NOT FOR PUBLICATION WITHOUT APPROVAL OF
THE TAX COURT COMMITTEE ON OPINIONS[1]

PRESERVE II, INC. Plaintiff, v. DIRECTOR, DIVISION OF TAXATION, Defendant.	TAX COURT OF NEW JERSEY DOCKET NO. 010921-2013
PULTE HOMES OF NJ, L.P. Plaintiff, v. DIRECTOR, DIVISION OF TAXATION, Defendant.	DOCKET NO. 010920-2013
PULTE COMMUNITIES OF NJ, L.P. Plaintiff, v. DIRECTOR, DIVISION OF TAXATION, Defendant.	DOCKET NO. 010922-2013 Approved for Publication In the New Jersey Tax Court Reports

Decided: October 4, 2017

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Michael J. Duffy for defendant
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[1] Honorable Jonathan A. Orsen, J.T.C. did not participate in the court's decision to publish this opinion.
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SUNDAR, J.T.C.

This is the court's opinion in the above-captioned matters. The predominant issue is the propriety of the corporation business tax ("CBT") assessments imposed by defendant ("Taxation") for tax years 2005-2007, upon plaintiff Preserve II, Inc. ("Preserve"), a foreign corporation. The tax was on Preserve's share of passed-through partnership income from two foreign limited partnerships, Pulte Homes of NJ, L.P. ("Pulte Homes NJ") and Pulte Communities of NJ, L.P. ("Pulte Communities NJ"), in each of which Preserve is a 99% limited partner. The general partners in those partnerships (Preserve I, Inc. and Pulte Home Corporation of the Delaware Valley) are also foreign corporations holding a 1% interest. All three entities are owned 100% by the same parent, also a non-domestic entity. The partnerships are in the business of developing, building, and selling residential homes in New Jersey, through the partners' parent. All entities (the two partnerships, Preserve, the general partners, and their parent) are part of the same corporate family of Pulte Group, Inc., a national residential real estate developer and builder.

The partnerships, which generated significant revenues from selling residential homes built in New Jersey, do not dispute that they do business in New Jersey. The general partners, because of their status as such, do not dispute their liability for CBT on their respective 1% share of the passed-through partnership income. Up until this court's decision in BIS LP, Inc. v. Director, Div. of Taxation, 25 N.J. Tax 88 (Tax 2009), aff'd, 26 N.J. Tax 489 (App. Div. 2011), Preserve never disputed its contacts with and nexus to New Jersey, and voluntarily filed CBT returns paying the requisite tax on its share of partnership income. It claimed status of an investment company, thus, paid CBT only on a portion of its income.

When Taxation audited Preserve for CBT liabilities sometime in 2010, Preserve claimed that pursuant to BIS, supra, it was a mere holding company, thus a passive investor. It claimed that it lacked any nexus or connection to New Jersey, thus, was entitled to CBT refunds.

Taxation disagreed and deemed Preserve to have sufficient constitutional contacts and nexus for CBT purposes. This determination was based on the fact that Preserve was authorized to do business in New Jersey, and Taxation's conclusion that Preserve had a "unitary relationship with" the two partnerships due to commonality of officers and shared banking facilities. It therefore denied Preserve's refund claims. It also imposed CBT assessments against the partnerships (with consequent interest and penalties) under N.J.S.A. 54:10A-15.7; 54:10A-15.11, which requires a partnership to withhold tax on income distributed to non-resident corporate partners who, or which, have not consented to New Jersey's jurisdiction to tax them.

Preserve argues here as follows: (1) it received authority to do business in New Jersey only for five days in 2006, and in 2007, thus, Taxation's basis for its 2005 assessment and refund denial is invalid; (2) a certificate of authority cannot create nexus for CBT purposes and Taxation's regulations purporting otherwise are invalid; (3) it did not have any nexus in New Jersey since it was not unitary with either partnership, and as a limited partner, it was prohibited from managing and controlling the partnerships' businesses; and (4) the assessments against the partnerships lack any presumptive correctness because they contradict Taxation's determination that Preserve was unitary with the partnerships for CBT/nexus purposes.

Preserve alternatively maintains that should it be found to have had nexus to New Jersey, then it should be entitled to an investment company status due to its sole activity of holding

limited partnership interests in each partnership. Thus, it should be taxed on only a portion of its New Jersey source income. It contends that Taxation's regulation, effective August 7, 2006, denying it such treatment is void of legal authority, as held in Manheim N.J. Inves. Inc. v. Director, Div. of Taxation, 30 N.J. Tax 18 (Tax 2017), in addition to being arbitrary, capricious and unreasonable as to the application of the regulation's effective date.

Both partnerships argue that the interest and penalty impositions against them were erroneous and unreasonable since Taxation possessed monies from Preserve which had paid self-assessed CBT and which monies were not refunded.

Taxation refutes all these claims, and argues that Manheim, supra, was incorrect.

For the reasons stated below, the court affirms Taxation's final determinations of CBT assessments against Preserve and denial of Preserve's CBT refund claims. The evidence shows that the partnerships were actively managed, operated, and, controlled in all aspects, by the same individuals. These individuals were all officers of the parent, and some were officers of Preserve and the general partners. All of them had one and only one business goal and activity: that of furthering the Pulte family's core business of developing, building and selling homes. Each one's compensation was tied solely to the performance of the common goal of home development and sale. They all wore one and, predominantly, one hat only: actively managing and running the core business of home development and building. There was no credible evidence to show any of these officers acted for/as the limited partner in a completely passive role of simply watching Preserve's $9,900 capital contribution grow, an assertion reinforced by the fact that some of the individual officers did not even know of Preserve's existence (or even of the general partners'

existence). There was no credible basis to find that the general partners and/or the parent actually and in reality, played a distinctly separate role as a passive investor, an issue not raised, litigated, nor discussed in BIS, supra. In the absence of any evidence of absolute or finite lines between the corporate partners, their parent, and the partnerships' business operations, the court cannot conclude that Preserve was a mere passive investor with zero nexus to New Jersey. Additionally, unlike in BIS, supra, it is undisputed that Preserve had no other or different business. Therefore, the court cannot conclude or infer that Preserve was a true limited partner vested purely in the return on (and of) its $9,900 capital contribution.

The above conclusion also lends itself to a negation of the assessments against the partnerships, and a finding that Preserve is not entitled to preferential tax treatment as an investment company. The court agrees with Preserve that the underpayment of tax penalties for 2005 and 2006 should be vacated, and the amnesty penalty for 2005-2007 should be cancelled.

FACTS

(A) Pulte Family Organization

The corporate parent, at the apex of the organizational chain is Pulte Group, Inc. (formerly known as Pulte Homes, Inc.) (hereinafter "apex parent"). It is a publicly held holding company incorporated in Michigan. It directly owns Pulte Diversified Companies, Inc. (Preserve's grandparent), and indirectly owns several other subsidiaries.

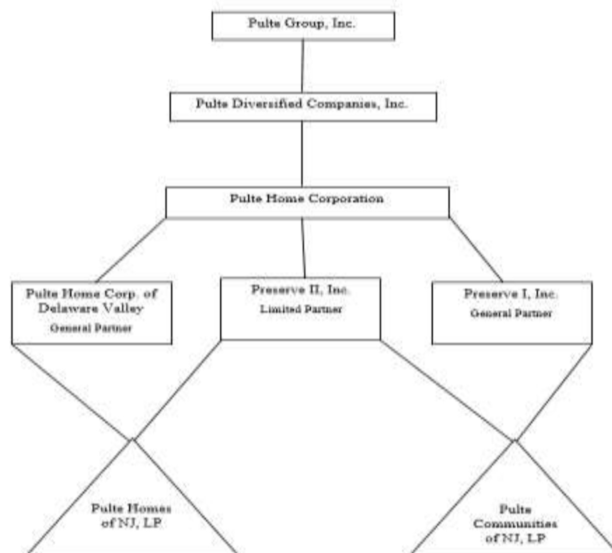
Pulte Diversified Companies owns Pulte Home Corporation (hereinafter "PHC" or "parent"). PHC is a Michigan corporation. It owns Preserve, Preserve I, Inc., as well as Pulte Home Corporation of the Delaware Valley, all Michigan corporations.

Preserve and Pulte Home Corporation of the Delaware Valley are partners in Pulte Homes NJ, a 99-year limited partnership formed in Michigan in 2001. Preserve is a 99% limited partner with a $9,900 capital contribution. Pulte Home Corporation of the Delaware Valley is a 1% general partner with a $100 capital contribution. The partnership's business is acquisition and development of land, and of building and selling homes in New Jersey.

Preserve and Preserve I, Inc. are partners in Pulte Communities NJ, a 99-year limited partnership formed in Michigan in 2001. Preserve is a 99% limited partner with a $9,900 capital contribution. Preserve I, Inc. is a 1% general partner with a $100 capital contribution. The partnership's business is acquisition and development of land and improvements, and of building and selling homes for active adult communities (over age 55).

By virtue of being 100% owner of Preserve and the two general partners, PHC indirectly owns the corporate partners' respective interest in each partnership. It is therefore a 100% indirect owner of each partnership.

The following is a corporate ownership chart for purposes of these complaints:



(B) Partnership Agreements

The partnership agreements of both Pulte Homes NJ, and Pulte Communities NJ, provide that the general partner has "full, exclusive and absolute" power to manage and control the partnership, including its property assets and business. This includes the exclusive right and power to buy and develop land, sell partnership assets (including other partnership interests), borrow money, create liens on partnership property, contract for goods/services, operate bank accounts, hire employees, and make/revoke tax elections. All of the decision-making authority is exclusively entrusted to the general partner, including the right to make partnership distributions and terminate the partnership. Further, the general partner and its affiliates can engage in any business that may or may not compete with the partnership's business. Similarly, the general partner and its affiliates can contract with the partnership with respect to the sale or lease of property, lending money, or providing services to the partnership for which they are entitled to compensation.

Preserve, as the limited partner, has "no voice or participation in the management of the [p]artnership business." It cannot "sign or act on behalf" of, nor "bind" the partnership.

(C) Preserve's CBT Returns

Preserve (a calendar year filer) filed CBT returns for tax years 2005-2007. Due to federal audited adjustments, it also filed amended CBT returns for each tax year. For each tax year, Preserve claimed an investment company status, thus claiming 40% of its total income as subject to CBT. The returns were signed by Ms. Zukoff, and for some years by Suzanne Treppa, each an Assistant Secretary, both of whom also signed the partnerships' tax returns.

Each return had differing information on when Preserve was authorized to do business in New Jersey ("none" in 2005 original return, 08/01/2000 on the amended return; "none" in the 2006 original return; and 01/25/2007 on the 2007 CBT return).

For each tax year 2005-2007, Preserve reported zero as its gross receipts or sales. It reported distributions from the partnerships (about $12.4 million in 2005; $3.1 million in 2006; and $5.6 million in 2007) as "other income."[2] It added back royalty payments made to a related member (in tax years 2005 and 2006), and interest paid to a related member Pulte Realty Corp., a subsidiary which acted as the Pulte group's internal bank ($12,543,866 for 2005; $4,203,800 for 2006; $63,546 for 2007). It claimed deductions for salaries and wages; for asset depreciation (each tax year) and for "domestic production activities" (tax years 2005 and 2006).

For each tax year, Preserve allocated 100% of its receipts, real and intangible property to New Jersey (99% in 2005), and claimed it had no regular place of business outside New Jersey. It also claimed zero employees within and without New Jersey.

Its balance sheet for each year reported zero liabilities. Assets comprised of "corporate stocks," and in 2007, "intercompany receivables" of $1,000. The end-of-year balance sheet for 2005 showed an increase in "unappropriated earnings," of which $14.7 million was attributed to "equity in subsidiaries." Those earnings were decreased in 2006 by about $27.4 million, again

[2] On Schedule P-1, "Partnership Investment Analysis," Preserve reported that it was a 99% limited partner in Pulte Homes NJ, Pulte Communities NJ, and Upper Gwynedd Dev. L.P., a Pennsylvania partnership in which Preserve was a 99% limited partner, all three being "flow-through" for accounting purposes, with the first two partnerships having "New Jersey Nexus." For 2006 and 2007, it did not include Upper Gwynedd, since that partnership had elected to be taxed at the entity level as opposed to at a pass-through level.

attributed to "equity in subsidiaries." However, for each tax year on Schedule P ("Subsidiary Investment Analysis") Preserve reported that it had zero interest, voting or non-voting, in any subsidiary. The decrease in the end-of-year unappropriated retained earnings for tax year 2007 was attributed to negative net income, however, Preserve also reported unrecorded but taxable income of $33,399,144 as income from "U.S. Pship" (i.e., from a partnership).

On each year's return, Preserve listed eight to nine individuals as its corporate officers (but none owned stock in Preserve). Common for all three years were Mr. Frees (President/CFO) and Mr. Robinson (Vice President/Treasurer). These two individuals, along with Mr. Cook were each executive officers of the parent and/or the apex parent.

(D) Partnerships' Tax Returns

The New Jersey partnership returns provided to the court (2005-2007, 2010 for Pulte Homes NJ; 2005-2008, 2010 for Pulte Communities NJ,) indicated that the partnerships had two "nonresident partners with physical nexus to New Jersey." The partnerships allocated 100% of their respective ordinary/loss (income/loss from trade or business) and passive income (such as dividends) to New Jersey. Suzanne Treppa signed the returns as the general partner.

Preserve's distributive share of partnership income/loss from Pulte Homes NJ, for each tax year 2005-2007, and 2010 (as amended) was $4,329,669; ($2,339,302); $9,483,716; and, $513,185 respectively. The Schedules K-1 used Code "FCM" to identify Preserve as a "non-New Jersey corporation," which, per the instructions, is "used to identify nonresident partners that maintain a regular place of business in New Jersey" as to which "no tax is to be remitted on [its] behalf."

Preserve's distributive share of partnership income/loss from Pulte Communities NJ, for each tax year 2005-2008, and 2010 (as amended) was $9,452,916; $3,865,336; $3,823,923; ($1,386,843); and, $1,408,996 respectively. The Schedules K-1 used Code "FCM" to identify Preserve as a "non-New Jersey corporation," which, per the instructions, is "used to identify nonresident partners that maintain a regular place of business in New Jersey" as to which "no tax is to be remitted on [its] behalf." However, for tax year 2010, Schedule K-1 used Code "FC" (identifying simply a "Non-New Jersey Corporation").

The federal partnership returns ("US-1065") provided to the court for each partnership (for certain tax years only) showed deduction for wages (Pulte Homes NJ, deducted $1, then $0 for 2006 and 2007), interest expense, and royalty payments (for certain tax years). The balance sheet for each partnership included "intercompany receivables" as an asset. "Accrued payroll and withholding" and "intercompany liabilities" were the current liabilities.

For 2005, Preserve's share of "recourse liabilities" as to Pulte Homes NJ, was $178,061,959 (and the general partner's as $1,798,606). For 2007, its share of "recourse liabilities" was $126,334,156, and "qualified nonrecourse financing" was $22,692,230 (the general partner's share of the same was $140,014,954 and $229,214 respectively). Preserve and the general partner made zero capital contributions during tax years 2005 or 2007 (the schedules K-1 reporting these items listing both partners as "domestic").

As to Pulte Communities NJ, Preserve's share of "recourse liabilities" was $42,770,481 (the general partner's share being $432,025) for 2005. For 2007 it was $532,263 (the general partner's share being $0), and for 2008 it was $0 (the general partner's share being $2,467,636).

The schedule K-1 showed Preserve made capital contributions of $9,546,830 in 2005 (the general partner made $96,433), $0 in 2007, and, $3,518,932 in 2008 (the general partner made $35,545), both partners listed as "domestic."

Preserve's Assistant Secretary, Ms. Zukoff, signed the federal returns as the Tax Matters Partner for each of the general partner, and the "election of partnership level tax treatment" on behalf of both Preserve and the general partners in each partnership.

(E) The Ruling in BIS

In July 2009, the Tax Court held that a foreign corporation holding a 99% limited partnership interest in a partnership doing business in New Jersey had no nexus in New Jersey for purposes of the CBT. BIS, supra, 25 N.J. Tax at 101-02. This is because it had no control over the partnership's business and had no other physical contacts (payroll, property) in New Jersey. Ibid. The court found that the foreign corporate limited partner was "not integrally related" to the partnership since it was "not in the same line of business" of data processing but was a "holding company that was implemented to limit liability at that level." Id. at 105. The Appellate Division affirmed in 2011.

(F) Taxation's Audit

While the appeal was pending in BIS, supra, Taxation commenced its audit of Preserve in 2010. In answer to Taxation's question seeking a description of Preserve's "business activities in New Jersey," Preserve responded that it holds "partnership interests in New Jersey partnerships," and proceeded to list the name of the partnerships. In response to the question asking for Preserve's "partnership business activities within and out of New Jersey," Preserve responded as follows:

> [Preserve's] partnership activities within and out of New Jersey is homebuilding which includes the acquisition and development of land primarily for residential purposes within the continental United States and the construction of housing on such land targeted for first-time, first and second move-up, and active adult home buyers.

Preserve also stated that "the income is derived from the sale of these homes," presumably in response to the sub-question, "indicate how each partnership's income was derived."

In 2012, Taxation requested Preserve to provide answers as to the unitary nature of Preserve and the partnerships. By this time, the Appellate Division had affirmed BIS, supra.

Preserve's responses claimed that it had "no overlapping of" employees or officers, "no sharing of facilities, technology and/or know how," and "no inter-company billings" between itself and the partnerships. Rather, it was "an investor only" in the partnerships. Subsequently, Preserve provided a list of the officers/directors of each general partner, and of Preserve. All nine individuals listed as Preserve's officers were also officers and/or directors of the two general partners.

In response to further clarification sought by Taxation, and several questions regarding the unitary nature of Preserve and the partnerships, Preserve now claimed to be a "Holding Company," while the partnerships were in the business of housebuilding, and that it had no connection to the partnerships other than its interest. It stated that Mr. Robinson, the person in charge of management of cash and investments "for the affiliated group" also managed Preserve's investments. It also stated that its "investment income is used for future potential acquisitions" and the income was "placed" in the internal bank, Pulte Realty Corporation. It responded "N/A"

to the question of whether there were individuals who were employees of the partnerships and also officers or employees of Preserve.

Based on all this information, Taxation concluded that Preserve had a unitary relationship with the partnerships (management/control, common banking facility, common accounting and tax preparation services, common employee benefit plan, and officers of the general partner were officers of Preserve). Further, due to Preserve's authority to do business in New Jersey, it had nexus. However, Taxation denied a "domestic production activities" deduction on ground it was not meant for construction activities plus Preserve's "sole business activity" in New Jersey was its limited partnership interest in the partnerships. It also rejected Preserve's claim for investment company status due to its regulation which barred eligibility for investments in non-publicly traded partnerships that could not qualify as investment companies. It noted that since Preserve filed its 2005 CBT return after the regulation's effective date of August 7, 2006 it was not entitled to favorable tax treatment, although it could have benefitted had the return been filed before that date.

On April 11, 2013, Taxation issued its Notice of Assessment against Preserve for CBT (2005-2007) totaling $5,429,385 (tax, penalty and interest).

On April 19, 2013, Taxation issued its Notice of Assessment against Pulte Homes NJ, for 2005, 2007 and 2010 in an amount totaling $2,126,591.02 (tax, penalty and interest). This represented Preserve's liability for New Jersey CBT under N.J.S.A. 54:10A-15.11 based on 99% of partnership income which was 100% allocable to New Jersey. After commencement of litigation, the parties agreed, by a partial stipulation of dismissal, that only tax year 2010 was at issue.

On April 19, 2013, Taxation issued its Notice of Assessment against Pulte Communities NJ, for 2005, 2006, 2008, and 2010 in an amount totaling $2,511,382.88 (tax, penalty and interest). This represented Preserve's liability for New Jersey CBT under N.J.S.A. 54:10A-15.11 based on 99% of partnership income which was 100% allocable to New Jersey. After commencement of litigation, the parties agreed, by a partial stipulation of dismissal, that only tax years 2008 and 2010 were at issue.

On April 5, 2013, Preserve filed a claim for refund for each tax years 2005 to 2007 totaling $2,084,656. The claim was filed due to the decision of the Appellate Division in BIS, supra. Preserve justified its claim on grounds it held "a passive investment as a Limited Partner" in both partnerships, which were "homebuilders" in New Jersey. Preserve claimed that it was not involved in either partnership's management or day-to-day operations, as evident from the partnership agreements. Due to its passive investment "in non-unitary partnerships," it claimed it did not have nexus for CBT purposes. Ms. Treppa, Preserve's Assistant Secretary, who had also signed Preserve's CBT returns and the partnerships' tax returns, signed the refund claims.

On July 2, 2013, Taxation denied the refund claims.[3] It stated that Preserve had nexus "by the mere fact that it is authorized to do business in New Jersey."

(G) Pulte Family Operations

The apex parent engages in the "core business" of home building, and related financial services, through its subsidiaries. This involves acquiring and developing land, constructing residential homes thereon, selling those homes, providing financing (mortgages) to buyers, and

[3] The auditor denying the refund claims was different from the auditor who had imposed the CBT assessments.

disposing of excess acquired land. All activities required in conjunction with the business of land development (planning, environmental/agency approvals, building roads, sewers, water and/or drainage facilities) are performed using staff and independent contractors and/or consultants. The Northeast segment of this core business includes, among other States, New Jersey.

Each operating segment is broken down geographically into an "Area." Each Area is divided into Divisions. The two partnerships herein were a Division of the Northeast segment.

The forms 10-K filed with the SEC do not identify either Preserve, or the two general partners, as holding companies. Rather, they note that the "non-operational activities" of the Pulte group are those of the apex parent and of Preserve's grandparent, due to their status as holding companies.[4] In such capacity, these two entities "support the operations of" the subsidiaries by acting as the "internal source of financing, developing and implementing strategic initiatives centered around new business development and operating efficiencies." The "non-operating assets" are identified as "equity investments in subsidiaries, short-term financial instruments and affiliate advances." Non-operating revenues are "investment earnings of excess funds."

The Forms 10-K also note that "all subsidiaries and operating units operate independently with respect to daily operations." On significant issues such as land acquisition, "homebuilding, mortgage banking, financing . . . and similar operating decisions" approval was required from the business unit and/or corporate senior management. Additionally, they note "each subsidiary is given autonomy regarding employment of personnel," however, "senior corporate management acts in an advisory capacity in the employment of subsidiary officers." Homebuilding

[4] The apex parent's asset is stock in its subsidiaries, and its primary income is dividends declared by the subsidiaries.

management personnel were given performance and incentive bonuses based upon individual results and the "performance of the applicable business unit, subsidiary" or the company as a whole. The corporate management personnel were paid incentive bonuses based on the company's "overall performance." Regardless of the purported autonomy, testimony showed that all personnel had to follow the Pulte family's policies and procedures as to any aspect of home building operations.

Financing for home purchase (mortgages) and title issues are handled by the group's financial services segment comprising of Pulte Mortgage, L.L.C. (owned by Preserve's immediate parent), and other subsidiaries. Pulte Mortgage, L.L.C. arranges financing through origination of mortgage loans for home buyers (and also for the general public), and sells such loans and related servicing rights. All of the underwriting, processing and closing functions, and loan officers are centralized in Colorado and North Carolina. Mortgage loans are originated using corporate family funds plus borrowings (made available through credit arrangements).

Testimony by various individuals explained the functioning of the core business. Although they were all under the impression that the activities were performed by "Division" employees (i.e., employees of the partnerships), it transpired that most were employees of Pulte Service Corp., another subsidiary of Preserve's parent.[5] Such individuals were assigned to work for different Pulte members and identified themselves as Division (or Area) employees. Thus, neither Preserve, nor the general partners, nor the partnerships had any employees. However, Preserve's parent had

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[5] In the statements appended to the amended tax returns, "Payroll" was identified as another subsidiary. There was no testimony on how this entity functions, and how it was related to Pulte Service Corp.

its own employees. The partnerships did not have any officers, however, Preserve and the general partners did. To the knowledge of the witnesses, Preserve did not have outside (i.e., third party) directors for any subsidiary except for certain joint ventures not 100% owned by a Pulte parent.

Mr. Mullen, Esq., an officer of the general partner, Preserve I, who was also an officer of the parent PHC, and employed by Pulte Services Corp., stated that the general partner of Pulte Communities NJ, operated out of Pennsylvania but had an office in South Jersey in the 1990s. Due to a desire to expand into North Jersey, a partnership was formed with an office in Somerset. The Pennsylvania location was a satellite office for land acquisition purposes, however, employees involved in land acquisition resided and worked in New Jersey. He stated that a "project" (home building) involved all of the steps identified as the Pulte group's core business. After the Division employees formulated the specifics of a project (location, type of home development, number of residences, estimated construction cost and profit), the Division's management (located in New Jersey), such as a Vice President, would review it. Then the Area's management would review it. Upper management at the corporate level (i.e., by PHC) also reviewed to ensure that the project complies with the Pulte Group's business plan.

An Asset Management Committee then reviews the project. Per Mr. Frees, who was Vice President & Controller of the apex parent, President of Preserve, a member of Preserve's Board of Directors (the other being Mr. Cook, who worked for the apex parent), and Vice President of both general partners, the Asset Management Committee reviewed the economics of the feasibility studies. The President of the Asset Management Committee was a Vice President for the apex parent. The partnerships had an Operating Committee staffed by the heads of the primary

functional areas (land acquisition, construction, sales, and finance) for the Area or Division, which made the day-to-day decisions. None of these heads were employed by the partnerships, the general partners or Preserve.

Once approved by the Pulte group, the partnerships purchased the land. Mr. Mullen testified that the general partner usually signs land acquisition documents, and he has on occasion, signed a land purchase agreement for the general partner, Preserve I. The court was however, not provided with any land purchase document for review. Mr. Mullen did not think that Preserve had a role on this committee nor in the feasibility studies. He had never visited Michigan, and never interacted with Preserve, but stated that Preserve had no day-to-day role, and its consultation or permission was not required for anything.

Mr. Walsh, the Director of Construction Operations, oversaw the construction aspect of a project (review of project feasibility in terms of time line, sale prices, building specifications, contractor selection), which required approval of the President, and thereafter of the Area's management. He worked out of the Basking Ridge office in New Jersey. He had never heard of Preserve or the general partners, and had no personal knowledge about the partnerships' formation. He could terminate an employee without need for pre-approval from the corporate group (he noted that there were about 200 employees between 2005 and 2010 in New Jersey), and without knowing who the "actual" employer was. He had authority to retain or terminate contractors or outside vendors (with contractors for certain supplies already identified by the Pulte management at the corporate level). The sample contracts provided to the court showed each partnership as one of the two contracting parties. Mr. Walsh visited Detroit only once and had regular meetings in

New Jersey with the various department heads of the "Division." He stated that Pulte had a common internal website for all employees for informational purposes, and included information as to customer relations, cost data, employee benefit plans and human resources.

Mr. Robinson, was a Vice President and Treasurer of PHC, and also an officer of Preserve and the general partners. He stated that he was an officer of "predominantly all of the entities [which were] subsidiaries," and signed documents on their behalf for ease of banking functions. He had no knowledge of the day-to-day operations of any entity or the partnerships, nor was he expected to. He was however aware of the line of business the entity was involved in, which would either be home building or financial services, the latter being mortgage and title insurance (located in Colorado). His main responsibility was to ensure availability of capital for any entity within the Pulte family. Proceeds from closings of homes were swept into the internal bank, Pulte Realty Corp. (hereinafter "internal bank"), which was then invested in short-term assets pursuant to Pulte investment policy set by a Finance Committee, or used to fund the capital/operating needs of the other members of the Pulte group. He stated that "any cash that was generated would have been swept" but did not know "where it was swept from." No entity had an outside bank account, including Preserve. Thus, for instance, if either partnership needed funds to buy land, the internal bank provided funds for the same through wire transfer or a check. The internal bank operated on a "zero balance account," an acceptable corporate practice so that debits and credits offset each other, however, he also stated that not every entity within the Pulte family "had an account" for this purpose. Mr. Robison was unaware if the partnerships participated in this internal cash sweep/management practice however, stated that the partnerships could not independently

make investments or borrow money from outsiders. He asserted that the internal bank lent funds to the Pulte subsidiaries at interest, and had funded the $9,900 Preserve's capital in each partnership.

He also stated that funding for the Pulte group (i.e., raising capital) was through outside borrowing by the corporate parent, that was then diverted to the internal bank, which then used those funds (plus the cash sweeps) to meet the group's funding needs, including applying funds towards the corporate parent's repayment obligations. PHC was the primary obligor of any outside borrowings, and some entities within the Pulte family guaranteed some of those debts. He asserted that Preserve never guaranteed any of the Pulte family debts. However, he was unable to explain the significant amounts reported on the federal schedules K-1 as Preserve's share of recourse and non-recourse liabilities. Nor did he know whether those amounts represented Preserve's guarantee of the partnerships' indebtedness or of any subsidiary's debt. He also asserted that any external debt was guaranteed only by the entity that procured the debt and collectible only against the assets of that Pulte entity due to separate notes (promises to pay) executed by that entity. The court was not provided with any such separate evidence of indebtedness. He also stated that there was no "commingling" of funds by the internal bank in that one could always identify the source of a funding entity. There was no documentary evidence in this regard.

Mr. Furstenberg, the Director of Taxes of PHC, testified that all tax returns for all Pulte business entities were filed at the corporate level (federal or state) from Michigan. He was not involved in the return preparation. Thus, although aware that the partnerships are included in a consolidated return, he was not involved in preparing their tax returns. He stated that once

the New Jersey market was identified as requiring two lines (home buyers and adult communities), corporate would seek his department's (i.e., the Tax Department's) advice on the corporate structure to accomplish the same. The Tax Department would explore tax compliance issues and "tax optimization," (depending on statutory and regulatory rules and procedures), while the Law Department (or outside counsel) would decide on the entity form. He also stated that the choice of the type of entity structure (partnership, LLC, or C corporation) would depend on a variety of factors such as state law, liability reasons and tax considerations. Mr. Frees, the common officer of Preserve and the general partners, and an officer of the apex parent, also stated that the parent's "home building management team" would first identify and research for a viable market (such as New Jersey). Then, with the assistance of the legal team, a corporate structure would be set up so as to "minimize the risk" for the company while also accommodating the objectives of establishing the home building business in that market.

Mr. Furstenberg agreed that Preserve and the partnerships shared accounting and tax preparation services, provided or accomplished by Preserve's parent, PHC, and that the partnerships were charged an internal fee for that by Preserve's parent (called "Pulte Business Charge"). However, he did not view this as a "shared service" because regardless of whether or not an entity used a service, an overhead charge was allocated based on a certain percentage of total revenues. PHC paid Preserve's tax liabilities. He stated that Preserve's capital contribution of $9,900 in each partnership could have been from the internal bank, however, the partnerships never borrowed from any parent or the bank. Rather, if money was needed, it funneled down from PHC to Preserve and from Preserve to the partnerships as capital contributions. He

speculated that the significant amounts of interest expense deductions on Preserve's CBT returns were likely from loans that Preserve may have borrowed from PHC pre-audit period, but did not know if they were passed-through expenses of the partnerships. He agreed that per the tax returns, that there were no cash distributions to Preserve from the partnerships. He also agreed that all entities in the Pulte family shared a common benefit plan and medical benefits. This included the officers of Preserve and the general partners. He also noted that no officer of Preserve or the general partner received extra remuneration to act as officer or director.

Mr. Frees stated that Preserve and the general partner (Preserve I) were among the several hundred subsidiaries which the parent used to manage or hold an investment in different partnerships or entities "to conduct our own building business."[6] He viewed both Preserve and Preserve I as an "investment holding company for" the parent's "business activities." He stated that Preserve had "no other activities." As President of Preserve, he did not consider diversifying or buying/selling other type of investment because home building was its core business, as it was of the parent. He could not recall if Preserve had a separate bank account or received cash distributions from the partnerships. He was not aware of Preserve having any "other activities, employees or property in New Jersey," or any outside individuals as being on the Board of Directors. He did not know how Preserve was capitalized. He opined that the business purpose of Preserve was an "appropriate legal structure," and done after the management team of the parent had identified New Jersey (or an area) as a viable market for the Pulte family's home building

[6] Mr. Frees was unable to be personally present for testimony at trial. The parties consensually agreed to admit his deposition testimony in lieu thereof.

business. The partnerships were however "hands-on builder[s]" of homes in New Jersey (buying land, developing it, constructing homes, and selling those homes).

He noted that as an officer of Preserve (and of the two general partners), he had no "daily responsibilities." He noted Preserve as being an "investment holding company," thus, there were no "day-to-day activities" or "much really going on." Even as officer of Preserve I (general partner) he had no daily responsibilities because that entity was "more an investment holding company." Thus, "there were really no daily responsibilities for Preserve I or Preserve II because the activities were more a holding company of an investment in different partnerships."

Mr. Frees had no interactions with the "management" of the partnerships and did not get involved in the "feasibility studies" for the New Jersey based home building projects. He stated that the Board of Directors of Preserve I had no "say" as to project selection or feasibility studies, however, the other general partner's Board of Directors had a say in project selection. He did not assist the partnership (as President of the general partner Preserve I) with the development of real estate or land/asset acquisition, nor did he delegate this power to anyone since those activities were performed by the partnership, noting that "the partnership was managed by the partnership." The "day-to-day activity, the partnership would be acting as a general partner" and the partnerships acted "independently from the general partner." He clarified that this was because the general partners had no employees, and the partnership's employees exercised the responsibilities of the general partner, although there was no express or written delegation in this regard. He further clarified that the employees of the partnerships meant the "people who were really on location and performing the activities" and assumed that they were employees of PHC, or through a Pulte

subsidiary that "takes care of the paychecks," and employees of the New Jersey Division of the Pulte family. Officers of Preserve were appointed by the parent's general counsel.

Mr. Frees' primary duties were for the apex parent, and his compensation was only related to his services to that parent, although his paychecks came from PHC. His "goals and objectives and incentives were really tied to" the parent entity. His principal place of business was in Michigan. He rarely made business trips to New Jersey, and if he was at a regional meeting in a State closer to New Jersey, then he would make a trip to "see how they might have been managing some of the communities there."

ANALYSIS

Preserve's Subjectivity to the CBT

Under law governing the creation and operation of partnerships, a limited partner cannot participate in the management of the partnership, and cannot be personally liable for the partnership's debts in contrast to a general partner. N.J.S.A. 42:2A-27(a). By virtue of such limitation, a limited partner is assumed to be a passive investor. However, the shield against personal liability for partnership debts is unavailable if the limited partner is "also a general partner" or if the limited partner takes part in the control of the partnership's business. Ibid. See also Canter v. Lakewood of Voorhees, 420 N.J. Super. 508, 518 (App. Div. 2011) ("A limited partner is presumed to be a 'passive investor' unless [it] exceeds that role and exercises control over the . . . partnership's business"). The general partnership laws (formation and operations) do not address taxability of the partnerships or partners. Nor do they address a foreign limited

partner's immunity from income taxation, whether the partner is an individual or an entity, vis-à-vis the partner's presumed passivity.

Partnerships are not taxable entities in New Jersey. Pursuant to the New Jersey Gross Income Tax Act ("GIT"), the distributive share of any "member of a partnership" is taxed at an individual level. N.J.S.A. 54A:5-4. A nonresident individual partner is taxed only on income sourced in New Jersey, thus, his or her "distributive share of" partnership income is subject to GIT if the partnership's income is a result of "work done, services rendered or other business activities conducted" in New Jersey. N.J.S.A. 54A:5-8(a)(3).[7] It is patently evident that the GIT is imposed regardless of the status of the partner, i.e., whether general or limited, and of the partner's residency (except that a nonresident partner can only be taxed on income derived from New Jersey).

For purposes of the CBT, N.J.S.A. 54:10A-2 also does not make any distinction as to a general versus limited partner for imposing tax on a corporation deriving receipts from New Jersey sources. Rather, the statute broadly subjects such receipts to the CBT. Prior to its amendment in 2002 by the Business Tax Reform Act, L. 2002, c. 40, (hereinafter "BTRA"), the statute subjected a foreign corporation to CBT for the privileges of having or exercising its corporate franchise; doing business; employing/owning capital or property; or maintaining an office, in New Jersey. It did not distinguish or immunize New Jersey sourced partnership income from the CBT on grounds the recipient was a foreign corporate limited partner.

[7] A nonresident individual partner is not subject to the GIT if the partnership buys, holds or sells intangible personal property provided these "activities related to the intangible personal property are for the account of the" partnership, and the partnership "does not hold the intangible personal property for sale to customers." N.J.S.A. 54A:5-8(c).

However, Taxation's regulations distinguished the taxability of a general partner and a limited partner. In 1997, Taxation proposed and adopted N.J.A.C. 18:7-7.6 addressing taxability of corporate partners, both general and limited, and the method of allocating their income to New Jersey. See 29 N.J.R. 1686(a) (May 5, 1997); 29 N.J.R. 4327 (a) (Oct. 6, 1997). The majority of the regulation was consistent with the guidelines issued in a 1991 New Jersey State Tax News article.[8] The proposed rule "was intended to address long-standing issues related to when New Jersey would subject to tax corporations that do not operate in New Jersey themselves but which are partners in limited partnerships that have nexus to New Jersey." 29 N.J.R. 1686(a), supra. Allowing corporate partners to use a flow-through method of apportioning income (using a combined allocation factor of the corporation's and the partnership, to the corporation's income) could "serve to reduce the corporate partner's tax liability, providing an incentive for businesses to operate in" New Jersey and provide taxpayers "options in structuring their form of business operation in New Jersey." Id.

Under N.J.A.C. 18:7-7.6(a), an actual or deemed foreign corporate general partner is subject to the CBT just by its status as such partner. However, if a foreign corporation is a limited

[8] See Division of Taxation, Division Issues Guidelines On Corporate Partners, New Jersey State Tax News 49, 50 (May/June 1991). The article stated that a foreign corporate partner is not subject to CBT "solely by virtue of the partnership's activity in New Jersey," unless the corporate partner was itself "doing business" or employing capital or property or maintaining an office, in New Jersey, and provided it "has sufficient contact" with the State for purposes of the federal Due Process clause "and is deriving income from New Jersey sources." Id. at 50. If there was a "distortion or elimination of the entire net income of the corporate partner" because the "partnership may be so integrated" with the corporate partner's business "and/or" because of "the entity theory," then the corporate partner or Taxation "may look through the entity to the partnership's nexus and/or apportionment factors under an aggregate approach." Id. at 51. The corporate partner was deemed to have nexus by virtue of the partnership's nexus. Ibid. Indicia of factors meriting this flow-through approach were substantial intercompany-partnership transactions; the partnership interest was the only or most substantial asset of the corporate partner and major source of income; substantial overlapping of employees/officers; and sharing of facilities, technology, or know-how. Ibid.

partner and its only connection to New Jersey is to own "one or more limited partnership interests" in partnerships doing business in the State, and is otherwise not subject to the CBT, then the ownership of the limited partnership interest does not make the corporation taxable. N.J.A.C. 18:7-7.6(b). A foreign corporate limited partner of a partnership doing business in New Jersey is taxed under the CBT if, (a) it is also a general partner, (b) it takes "an active part in the control of the partnership business," (c) it meets the criteria of a corporation doing business under N.J.A.C. 18:7-1.9, and, (d) it is liable to third parties. N.J.A.C. 18:7-7.6(c).[9]

The regulations also provided an allocation methodology depending on whether the corporate partner was unitary with the partnership. N.J.A.C. 18:7-7.6(g). If unitary, a "flow-through accounting apportionment should be used." Ibid. In this regard, factors indicative of unitariness included the same factors set forth in the 1991 New Jersey State Tax News, supra, with the additional factor that the corporate partner and partnership are "in the same line of business." N.J.A.C. 18:7-7.6(g)(3)(iv). If, however, a foreign limited corporate partner's business was not unitary with the partnership's business, and the partner was not liable for third party debts, then it would not be subject to CBT, because it was a "true limited partner, not a 'deemed general partner.'" N.J.A.C. 18:7-7.6, example IV.

[9] Taxation deleted proposed subsection (d) which had enumerated circumstances indicating a foreign corporate limited partner's "active part in the control or operation of the limited partnership doing business in New Jersey." See 29 N.J.R. 4327(a). The comments to the proposal was that it was "too subjective and will discourage investment in New Jersey partnerships." Id. Taxation responded that the enumeration was based upon N.J.S.A. 42:2A-27(b) which addressed a limited partner's liability to third parties, thus it would delete the enumerated factors and provide that the "exercise of one or more enumerated limited partner rights or powers set forth in N.J.S.A. 42:2A-27b will not provide a basis for a finding of subjectivity." Id.

In 2002, the BTRA extended the reach of the CBT statute to domestic or foreign corporations "for the privilege of deriving receipts from" New Jersey sources, or "of engaging in contacts within" New Jersey, in addition to the other privileges under existing law. N.J.S.A. 54:10A-2. The Legislature made it clear that a corporation's "business activity in" New Jersey suffices to allow imposition of the CBT provided it is permissible by the federal Constitution and federal laws. Ibid. See also N.J.A.C. 18:7-1.6(b) (a foreign corporation is subject to CBT if its "business activity in this State is sufficient to give this State jurisdiction to impose the tax under the Constitution and statutes of the United States").[10]

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." Assembly Budget Committee, Statement to Assembly No. 2501 (June 27, 2002). 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.

Thus, the Legislature intended the CBT "extends" its "reach . . . to a corporation that derives any income from New Jersey sources" instead of limiting the same to the concepts of

[10] In 2011, Taxation inserted the last portion of the sentence starting with "provided," to conform the regulation to the 2002 amendment to N.J.S.A. 54:10A-2. See 43 N.J.R. 277(a) (Feb. 7, 2011); 43 N.J.R. 2193(b) (Aug. 15, 2011).

"'doing business,' employing or owning capital property, or maintaining an office in the State." Id. "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." Id.

In 2003, Taxation promulgated extensive regulations to implement the BTRA's nexus expansion. See 35 N.J.R. 1573(a) (April 7, 2003); 35 N.J.R. 4310(a) (Sep. 15, 2003). Relevant to the issues here, N.J.A.C. 18:7-1.6 was amended to include "deriving receipts" from New Jersey source and "engaging in contacts" with New Jersey as two alternative bases for CBT subjectivity, limited only by the federal Constitution.[11]

N.J.A.C. 18:7-7.6 relative for "allocation" of income for corporate partners was changed. In keeping with the broad reach of the BTRA, subsection (b) now provided that a foreign corporation whose only connection to New Jersey was the owning of partnership interests could be subject to CBT provided its "connection with" New Jersey sufficed to allow taxability under the federal Constitution and laws. Subsection (c) was amended so the circumstances under which a foreign corporate limited partner would be subject to the CBT were stated in the alternative. Thus, if the limited partner was also a general partner; or took "an active part in the control of the

[11] In response to a comment Taxation noted that "the nexus standards over a foreign business are set forth in N.J.S.A. 54:10A-2 and N.J.A.C. 18:7-1.6. New Jersey does not use a factor presence nexus rule based upon substantial presence of apportionment fractions in New Jersey." 35 N.J.R. 4310(a), supra. Taxation "is simply following the legislative intent of the statute insofar as it is imposing tax to the limits of the U.S. Constitution and Federal statutes." Ibid. In response to a comment that the BTRA and implementing regulations "are a source of confusion when they provide taxpayers notice that for nexus purposes the CBT reaches the limits of the Constitution," Taxation responded that guidance in this regard is from rules, judicial opinions, and Congress "in particular areas where constitutional jurisprudence may be unsettled." Ibid.

partnership business;" or met the criteria of a subjectivity under N.J.A.C. 18:7-1.6; or met the criteria for "doing business" under N.J.A.C. 18:7-1.9;[12] or if the partnership's business was "integrally related to the" corporate partner's business, then the limited partner was subject to CBT. Subsection (d) was amended to cross-reference N.J.A.C. 18:7-17 as to the "[t]ax filing and payment responsibilities of partnerships."

Taxation also amended N.J.A.C. 18:7-1.8(a) (in 2011 but effective 2002) to conform to the BTRA's explicit intention to subject foreign corporations to tax if they either received income from New Jersey sources or engaged in "contacts within this State." 43 N.J.R. 277(a) (Feb. 7, 2011); 43 N.J.R. 2193(b) (Aug. 15, 2011). The regulation now stated that the CBT is imposed on a foreign corporation described in N.J.A.C. 18:7-1.6, including one "that derives receipts from sources within New Jersey or engages in contacts within New Jersey." N.J.A.C. 18:7-1.8(a). This was provided the "the taxpayer's business activity in New Jersey" being "sufficient to give" New Jersey the "jurisdiction to impose the tax under the Constitution and statutes of the United States." Ibid. The regulation retained the prior language of subjectivity to CBT, i.e., if the foreign corporation was "doing business," or employing capital, owning property or maintaining an office in New Jersey. N.J.A.C. 18:7-1.6.

[12] Factors considered when determining whether a foreign corporation is deemed to be "doing business" include (1) "the nature and extent of [its] activities" in this State; (2) office or place of business location; (3) "continuity, frequency, and regularity of [its] activities" in this State; (4) employment of "agents, officers, and employees" in this State; and (5) "location of [its] actual seat of management or control." N.J.A.C. 18:7-1.9.

It is undisputed that Preserve had New Jersey sourced income for the tax years at issue as a result of being a limited partner in both partnerships. It is undisputed that both partnerships did business in New Jersey, resulting in production and sales of a tangible product (improved real property) in New Jersey, and income therefrom. It follows therefore that Preserve is undoubtedly subject to CBT for the "privilege of deriving receipts from" New Jersey. See N.J.S.A. 54:10A-2; N.J.A.C. 18:7-1.6(a)(2); N.J.A.C. 18:7-1.8(a). Its status as a limited partner, will not in and of itself, defeat the CBT's statutory or regulatory subjectivity provisions. See N.J.A.C. 18:7-7.6(c)(3) (foreign limited partner which meets the criteria of N.J.A.C. 18:7-1.6 is subject to CBT on its distributive share of partnership income). See also I. Jerome R. Hellerstein and Walter Hellerstein, State Taxation, ¶6.12 (3d ed. 2005) ("In most states, a corporate partner in a partnership doing business in the State is subject to the State's corporate income or franchise tax on its distributive share of the partnership income, even if the corporate partner has no other ties to the State . . . . The States generally apply this rule to limited corporate partners as well as to general partners."); John A. Swain, State Income Taxation of Out-of-State Corporate Partners, 18 Chapman L. Rev. 211, 217-18 (Fall 2014) (since the BTRA "explicitly asserts jurisdiction as far as the federal Constitution would permit," foreign corporate limited partners can be taxed for receiving New Jersey source partnership income). Indeed, Preserve complied with this law by filing CBT returns, reporting and paying tax upon, its share of the partnerships' income with the accompanying

Schedules (K-1 or to Preserve's CBT returns) consistently reporting Preserve as either having a presence in New Jersey or no regular place of business outside this State.[13]

Since Preserve is subject to the CBT simply by virtue of having unquestionably derived income from New Jersey sources, the court need not consider Preserve's claim that Taxation's assessments are voidable since they were erroneously grounded on a finding that Preserve had authority to do business. Since 1994, N.J.A.C. 18:7-1.8(a) provided that the CBT is imposed upon a foreign corporation "regardless of whether it has formally qualified or is authorized to do business in New Jersey." See also Thomson-Leeds Co., Inc. v. Taxation Div. Director, 8 N.J. Tax 24, 31-32 (Tax 1985) (a corporation is "subject to the CBT even if it has not officially procured a corporate franchise certificate in New Jersey, if the corporation does, in fact, do business, employ or own property or capital or maintain an office in this State") (citations omitted).

Preserve maintains that N.J.A.C. 18:7-1.6 and Example 3 of N.J.A.C. 18:7-1.8(a) should be voided as exceeding statutory authority of N.J.S.A. 54:10A-2. As noted above, N.J.A.C. 18:7-1.6 addresses the "subjectivity to" CBT. Subsection (a)(1) makes every domestic company subject to the CBT. Subsection (a)(2)(i) addresses a foreign corporation and deems it subject to the CBT, if among others, it holds a certificate of authority "to do business in this State." Example 3 of

[13] N.J.S.A. 54:10A-2 and its expressed intent aim to capture "receipts" or any income. Consequently, the observation in BIS, supra, that N.J.A.C. 18:7-8.12 (the regulation defining business receipts for allocation purposes) does not "specifically address partnership distributions as a business receipt to be taxed," see 25 N.J. Tax at 102; 26 N.J Tax at 500-01, is not per se a reason to dismiss Taxation's final determinations. Notably, the regulation also applies to receipts such as dividends, which, similar to a partner's distributive share of partnership income, is a stockholder's share of a corporation's excess income received due to the stockholder's status as an owner. In any event, the BIS court did not rest its conclusion on a distinction between receipts and income, therefore, its observation in this regard is neither binding nor persuasive.

N.J.A.C. 18:7-1.8(a) states that where a foreign corporation has "received a certificate of authority to do business in New Jersey by Division of Revenue . . . but does not actually do any business in New Jersey" nor has any other business contacts, it is subject to CBT. This is because it "sought and received the privilege of exercising its corporate franchise in New Jersey." Ibid. Such a company must "file a return and pay the minimum tax." Ibid.

Preserve's arguments for invalidating the above regulations and Example 3 are not persuasive. First, Preserve asks this court to invalidate N.J.A.C. 18:7-1.6 in its entirety. However, the regulation includes subjectivity of domestic companies to the CBT and several alternatives as a basis for New Jersey's ability to impose CBT. Yet Preserve does not articulate any reason for the relief it seeks. Second, N.J.S.A. 54:10A-2 itself subjects a corporation to the CBT for either "having" a corporate franchise in New Jersey, or exercising the same in this State. The regulations thus parrots the statute, yet Preserve does not argue that the statute is invalid. Example 3 of N.J.A.C. 18:7-1.8(a) simply seeks imposition of the minimum tax. Neither N.J.A.C. 18:7-1.6(a)(2)(i) nor Example 3 profess to ignore the constitutional limits incorporated in N.J.S.A. 54:10A-2 and N.J.A.C. 18:7-1.8(a).

Consequently, that Preserve formally acquired a Certificate of Authority in December 2006 does not invalidate Taxation's CBT audit for tax years 2005 or later, nor estop Taxation from asserting such CBT liability. In this connection, Preserve's contentions that the refund denials were arbitrary, capricious, and in violation of the Taxpayer Bill of Rights because they were based on facts known to be untrue, are fallacious. While it is certainly undisputed that the State issued a Certificate of Authority in late December 2006 (after it had notified Preserve in October 2006 that

Preserve's tax filing and payments required it to obtain such certificate), Preserve's own 2005 amended CBT return claimed it was doing business since 2000.[14] Further, although the auditors issuing the assessment and refund denials were different individuals, Preserve was entirely aware that Taxation was pursuing a unitary analysis as a basis of asserting Preserve's nexus to New Jersey, and that several Pulte subsidiaries were involved. The audit narratives show that Preserve's representative was aware of these inter-related audits/issues and even delayed acting on Preserve's refund claims in this regard.

Preserve's Nexus To New Jersey

In BIS, supra, the Appellate Division noted that regardless of the Legislature's explicit intention in the BTRA that a foreign corporation should be taxed up to the limits of the federal Constitution, "such an intent, like the statutory provisions themselves, cannot override constitutional limits on a state's taxing power." 26 N.J. Tax at 497. Thus, "notwithstanding the legislative effort to close CBT loopholes, the constitutional test remains intact" and the lower court had "applied the correct statutory provisions and relevant case law without the need to discuss the legislative history of changes made to the CBT Act." Id. at 498. In other words, although the BTRA explicitly sought to limit foreign companies avoiding tax on income received from a New Jersey business by participating in that business as a partner, and although the Legislature also explicated that limited partnerships in New Jersey using corporate partners "result[ed] in the avoidance of even a single taxation" of the partnership's income "derived from their New Jersey

[14] Per a 2012 Office Audit Narrative, Taxation observed that Preserve had been doing business in New Jersey since January 8, 2001.

activities," Statement to Assembly No. 3045 (Aug. 11, 2000), those goals must cede to the federal constitutional limits.

In Village Super Market of PA, Inc. v. Director, Div. of Taxation, 27 N.J. Tax 394, 410-411 (Tax 2013), the court noted that under the federal Constitution's Due Process clause, a State can tax a foreign corporation which has "minimal connection" with that State. Nexus can be established through either a "transaction-based analysis (tax on an activity) or a presence-based analysis." Id. at 411. "In a transactional analysis, there must be a connection between the" foreign entity and "the activity being conducted in the taxing State." Ibid. A "passive investor in an unrelated business enterprise would not have transactional nexus." Ibid. (citing Allied-Signal Inc. v. Director, Div. of Taxation, 504 U.S. 768 (1992)). The court concluded that the taxpayer therein had "sufficient minimum contacts to meet the requirement of presence based nexus with New Jersey," due to a physical presence of its office in New Jersey, a "contractual presence" due to a cash management Agreement governed by New Jersey laws, and "correlating business interests." Village, supra, 27 N.J. Tax at 415-16.

The court will therefore examine Preserve's nexus under the above framework. In doing so, the court rejects Preserve's argument that since the partnership agreements render it a mere limited partner with no role in the business conduct or operation of either partnership, it cannot be a general partner, therefore, cannot have nexus. However, as noted before, neither the statute nor the regulations support an argument that the mere status of the corporation as a limited partner is decisive of the entity's subjectivity to CBT. Indeed, even before the BTRA, when Taxation first promulgated N.J.A.C. 18:7-7.6(c)(2) (corporate limited partner which "takes an active part in the

control of the partnership business" is subject to CBT), a comment requested its elimination as "business participation by a limited partner . . . would appear to be legally prohibited." See 29 N.J.R. 4327(a), supra. Taxation did not accept this suggestion noting that if a "limited partner exceeds its legal authority," which can occur, then, such partner will be subject to the CBT. Id. Consequently, the recitation of the restrictions of a limited partner in the partnership agreement does not end the inquiry for purposes of N.J.S.A. 54:10A-2.

To this extent Preserve's reliance on BIS, supra, for the proposition that a limited partner can never be subject to the CBT because it can never participate in the partnership's business by virtue of the partnership agreement, is misplaced. To hold otherwise is to elevate form over substance, render redundant not only the need for a trial on cases with these issues, but also the CBT statute, which extends taxability to foreign corporate partners, general or limited. The court will therefore consider all the facts and circumstances of Preserve's business purpose, its involvement in the partnerships' business, and its and the partnerships' dependence and interdependence on PHC.

The evidence before the court shows that the key management personnel who were the officers of Preserve and of the general partners, were all officers of PHC and/or the apex parent. The other individuals were also officers of PHC. Those individuals were all in a management capacity for PHC or the apex, and in that same capacity actively operated and ran the partnerships. Their essential roles were only to actively manage and operate the partnerships' business of developing land, building and selling homes, each of which is the core business of the Pulte family, in compliance with the Pulte family's business policies and practices. Their compensation and

incentives were tied only to that function and role. They ran committees which managed and made decisions for the partnership's business, subject to the supervision, consultation, and approval of PHC. Mr. Frees, an officer of Preserve and the general partners, worked for the apex parent, his compensation was only related to his services to that parent, his "goals and objectives and incentives were really tied to" the parent, so much so that he seldom visited New Jersey where the partnerships did business. The Vice President and Treasurer of PHC, in charge of financing activities of/for all Pulte entities performed the same role for Preserve, the general partners, and the partnerships.

In other words, these individuals' only interests were in ensuring that the Pulte family's core business was properly being undertaken and executed. That core business was home building, not passively investing in partnerships. The individuals viewed their responsibilities in the home building business as being executed for the New Jersey "Division" of Pulte group. Testimony showed that some individuals did not even know of Preserve's existence, the general partners' existence, or even the partnerships' existence. There was no evidence explicit or implicit, to show that these officers or individuals played a distinctly passive role for Preserve, i.e., contributed capital to the partnerships and then did nothing, or as Preserve's officers, were actively engaged in an independent unrelated business or business activity. Therefore, it cannot be concluded that these individuals, some of whom were officers of both Preserve and the general partners, all of whom worked for the parent, all of whom actively managed PHC's and the partnerships' day-to-day operations and the core business of the Pulte family, took no part at all in the partnerships' business, if and when they donned the hat as Preserve's officers. This is especially when

there was absolutely no distinction in the partnerships' and PHC's line of business of home building. Even if it said that PHC actually ran the partnerships (Preserve maintains it has no qualms in conceding that the partnerships are unitary with PHC), it ran it through individuals, some of whom were officers in both Preserve and the general partners, solely in furtherance of the parent's goal of actively managing and operating the Pulte family's core business of building and selling homes. As with the individuals, there was nothing to show any quantum of passivity in this role or any role of any passive "investment" in this capacity. See e.g. Village, supra, 27 N.J. Tax at 417 (limited partner's distributive share of partnership income bore a "rational relationship to New Jersey" due to, among others, "the overlap of officers and directors, the commonality of the business enterprises"). Under the totality of the facts here, the minutes of Preserve's meeting showing officer appointments as proof of zero activity in the partnerships, does not, standing alone, require a different conclusion.

Except for one document that was purported to have been signed by the general partner (which document was not provided to the court), there was nothing to show that only the general partner performed all operations, management and control for the partnership while the limited partner was an absolute passive "investor." Although the sample contracts provided to the court showed each partnership as one of the two contracting parties, there was nothing to show that the individual signing those contracts was an officer or employee of only the general partner. The court review of the officers listed on Preserve's CBT returns showed that none of those individuals

were the signatories on the sample contracts.[15] These facts weaken Mr. Mullen's testimony, which cannot be considered in a vacuum, that he had never interacted with Preserve, and that Preserve had no day-to-day role, and its consultation or permission was not required for anything.

Directly contrary to Preserve's position that it is a holding company, the forms 10-K do not identify Preserve as such, or even as a "non-operational" entity. Those forms identify the "non-operating assets" as "equity investments in subsidiaries, short-term financial instruments and affiliate advances." Yet Preserve's CBT returns showed absolutely no investments in any Pulte subsidiary. Nor did those returns reflect any "investment earnings of excess funds," that terms defining the term "non-operating revenues" on the Forms 10-K.

In sum, the record amply supports a finding that the lines between the partnerships, the general partner, Preserve and PHC were far from sharp and distinct and in fact were completely blurred. Preserve was not a mere passive investor, actively involved in an unrelated business, as was the finding for the foreign corporate limited partner in BIS, supra. Indeed, Preserve had no authority to make, sell, or diversify any investments let alone have its own independently held/operated external bank/financial account. See e.g. Village, supra, 27 N.J. Tax at 416 (finding the claims of the limited partner as being entirely different from the general partner or the

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[15] Preserve argued that the seven to nine individuals shown on the CBT returns (and provided to the court) were limited due to space constraints on the returns when in fact there were 11 more officers per the minutes of the Board meetings, which showed that there was no "substantial" overlapping of officers and employees between Preserve and the general partners. The basis for this argument is specious. Although the schedule on the CBT returns has seven lines to indicate the names of officers, it did not preclude inclusion of an attachment for more listings. Indeed, Preserve indicated names of the eight or nine individuals only on an attachment to the Schedule.

partnership as incredible since "[t]he formation of the separate business entities of the [limited partner] and [the partnership] appear to simply be a guise created for the purpose of tax avoidance"). The court concludes that under all of the facts, Preserve had nexus to New Jersey.

While not necessary for this opinion, the above facts equally support a conclusion that Preserve was completely integrated and interdependent with/upon the partnerships' and PHC's business. No entity was allowed to diverge from the Pulte family's practices and procedures. As noted above, there was commonality of officers, thus, sharing of management personnel and functions. All eight/nine individuals of Preserve were also officers and employees of both general partners. One employee common to Preserve, the general partners, and the partnerships signed Preserve's CBT returns and the partnerships' tax returns. All entities, including Preserve and the partnerships shared tax preparation, filing, and tax payment facilities. All entities, including Preserve and the partnerships, were provided the same financing facilities, i.e., only through Pulte's internal bank. Neither Preserve, nor the general partners, nor the partnerships, were allowed to open/operate external bank or financial accounts, or invest monies (which is also evidence that partnership agreements' reservation of the "exclusive right and power to buy and develop land, . . . borrow money . . . operate bank accounts, hire employees, make or revoke tax elections" to the general partner, was not the actuality). All employees, whether they considered themselves as "Division" employees or otherwise, participated in the same medical/benefit plans. This included the officers of Preserve and the two general partners. In other words, each entity, i.e., the partnerships and the three corporate partners, were treated no differently than, and were Restricted/limited to the same extent as any other Pulte family member.

Preserve's CBT returns further support the inter-company involvement/transactions. Preserve agrees that it participated in the cash management system, however, by a "single transaction" of $1,000, a barely significant amount in the weighty nexus analysis. Its balance sheet for each year 2005-2007 shows a beginning-year and year-end balance of $1,000 as "intercompany receivables." Preserve does not explain what this "transaction" is and why it is "single," but presumes this must be so because the same $1,000 is reflected at the beginning and end of the year for each of the three years at issue here. However, this is not a foregone conclusion. The balance sheet only shows the beginning-year and year-end balances and does not capture or explain periodic cash sweeps, if any. Therefore, its reliance on this reported amount as showing an allegedly insignificant participation in the Pulte group's cash sweep management, thus, lack of nexus, is unpersuasive.[16]

Additionally, on each of its CBT returns for the years at issue, Preserve added back significant amounts as interest paid to the internal bank ($12,543,866 for 2005; $4,203,800 for 2006; $63,546 for 2007). Yet its balance sheet showed zero liabilities and zero loans payable to affiliates. Taxation's audit papers indicate that they were Preserve's share of interest expense paid by the partnerships to a subsidiary (Pulte Realty Corporation).[17] However, the testimony in this

[16] Notably, Preserve's balance sheet for 2005 shows a beginning-year balance of $1,000 as "trade notes and account receivables," and zero as the year-end balance. A "trade" receivable generally means debt owed to the business in the course of that business' regular trade or operations, yet Preserve claims to have no intercompany transactions as to the home building business.

[17] Taxation also noted that for 2008 tax year, per Preserve's own responses, the interest expense passed through to it was its share of expense paid to a third party, not to Pulte Realty Corporation, and that inter-company accounts reflected transactions with the Parent's primary lending account used for inter-company loans. Balances in such accounts move in and out on a daily basis.

regard was either no knowledge at all, no knowledge whether they represented passed-through expenses of the partnerships, or a speculation that the interest expense deductions were likely on loans Preserve borrowed from PHC for a pre-audit period. Even if it is deemed that Preserve was only "borrowing" to make capital contributions to the partnerships, the amounts paid and time when payments were made do not co-relate since Preserve made additional contributions to Pulte Communities of $9,546,830 in 2005, and $3,518,932 in 2008.

Preserve's dismissal of the reporting of its share of recourse liabilities on the federal schedule K-1s as evidencing any link between itself, the partnerships, PHC and/or the internal bank is unconvincing. Preserve claims that those amounts represent "balance sheet liabilities," not "borrowings" of the partnerships. It notes that "whoever prepared" Pulte Homes' 2005 federal schedule K-1s performed a mechanical math exercise by allocating 99% of accounts payable, plus short term mortgages, notes, bonds, plus other current liabilities, plus other liabilities, totaling $179,860,565 (shown on the balance sheet). However, it appears incongruous to suggest that a nationally operating home building business, sophisticated enough to create corporate entities for maximal tax savings, would suddenly permit "whoever" to prepare an improper K-1. Regardless, the explanation is unpersuasive. The statement accompanying the balance sheet breaks down "other current liabilities" into "accrued liabilities" for items such as service, insurance, "model conv.," model startup, severance, miscellaneous, and payroll/withholding. Also included are customer deposits, intercompany liabilities and job cost payable. Preserve fails to explain what comprises "accounts payable" or "intercompany liabilities" (a category in the statement itemizing "other current liabilities" of $563,566,886, which category appears for each tax year at issue

here, from each partnership). Nor does it explain how liability for "customer deposits" are not the partnerships' business debts.

Preserve may be correct that the itemized current liabilities are not "borrowings" by the partnerships in the sense of loans taken by the partnerships from a third-party financial institution to meet the operational costs. Nonetheless, the manner in which the internal bank functioned vis-à-vis Preserve's and the partnerships' financing needs is substantively no different than an outside lending (e.g., a line of credit), albeit, as alleged, with more efficiency and lower costs due to funds being cycled and recycled among the Pulte entities. This is very similar to the inter-company loans between the parent/general partner, and used by the latter for business of the partnership in Village, supra (albeit without a formal agreement present in that case). 27 N.J. Tax at 403, 416.[18]

In sum, the court finds that there was no substantive distinction made as to the corporate partners whereby only the general partner exercised power, control, or management for the partnerships' operations, and was solely responsible for the financial aspects of the partnership (borrowing, repayment) while Preserve was limited or circumscribed in every facet including financial liability. Evidence shows that the lines between PHC, Preserve and the partnerships are not as finite as specified in the partnership agreements, and are in fact extremely blurred (if drawn

[18] In furtherance of its argument that the recourse liabilities on the K-1s should be disregarded for purposes of the issues herein, Preserve claims that it never guaranteed any entity's debt. The testimony in this regard was unhelpful since the witness who stated that Preserve does not guarantee debts was unable to explain the federal K-1s showing Preserve's share of recourse liability. In its post-trial brief, Preserve referenced a website to show that only the partnerships were identified as guarantors. The court will not consider this new evidence since it was not part of the trial or the two-binder joint stipulation of exhibits, nor incorporated in those exhibits by reference. The court however does note that the SEC Forms 10-K discuss the "unsecured senior notes" which are issued by the apex parent are "guaranteed by" both that parent and "certain of its 100% owned subsidiaries," which are not specifically identified by name. Nonetheless, this does not change the court's rejection of Preserve's disregard of the un-amended schedule K-1s.

at all), and do not credibly establish a distinction as to Preserve due to its limited partner status, and the other two corporate general partners. There was only one hat worn by the individuals who actively managed the partnerships' business, some of whom were officers of both Preserve and the general partners, some of whom were only the general partner's officer, and all of whom were officers of the parent. That hat was to actively run the day-to-day operation of the Pulte's core business, home development and building. The lack of knowledge of the very existence of Preserve, the general partners or the partnerships enforces this conclusion. The court cannot, and will not conclude that due to the partnership agreements language of reserving the exercise of power, control or management only to the general partner, the necessary consequence must be that Preserve did nothing in either partnership except receive its share of pass-through income. Under the facts here Preserve was as much of a general partner as the other corporate general partners, and Preserve had nexus to New Jersey for CBT purposes. These facts, and conclusions therefrom, distinguish the instant matters from BIS, supra, where there was neither an allegation, an issue, nor discussion, thus, no finding, of a limited partner being a deemed general partner.

The BTRA amended the CBT subjectivity statute to the limits of our Constitution. Thus, a mechanical reading of the same or an unduly restrictive reading of the same will defeat this clearly stated legislative goal and purpose. As was noted in Wirth v. Commonwealth, 95 A.3d 822, 839 (Pa. 2014), a "narrow argument" that the State cannot impose income tax on non-residents would "arguably foreclose[] . . . the ability to tax non-Pennsylvanians engaged in commercial real estate transactions within our state." However, "[e]ntities that operate in multiple states are not immune from . . . state taxation, and so long as a state fairly apportions and taxes a foreign entity

for business conducted within that state, the Due Process Clause is not violated." Ibid. (citation and internal quotation marks omitted). This pointed observation is a persuasive endorsement of the conclusion herein and applies regardless of the fact that the limited partners in Wirth were individuals. See also Swain, State Income Taxation of Out-of-State Corporate Partners, supra, 18 Chapman L. Rev. at 217-18 (since the BTRA "explicitly asserts jurisdiction as far as the federal Constitution would permit," foreign corporate limited partners should be taxed for receiving New Jersey source partnership income).

Validity of the Assessments Against the Partnerships

In 2001, the Legislature enacted N.J.S.A. 54:10A-15.7 addressing payment of the CBT by foreign corporate partners which do, or do not, consent to the State's jurisdiction for CBT purposes. The reason for this enactment was to "close[] a gap in the administration of the taxes imposed on owners of limited partnerships . . . ." Assembly Commerce, Tourism, Gaming & Military and Veterans' Affairs Committee, Statement to Assembly No. 3045, (June 4, 2001). The gap was because the limited partnerships in New Jersey using corporate partners "were [being] created to avoid a double level of taxation," however, in reality, such business-form mechanisms "result[ed] in the avoidance of even a single taxation" of the partnership's income "derived from their New Jersey activities." Id. Failure to obtain consent or withhold the required tax renders the "business" liable as "a corporation business taxpayer itself." Id. See also Assembly Appropriations

Committee, Statement to Assembly Committee Substitute for Assembly No. 3405 (June 21, 2001) (law is intended to "assure[] the fair taxation of the owners of . . . limited partnerships").[19]

As part of the loophole closing mechanism, the BTRA also enacted amendments which affected "tracking . . . income of . . . partnerships, that do not themselves pay taxes but distribute income to their owners, the eventual taxpayers." Statement to Assembly No. 2501, supra. This is because enforcement of the CBT was "difficult" for the New Jersey sourced income paid to non-resident partners or members of pass-through entities. Id. The BTRA's solution was by "providing a mechanism for securing revenue prior to distribution," so that partnerships (except those listed on a U.S. national stock exchange) would be required to "make a payment on the share of income of each nonresident (corporate) . . . owner at a 9% rate," which could be credited towards the partner's "tax liabilities." Id. See also BIS L.P. Inc. v. Director, Div. of Taxation, 27 N.J. Tax 58, 63-64 (Tax 2012), aff'd, 28 N.J. Tax 269 (App. Div. 2014) (the BTRA "further clarified how the tax payments required by N.J.S.A. 54:10A-15.7 would be treated.").

N.J.S.A. 54:10A-15.7 (a) provides that a foreign limited partnership "may obtain" the consent of "each of its partners" that New Jersey has "the right and jurisdiction to tax and collect the tax, hereby imposed, on the entire net income of the partner." Computation of the tax is based

[19] The Substitute introduced the allocation factors based on the "unitary" relationship (or lack thereof) between the foreign corporate partner and the limited partnership, as well as the credit of withheld and paid tax to the nonconsenting partner. See Assembly Committee Substitute to Assembly No. 3405 (June 21, 2001). The Substitute and Assembly No. 3405 referenced only "owners" of the partnerships. Cf. Statement to Assembly No. 3405 (bill "provides a similar mechanism [as that of S corporation members] for the taxation of limited corporate owners of . . . limited partnerships").

on allocation factors and differs "if the relationship between the partner and . . . foreign limited partnership is unitary" or "not unitary." Ibid. If a "written consent" is not obtained, then the partnership should "remit" CBT which equals the "the nonconsenting partners' share of the entire net income of the" partnership times an allocation factor, times the maximum tax rate. N.J.S.A. 54:10A-15.7 (b). Any tax paid should be "credited to the partner." N.J.S.A. 54:10A-15.7 (c). The statute does not distinguish between a limited and general partner since it defines "partner" as "an owner of an interest in the partnership, in whatever manner that owner and ownership interest are designated." N.J.S.A. 54:10A-15.11(c).

Taxation's regulations define a nonresident corporate partner as a corporation which is not tax-exempt, and which does "not maintain a regular place of business" in New Jersey. N.J.A.C. 18:7-17.1. In this connection, "each regular place of business of a partnership that is unitary with a corporate partner who is filing a return in this State is to be treated as a regular place of business of the corporate partner." N.J.A.C. 18:7-17.5(c). For instance, if a New Jersey partnership "has a unitary relationship under the criteria set forth at N.J.A.C. 18:7-7(g)(3)[20] with a corporate partner located in Illinois," then the "corporate partner" is deemed "to have a regular place of business in the State," and is consequently "not a 'nonresident corporate partner.'" N.J.A.C. 18:8-17.8

[20] As noted above, unitary relationship between a corporate partner and partnership exists if there is one or more of the following facts: "substantial intercompany-partnership transactions;" the partnership interest is the only or most substantial asset of the corporate partner and major source of income; the corporate partner and partnership are in the same line of business; there is substantial overlapping of employees/officers; sharing of facilities, technology, or know-how. N.J.A.C. 18:7-7.6(g)(3).

(example). In this case, the corporate partner can file a form to indicate that the partnership need not pay CBT on the partner's behalf. Ibid.

Both parties concede that if this court were to find Preserve as subject to CBT for the tax years at issue, and having nexus, then the assessments against the partnerships falls since by virtue of the statue and regulations Preserve would be considered a resident corporate partner. That is what this court has found. This finding would also cancel the imposition of interest and penalties relative to those assessments.[21]

Preserve's Entitlement to Pay Lower Tax as an Investment Company

Effective August 7, 2006 (thus, much after the BTRA was enacted), Taxation amended its regulations as to investment companies so that "[t]he direct investment in a non-publicly-traded pass-through entity" would not be considered "'qualified investment activities and 'qualified investment assets' . . . if that entity would not satisfy the definition of investment company if it had been organized as a corporation." N.J.A.C. 18:7-1.15(b).

The BIS court held that the regulation it could not be applied retroactively (there, to tax year 2003, the "year in which" the corporate limited partner elected to be treated as an investment company). 25 N.J. Tax at 99-101. In Manheim, supra, this court decided that the amendment was an invalid exercise of Taxation's rule making power. 30 N.J. Tax at 37.

[21] Neither party addressed their arguments specifically to tax years 2008 and 2010, the only years before this court as to the assessments against the partnerships, when those two tax years were not before the court as to the assessments against and denial of refunds to Preserve. However, if Preserve is subject to the CBT with nexus, then the assessments against the two partnerships would be unwarranted. The court notes that Taxation's audit did not impose any additional CBT for tax year 2008 during its audit, therefore, this year may be a non-issue.

This court's findings as to the confluence of Preserve's and the partnerships' involvement in the Pulte family's business of home building, the lack of any substantive distinction between Preserve and the corporate general partner as to the partnerships' business operations, control and management, as well as Preserve's involvement in the inter-corporate financial dealings, fully and adequately support a finding that Preserve is not entitled to an investment company status. Consequently, the court does not have to analyze the definition of an investment company in N.J.S.A. 54:10A-4(f) vis-à-vis Taxation's regulations interpreting the same, and thus, the decision in Manheim, supra.

Notably in Manheim, supra, there was no finding as to the limited partner's allegations that it was a mere passive investor, thus, was automatically entitled to an investment company status. Rather, the court simply ruled on the validity of Taxation's regulation which disqualified investment in certain partnerships from being considered for purposes of the investment company analysis. 30 N.J. Tax at 37. The court specifically denied the taxpayer's motion for summary judgment as to its "qualification as an investment company." Id. at 40. It held that Taxation's audit "which found that there was a substantial overlap of officers and directors of the general and limited partners" would allow a "rational fact-finder" to infer that the taxpayer's "officers and directors did, in fact, exercise control over" the partnership's business operations. Id. at 39-40. As pertinent here, the court also stated that "an examination of the facts in this case may lead a

fact-finder to find that plaintiff has a constitutional presence in New Jersey that would subject plaintiff to CBT." Id. at 40. This is exactly the situation here.[22]

Abatement of Penalties

The court agrees with Preserve that amnesty penalties are unwarranted since there was no willful decision to underpay tax. Indeed, here Preserve paid CBT (albeit as an investment company for all three tax years at issue). See also United Parcel Service General Services Co. v. Director, Div. of Taxation, 220 N.J. 90, 94 (2014) (the amnesty penalty statues do not "expressly indicate[] whether a taxpayer who timely files tax returns, pays all reported tax liabilities and is found to be liable for additional taxes following an audit, has 'failed to pay' New Jersey taxes, and therefore should be assessed a penalty").

As to the underpayment penalties, Preserve notes that this would only come into play should this court find it could not qualify as an investment company. If so, Preserves argues the same should be abated since the denial of the status was based upon an invalid regulation, which in any event can only apply to tax year 2007 since the effective date cannot be retroactive or a date without any reference to a tax year. Taxation argues that the effective date should be read as applying to any tax return filed on or after August 7, 2006.

First, the effective date of an enactment puts the public on notice of the same, and the date it is effective. See e.g. Brasko v. Duchek, 27 N.J. Eq. 567, 569 (Prerog. Ct.1940) ("A statute does

[22] Also pertinent is the court's holding that although Taxation had allowed an investment company treatment in a prior tax year, it was not estopped from denying such a treatment subsequently. Manheim, supra, 30 N.J Tax at 40. Taxation would similarly not be foreclosed here from denying Preserve an investment company status and treatment.

have the effect, immediately upon its enactment, of giving notice to all persons that the law will be as set forth in the statute, on and after the specified date for it to come into effect"). Further, whether the effective date is a future one, then the enactment "is to be construed in the same manner as if it had been enacted on that date, -- that it speaks only from the date on which it is to go into effect, and has no force or effect whatever until the arrival of that date." Ibid. Thus, here, the regulation's effective date is not per se invalid.

Second, a corporation elects its investment company status "on a timely filed original return or on a timely filed amended return." N.J.A.C. 18:7-1.15(e). Thus, the timing of electing such status is when it files it tax returns. See e.g. Chemical New Jersey Holdings, Inc. v. Director, Div. of Taxation, 22 N.J. Tax 606, 612 (App. Div.2004) ("When plaintiff filed its returns as an investment company . . . it presumably did so to take advantage of the preferential tax treatment . . . afforded investment companies" thus, its "choice to file as one . . . was a business decision").[23] Here, as of the filing dates of Preserve's CBT returns, the amended regulation was in effect, thus, its choice to use the investment company regardless, was accompanied with a risk of a denial of that status. See e.g. Praxair Technology v. Director, Div. of Taxation, 201 N.J. 126 (2009) (remanding the issue of underpayment and amnesty penalties to the Appellate Division, which in an unpublished opinion, affirmed the Tax Court's unpublished opinion affirmance of the same, in a case involving a challenge to the validity and retroactive effect of a regulatory amendment).

[23] The instructions on the CBT return also notes that "the election to report as an investment company is effective only for the particular year covered by the return," thus, must be "renewed" for a "subsequent year."

Nonetheless, the regulation's effective date has an illogical and an unfair result. For instance, here, if Preserve had filed its return on April 15, 2006, it would have received benefit of the preferential tax treatment, which Taxation's audit report confirms. Yet, the intent of the regulatory amendment was apparently to "limit tax planning and abusive reorganization," and address the "use of pass-through entities and proliferating loopholes [which] has allowed companies to avoid taxation of income derived from New Jersey activities." Manheim, supra, 30 N.J. Tax at 32. Effectuating a change to accomplish this goal mid-year would certainly put taxpayers who had invested in such a pass-through entity for all of 2005, with no knowledge they would be denied an investment company status, would not accomplish any such alleged purpose for a year that is already passed.

Additionally, as Preserve credibly points out, if a taxpayer filed a return one day before the regulation's effective date, it would receive preferential tax treatment but Preserve would not even though its investment vehicle is the same as the other taxpayer, i.e., a "a non-publicly-traded pass-through entity." This raises a concern that taxpayers in identical situations will be disparately treated simply because of the date they each chose to file their tax returns. This court echoes the dicta in Manheim, supra, where the court noted that using a specific date "rather than a particular tax year," was of some concern because it would unfairly treat "similarly situated taxpayers . . . differently solely because of their tax return filing dates." 30 N.J. Tax at 30, n.5.

Changing a regulation mid-year also has an unfair impact for the 2006 tax year returns although they are filed only in 2007 (at which time taxpayers are on notice of the regulation). The regulation's definition of an investment company is with respect to its activities and

assets relates specifically "for the period covered by its return," or "during the entire period covered by its report. See N.J.A.C. 18:7-1.15(a)(1); (2); (f). Would a taxpayer receive investment company status if it changed its investment from one in "a non-publicly-traded pass-through entity" to another qualified investment activity after August 7, 2006 relative to tax year 2006 due to the requirement of an "entire period"? Would it have to file two short-year returns to overcome the "entire period" requirement? It does not appear that such machinations were intended or contemplated by the regulatory amendment (as it applies to tax year 2006).

For the above reasons, the court agrees with Preserve that, for purposes of the underpayment penalty issue only, the regulatory amendment's effective date cannot apply to tax years 2005 or 2006. For tax year 2007, however, the above reasoning would not apply. Since the court has found, albeit on different grounds, that Preserve is not an investment company, the now-declared invalidity of the regulation should not impact the issue of the sought-for abatement of the underpayment penalty. Rather, the risk of denial of the status accompanied the claim for the same on the return due to the clear notice and knowledge of the regulatory amendment.

CONCLUSION

For the above reasons, Taxation's determination that Preserve had nexus with New Jersey within the limits of the Constitution as required by the CBT statute, and is thus liable for CBT for 2005-2007, is not unreasonable, arbitrary or capricious, as was its denial of Preserve's claim for refunds of CBT for 2005-2007, and claim for preferential tax treatment as an investment company. Preserve is not liable for underpayment penalties for 2005 or 2006 or for amnesty penalties for

2005 to 2007. Finally, as a consequence of these findings, the court negates Taxation's assessment against the partnerships, including the interest and penalties.