Order impermissibly classifies similarly situated taxpayers and

unreasonably classifies property in the form of business income in violation of Part I, Article 12 and Part 2, Articles 5 and 6. (Id. ¶¶ 68–93.) The plaintiff further asserts that the Final Order violates the Due Process and Commerce Clauses of the Federal Constitution because it results in grossly distorted and unfair taxation of a unitary business. (Id. ¶¶ 95–99.)

DRA asserts that its determination was supported by a plain reading of the relevant statutes and regulations. (See Def. Mot. Summ. J. at 4–14.) It argues that, contrary to the Internal Revenue Code, pursuant to the plain language of the statute and the regulations under N.H. Admin. R., Rev. chapter 300, each business organization must calculate its own revenues less expenses and gross business profits and only after these are calculated, the combined net income of the combined group can be determined. (Id. at 12.) It argues that, because it relied on the plain language of RSA chapter 77-A and N.H. Admin. R., Rev. chapter 300 when determining the plaintiff's PBT liability, it did not violate the NHAPA. (Id. at 14–15.)

As to the plaintiff's constitutional claims, DRA argues that the plaintiff's proposed reading of N.H. Admin. R., Rev. chapter 300 violates the State Constitution because it provides combined filers "with a special benefit that is not afforded to separate entity filers; namely, the netting of one organization's losses against another's gains." (Id. at 16–17.) According to DRA, the plaintiff's proposed interpretation creates discrimination in the case of separate filers sharing common ownership or control but that do not qualify as a unitary business and thus creates a "veritable boon [. . .] for businesses which are part of a combined group over the singular mom and pop business operating solely within New Hampshire." (Id. at 17–18.) DRA asserts that the Final Order

properly distinguishes between types of property—not taxpayers—and that it correctly made its BPT determination based on the classification of the property. (Id. at 18.)

The Court first addresses whether the hearing officer erroneously denied the plaintiff's carryback position in violation of RSA chapter 77-A. When engaging in statutory interpretation, the Court first "look[s] to the language of the statute itself, and, if possible, construe[s] that language according to its plain and ordinary meaning." Polonsky v. Town of Bedford, 171 N.H. 89, 93 (2018). When interpreting legislative intent, the Court considers "the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." Id. The Court "construe[s] all parts of a statute together to effectuate its overall purpose and to avoid an absurd or unjust result." Id. Furthermore, the Court does "not consider words and phrases in isolation, but rather within the context of the statute as a whole." Id. "This enables [the Court] to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme." Id. "Absent an ambiguity, [the Court] will not look beyond the language of the statute to discern legislative intent." Id.

With these principles in mind, the Court considers RSA chapter 77-A. RSA 77-A:6, IV in relevant part provides

> A business organization which is part of a water's edge combined group and required to report under this chapter, shall file a return containing the combined net income of the water's edge combined group and such other informational returns as the commissioner shall require by rules adopted under RSA 541-A. The commissioner is authorized to impose the tax as though the entire combined net income of the water's edge combined group was that of one business organization or the commissioner may adjust the tax or income in such other manner as the commissioner shall determine to be equitable if the commissioner determines it to be necessary in order to

> clearly reflect the net income earned by such organization from business done in this state. . . .

Based on its plain language, the statute clearly permits the commissioner to treat and to tax a water's edge combined group, such as the plaintiff, as a single entity. The statute, however, is silent as to apportioning capital gains and losses for members of a water's edge group. The legislature gives no guidance for how the commissioner should apportion a capital loss generated by one member of a water's edge group to another member. The plain language only provides that a water's edge group is to be treated "as one business organization." See RSA 77-A:6, IV (emphasis added).

The definitions portion of the statute, RSA 77-A:1, also provides no further clarification. RSA 77-A:1, XVI, defines "water's edge method" as "the determination of taxable business profits for a group of business organizations conducting a unitary business by adding their combined net income, the additions and deductions provided in RSA 77-A:4 for the members of the group, and apportioning the result as provided in RSA 77-A:3." This section is silent as to how individual members within a water's edge group may apportion capital losses and whether such losses may be applied to the water's edge group as a whole. Because the statute is silent as to how such property should be apportioned to groups classifying as a water's edge group, the Court finds that RSA 77-A:6, IV is ambiguous. See In the Matter of Lyon & Lyon, 166 N.H. 315, 319 (2014) ("statutes silence arguably creates ambiguity" (quotation omitted)). The Court therefore turns to legislative history to discern the legislature's intent in enacting a combined method of reporting. See Polonsky, 171 N.H. at 93.

Before New Hampshire's adoption of combined reporting method in 1981, "large, multi-form corporations were allowed to file their business profits tax returns on a

separate accounting/separate entity basis as if unconnected and unrelated to its affiliated sister corporations." See H.B. 121-FN ¶¶ I–II (N.H. 2023). "This separate method of taxation [wa]s inadequate to measure accurately the income of a corporation with non-New Hampshire affiliates and create[d] tax disadvantages for smaller New Hampshire corporations which compete with larger multistate and multinational corporations conducting business in New Hampshire." Id. ¶ II. Combined reporting, however, treats a parent corporation and its subsidiaries "as if a single taxpayer." Id. ¶ III. "The purpose of combined reporting is to counteract the profit shifting that takes place between and among a parent and its subsidiaries operating across state lines and international boundaries." Id.

The combined reporting method was altered in 1986 to the water's edge method, which now restricts New Hampshire's "ability to employ the worldwide unitary method of taxation," and now multinational corporations are "separated into two distinct pieces: one operating in the United States and another operating outside the United States and treated as unrelated separate taxable entities." Id. ¶ IV. Although New Hampshire's international reach became limited with the adoption of the water's edge method, the underlying purpose of unified reporting remained the same: treating parent companies and its subsidiaries operating within the United States as if they were "a single taxpayer" in order to counteract profit shifting. See id. ¶ III.

The DRA argues that the plain language of RSA chapter 77-A and N.H. Admin., Rev. chapter 300, "does not create a new monolithic organization," (see Def. Mot. Summ. J. at 5); the Court, however, disagrees. The plain language of the statute and the underlying purpose of combined reporting permit treating a water's edge group "as

one business organization" in order to identify and mitigate profit shifting between multi-form corporations. Thus, the plaintiff, being taxed as one business organization, should be permitted to apply a long-term capital loss carryback generated by one member of the water's edge combined group to the water's edge group's capital gains. The Court therefore rules that the Final Order erred in its interpretation of RSA chapter 77-A by failing to treat plaintiff and its affiliates as one business organization as required by the plain language of the statute and its underlying purpose.

The Court next turns to whether the administrative rules relied on by DRA impermissibly conflict with the statute. See Appeal of Wilson, 161 N.H. 659, 662 (2011). "While the legislature may delegate to administrative agencies the power to promulgate rules necessary for the proper execution of the laws, this authority is designed only to permit the board to fill in the details to effectuate the purpose of the statute." Id. "Thus, administrative rules may not add to, detract from, or modify the statute which they are intended to implement." Id.

N.H. Admin. R. Rev. 302.09 provides:

> (c) A combined group of business organizations filing a federal consolidated return shall determine the gross business profits of each separate business organization in accordance with [this rule].
> (d) The amount of income, expense and gross business profits determined under (a) above, for each entity shall be added together and all intergroup activity eliminated to arrive at the gross business profits of the combined group.

N.H. Admin. R. Rev. 302.10 further explains that "[b]usiness organizations utilizing combined reporting, as defined in Rev 301.08, shall determine the gross business profits of each business organization includible in the combined group as if the business organizations were not affiliated in accordance with RSA 77-A:1, I and III." The plain

language of these rules permits DRA to determine gross business profits for each member of a water's edge group separate and apart from the other members, as if they were not affiliated with the other members. As the Court has determined that RSA 77-A:6, IV requires that members of a water's edge combined to be treated as "one business organization", the Court rules that the promulgated rules improperly add to and modify the enabling statute. See Appeal of Wilson, 161 N.H. at 662.

Because the Court concludes that the final order erroneously interpreted RSA chapter 77-A, the Court need not address the parties' other arguments. See Antosz v. Allain, 163 N.H. 298, 302 (2012) (declining to address other arguments where holding on one issue was dispositive).

IV. Conclusion

For the foregoing reasons, the plaintiff's requested relief as to parts a, b, and c in its complaint is GRANTED. (See Compl. at 18.)

SO ORDERED.

February 21, 2025
Date

John C. Kissinger, Jr.
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 02/21/2025