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THE TAX COURT COMMITTEE ON OPINIONS

NATIONAL AUTO DEALERS EXCHANGE, L.P., Plaintiff, v. DIRECTOR, DIVISION OF TAXATION, Defendant.	TAX COURT OF NEW JERSEY DOCKET NO. 000028-2014 Approved for Publication In the New Jersey Tax Court Reports

Decided: February 26, 2018

Marc A. Simonetti for plaintiff (Eversheds Sutherland (US) LLP, attorneys).

Michael J. Duffy for defendant (Gurbir S. Grewal, Attorney General of New Jersey, attorney).

ANDRESINI, P.J.T.C.

This constitutes the court's opinion on plaintiff's motion for summary judgment. In its motion, plaintiff, National Auto Dealers Exchange, L.P., ("NADE"), asks the court to declare the assessment of Corporation Business Tax, N.J.S.A. 54:10A-1 ("CBT"), issued by defendant, Director, Division of Taxation (the "Division") against plaintiff, for tax years ended December 31, 2005 through December 23, 2009 (collectively, the "Relevant Period"), invalid under New Jersey law.

The facts of the case are not in dispute. NADE, an affiliate of Cox Enterprises, Inc., was a limited partnership organized under the laws of Delaware. NADE operated a wholesale automotive auction business in New Jersey. During the Relevant Period, the partners in NADE

were Georgia Auction Services, Inc. ("Georgia Auction"), as a general partner, and Manheim NJ Investments, Inc. ("MNJI"), as a limited partner. Georgia Auction and MNJI's respective rights, obligations, and interests as partners in NADE were established by a written limited partnership agreement. Georgia Auction and MNJI were Delaware corporations with principal places of business in Atlanta, Georgia.

During the Relevant Period, NADE was taxed as a partnership for federal income tax purposes. For each tax year during the Relevant Period, NADE timely filed a New Jersey Partnership Return ("NJ-1065"), reporting its partnership income or loss.

NADE obtained Form NJ-1065E, Nonresident Corporate Partner's Statement of Being an Exempt Corporation or Maintaining a Regular Place of Business in New Jersey, from Georgia Auction and MNJI for each of the tax years in the Relevant Period. Correspondingly, NADE submitted Form NJ-1065Es with each of its NJ-1065s filed during the Relevant Period. In each Form 1065-E, MNJI checked the box that states "[b]y signing this statement, the nonresident corporate partner is declaring that it maintains a regular place of business in New Jersey other than a statutory office." Subsequently, MNJI timely filed CBT returns and paid the tax on its distributive share of New Jersey partnership income from NADE. The Division does not contest the amount of CBT due or the fact that it was fully paid by MNJI.

After the Appellate Division decision in BIS LP, Inc. v. Director, Div. of Taxation, 26 N.J. Tax 489 (App. Div. 2011),[1] MNJI filed a refund claim for the Relevant Period requesting a return of payments made (except for alternative minimum tax) ("Manheim").[2] In its claim, MNJI

[1] In BIS, the court affirmed the New Jersey Tax Court's holding that the nonresident corporate limited partner was not in unitary relationship with the general partner and had no constitutional presence in New Jersey to be subject to CBT. 26 N.J. Tax 489.

[2] See Manheim NJ Inv. Inc. v. Director, Div. of Taxation, 30 N.J. Tax 18 (Tax 2017) (currently pending before this court under docket No. 015083-2014).

maintains that it did not have nexus with New Jersey for CBT purposes, and was therefore entitled to a refund of CBT paid. After denying the refunds in 2011, the Division, by final determination dated August 1, 2014, affirmed the denials. MNJI then filed its complaint with this court on October 22, 2014.

The Division also audited NADE and issued a Notice of Assessment Related to Final Audit Determination dated August 28, 2012, assessing additional CBT on MNJI's distributive share of NADE's entire income for each of the tax years during the Relevant Period and citing to N.J.S.A. 54:10A-15.11 to support this assessment. NADE timely protested the assessment. On October 8, 2013, the Division issued a final determination, upholding its assessment which totaled $11,826,595.70 (CBT, penalty, and interest). NADE appealed the final determination by filing a complaint with this court on January 3, 2014.

In the present motion, NADE alleges that the Division lacks statutory authority to assess CBT against NADE because, as a limited partnership, which is a pass-through entity, it is not subject to CBT. Rather, its only obligation is to withhold and remit CBT on behalf of a nonresident corporate limited partner, if that partner does not consent to taxation by New Jersey. See N.J.S.A. 54:10A-15-7. Here, since MNJI had, in accordance with N.J.A.C. 18-7-17.8, provided NADE Form NJ-1065Es for the Relevant Period that NADE filed with its respective NJ-1065s, NADE contends it has satisfied its CBT obligation. It also notes that the CBT assessments for 2005 and 2006 are barred by the statute of limitations under N.J.S.A. 54:49-6(b).

The Division concedes that the statute of limitations bars the 2005-2006 assessments, but argues that, under N.J.S.A. 54-10A-4(h), 5(h), and -15.11, it is permitted to assess a deficiency against NADE for 2007-2009. This is because, the Division contends, by filing a refund claim, MNJI has "effectively revoked" its Form NJ-1065Es, thus triggering a violation of NADE's

withholding obligation. The Division further asserts that it is statutorily permitted to assess a deficiency against NADE as a protective measure to preserve New Jersey tax revenues and prevent the government from relitigating the issue of nexus if MNJI prevails in its refund claim asserted in Manheim.

In its reply, NADE reasserts that the Division lacks statutory authority to assess a deficiency against NADE and argues that even if MNJI's refund claim were to be viewed as a revocation of its Forms NJ-1065E, the issue of nexus would nevertheless have to be litigated in NADE's pending complaint due to the Constitutional limits on a State's power to tax.

During oral argument, the Division maintained that under N.J.S.A. 54:10A-4(h), -5(h), and -15.11 it was allowed to assess NADE the CBT to be remitted on behalf of the partner, regardless of whether Form NJ-1065E was filed. NADE countered that a partnership is a pass-through, nontaxable entity, and that the reference to N.J.S.A. 54:10A-15.11 in N.J.S.A. 54:10A-5(h) did not abrogate the provision of N.J.S.A. 54:10A-15.7, which allows the nonresident corporate limited partner to submit an exemption form, thus relieving the partnership of the duty to remit tax on behalf of that partner. NADE stated that once a partnership has submitted Form NJ-1065E with its return, it is relieved of the duty to remit tax. Moreover, NADE stated the Division had no recourse against the partnership, but instead is required to pursue the individual nonresident corporate limited partner that consented to New Jersey taxation by providing NADE with Form NJ-1065E.

Conclusions of Law

Summary judgment should be granted where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment

or order as a matter of law." R. 4:46-2. In Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995), our Supreme Court established the standard for summary judgment as follows:

> [W]hen deciding a motion for summary judgment under Rule 4:46-2, the determination whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.
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> [Id. at 523.]

A court should not hesitate to grant summary judgment if "one party must prevail as a matter of law." Id. at 540.

In the present case, the parties do not allege that any genuine issue of material fact exists and instead disagree about the legal consequenses of the undisputed facts under the CBT Act.[3] Statutory interpretation is considered a question of law because it involves examination of legal issues. State in Interest of K.O., 217 N.J. 83, 91 (2014). Therefore, this motion for summary judgment is ripe for consideration.

I. The 2005-2006 Assessments Are Voided As Barred by the Statute of Limitations.

The parties agree that tax years 2005 and 2006 are barred by the statute of limitations, a position supported by the facts of the case and New Jersey law.[4] Therefore, the assessments for those years are voided.

II. The Division Lacks Statutory Authority to Impose a Deficiency Assessment on NADE for Years 2007-2009 because NADE has Satisfied its Withholding Obligation by Filing MNJI's Form NJ-1065Es with NADE's NJ-1065s.

[3] N.J.S.A. 54:10A-1 to -41.
[4] N.J.S.A. 54:49-6(b).

The Division argues that the CBT Act permits its assessments against NADE and points to the following language in portions of sections of the CBT Act –

> (h) "Taxpayer" shall mean any corporation, and any partnership required, or consenting, to report or to pay taxes, interest or penalties under this act. "Taxpayer" shall not include a partnership that is listed on a United States national stock exchange.
>
> [N.J.S.A. 54:10A-4(h).]
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> (g) Provided however, that for privilege periods beginning on or after January 1, 2001 but before January 1, 2002 the franchise tax annually assessed to and paid by a taxpayer:
> . . . (2) that is a limited partnership or foreign limited partnership classified as a partnership for federal income tax purposes shall be the amount determined pursuant to the provisions of section 4 of P.L.2001, c.136 (C.54:10A-15.7).
> (h) Provided however, that for privilege periods beginning on or after January 1, 2002 the franchise tax annually assessed to and paid by a taxpayer that is a partnership shall be the amount determined pursuant to the provisions of section 12 of P.L.2002, c.40 (C.54:10A-15.11).
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> [N.J.S.A. 54:10A-5(g), (h).]

In connection with these provisions, the Division makes several arguments. First, it argues that because N.J.S.A. 54:10A-4(h) and -5(h) refer to a partnership as "taxpayer," the partnership is a taxable entity for purposes of the CBT Act, and liable for CBT. This "taxpayer," the Division argues, is required to remit payments on behalf of a nonresident corporate limited partner regardless of any actions undertaken by that partner.

Second, the Division argues that N.J.S.A. 54:10A-5 (h) operates to prevent the application of N.J.S.A. 54:10A-15.7 to tax returns for the tax periods after January 1, 2002; therefore, the provision allowing the nonresident corporate limited partner to submit an exemption form is not effective for returns for tax years beginning after January 1, 2002. The Division states that for tax years beginning after January 1, 2002, it can pursue the partnership to collect the nonresident

corporate limited partner's share of tax, if that partner files a refund claim, because N.J.S.A. 54:10A-15.11 does not contain a provision allowing the foreign corporate limited partner to submit an exemption form.

Third, the Division maintains that Form NJ-1065E exists only for the internal use of the partnership and has no bearing on the partnership's duty to remit payments on behalf of the nonresident corporate limited partner. The Division admits that MNJI's change of position was a result of BIS, 26 N.J. Tax 489, which effectively changed the law regarding nexus between a nonresident corporate limited partner and New Jersey. But, the Division claims, N.J.S.A. 54:10A-15.11 requires the partnership to retroactively remit the payment for the years in which the partner initially claimed to have maintained a regular place of business in New Jersey, filed a New Jersey tax return, paid CBT in full, and later filed a refund claim, as in the present case. In essence, the Division suggests that New Jersey law permits the Division to assess CBT on both the partnership and the nonresident corporate limited partner when that partner files an amended return claiming a refund of CBT. The Division alleges that the "alternative assessment" protects the State's duty to collect and retain CBT on New Jersey sourced income and prevents the Division from relitigating the issue of nexus raised in Manheim if MNJI were to prevail in its refund claim.[5]

The Division's first argument has no support in New Jersey Law. In general, New Jersey does not tax partnerships. A partnership is a pass-through entity, and any tax on income received from the partnership by the partner is calculated and paid through the partner's individual (i.e. personal) gross income return. N.J.S.A. 54A:2-2. The CBT Act was enacted in 1945 imposing an annual franchise tax on corporations for the privilege of doing business in New Jersey. It

[5] The Division stated that the assessment against NADE was an "alternative assessment" that would only become collectible from NADE should the Division lose in the Manheim litigation, since the assessments would be voluntarily dismissed if the Division prevailed therein.

imposes CBT on corporations, not partnerships, by providing that "[e]very domestic or foreign corporation which is not hereinafter exempted shall pay an annual franchise tax for each year, as hereinafter provided." N.J.S.A. 54:10A-2. A corporation is defined as:

> any corporation, joint-stock company or association and any business conducted by a trustee or trustees wherein interest or ownership is evidenced by a certificate of interest or ownership or similar written instrument, any other entity classified as a corporation for federal income tax purposes, and any state or federally chartered building and loan association or savings and loan association.
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> [N.J.S.A. 54:10A-4(c).]

Notably, partnerships are not included in this definition. The only exceptions to the general rule are N.J.S.A. 54-10A-15.7(b) and N.J.S.A. 54:10A-15.11, which require a limited partnership to withhold and remit CBT for each nonresident corporate limited partner. Comporting with the general principle of nontaxability of partnership entities, the CBT Act provides that CBT remitted by the partnership on behalf of such nonresident corporate limited partner is not attributable to the partnership, but instead: "[s]hall be credited to the partnership accounts of its nonresident partners in proportion to each nonresident partner's share of allocated entire net income . . . [and] shall be deemed to have been paid by the respective partner in respect of the privilege period or taxable year of the partner." N.J.S.A. 54:10A-15.11(b).

A well-settled canon of judicial interpretation of statutory provisions is to view an individual provision as a part of a larger body of the whole statute. Kucana v. Holder, 558 U.S. 233, 245 (2010) ("[i]n reading a statute we must not look merely to a particular clause, but consider in connection with it the whole statute"). Moreover, it is "a cardinal principle of statutory construction that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" TRW Inc. v. Andrews,

534 U.S. 19, 31 (2001) (quoting Duncan v. Walker, 533 U.S. 167, 174 (2001)). The application of these principles to the provisions of the CBT Act, which the Division relies upon, leads the court to conclude that the corporate partner, not the partnership, is the entity subject to CBT. This conclusion is further supported by the Division's own regulation which states, "the amount of tax paid by a partnership pursuant to N.J.A.C. 18:7-17.5 shall be credited to accounts of its nonresident partners in proportion to each nonresident partner's share of allocated entire net income." N.J.A.C. 18:7-17.6(a).

In sum, the text of the CBT Act and the Division's regulations clearly show that the Division is mistaken in its belief that a partnership, by virtue of having a nonresident corporate partner, becomes a taxable entity. As seen from the language in N.J.S.A. 54:10A-2, -4(c), -15.7, and -15.11, the taxable entity is still the corporate partner, and the partnership has no independent tax liability of its own.

This brings the court to the Division's second argument: that N.J.S.A. 54:10A-15.11 cancels out the provisions of N.J.S.A. 54:10A-15.7 because N.J.S.A. 54:10A-5(h) requires the partnership to look to the former to determine the amount of CBT due to be remitted. This contention puts the cart before the horse. As discussed above, the entire body of New Jersey law and the CBT Act indicate that the taxable entity is the nonresident corporate partner, and thus the duty to remit tax must depend on whether or not the underlying corporate partner entity is taxable at all. This is why N.J.S.A. 54:10A-15.7(a) allows the partner to provide the partnership with a form that states the partner is exempt from New Jersey taxation or maintains a place of business in New Jersey. Contrary to the Division's assertion, N.J.S.A. 54:10A-15.7 does not only apply to tax years beginning on January 1, 2001 and ending before January 1, 2002, as it was enacted in 2001,

survived multiple amendments to the CBT Act, and was never repealed.[6] N.J.S.A. 54:10A-15.11 was enacted in 2002 as a part of Business Tax Reform Act ("BTRA") in attempt to close a number of CBT loopholes, but the Legislature chose not to change or repeal N.J.S.A. 54:10A-15.7 neither at the time of enactment of N.J.S.A. 54:10A-15.11 nor thereafter.[7] Accordingly, the court must assume that the Legislature intended it that way. See State v. Buckner, 223 N.J. 1, 14 (2015) ("case law has steadfastly held to 'the principle that every possible presumption favors the validity of an act of the Legislature'") (quoting N.J. Sports & Exposition Auth. v. Mc Crane, 61 N.J. 1, 8 (1972)); State v. Trump Hotels & Casino Resorts, 160 N.J. 505, 526 (1999) ("a legislative act will not be declared void unless its repugnancy to the Constitution is clear beyond a reasonable doubt") (quoting Harvey v. Bd. of Chosen Freeholders, 30 N.J. 381, 388 (1959)). This conclusion is further supported by the Division's own regulation, which states that filing Form NJ-1065E with the partnership tax return establishes that the partnership is not required to pay tax on a nonresident corporate limited partner's behalf. N.J.A.C. 18:7-17.8(a). This regulation, which is still in effect, was enacted under the authority of BTRA in 2003 and last amended in 2017 (years after BIS, 26 N.J. Tax 489).[8] Further, each year to date, the Division includes Form NJ-1065E with its NJ-1065 New Jersey Partnership Tax Return package. In sum, the law and the Division's actions speak conclusively that N.J.S.A. 54:10A-15.7(a) applies to all tax years following its enactment in 2001, and allows the partner to relieve the partnership of the duty to remit tax on its behalf by providing the partnership with a Form NJ-1065E.[9]

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[6] L. 2001, c. 136, § 4 (eff. June 29, 2001).

[7] L. 2002, c. 40, § 12, (eff. July 2, 2002); amended by L. 2003, c. 256, § 1 (eff. Jan. 14, 2004); L. 2005, c. 288, § 1 (eff. Jan. 9, 2006); L. 2014, c. 13, § 2 (eff. June 30, 2014).

[8] "The amendments and new rules set forth herein are intended to supply guidance to taxpayers and interested members of the public and to assist them in meeting their responsibilities under the BTRA." 35 N.J.R. 1573(a) (Feb. 27, 2003).

[9] Legislative history also supports this conclusion. The statement to the introduced bill provided: "a limited liability company, foreign limited liability company, limited partnership or foreign limited partnership . . . that is classified as a partnership for federal tax purposes . . . that properly complies with the requirement to obtain consents from its

The Division's argument that Form NJ-1065E is of no use to the Division in examining the partnership tax return is also not supported by the Division's actions. As mentioned above, Form NJ-1065E is a part of NJ-1065 Partnership Tax Return package created by the Division in accordance with N.J.A.C. 18:7-17.8(a). It operates as a notice from the nonresident corporate partner that it maintains a regular place of business in New Jersey (listing that place of business) and is taxable by New Jersey ("By signing this statement, the partner is declaring that it maintains a regular place of business in New Jersey other than a statutory office and is subject to the New Jersey Corporation Business Tax in accordance with NJSA 54:10-1, et seq. . . . [f]ailure to list at least one place of business will result in the partnership entity remitting a payment of tax on your share of New Jersey income."). This form effectively relieves the limited partnership from the obligation to remit taxes on the limited corporate partner's behalf. N.J.A.C. 18-7-17.8. This, of course, makes sense because both N.J.S.A. 54:10A-15.7 and 15.11 only require the limited partnership to remit a payment on behalf of nonresident limited corporate partner. Nonresident corporate partner is defined as "a partner that is not an individual, an estate or a trust . . . that is not a corporation exempt from tax . . . and that does not maintain a regular place of business in this State other than a statutory office." N.J.S.A. 54:10A-15.11. By providing the partnership with Form NJ-1065E, the nonresident corporate limited partner consents to taxation by New Jersey and ceases to be a nonresident for the purposes of N.J.S.A. 54:10A-15.11 because it claims to have a regular place of business in New Jersey. Simply put, when the nonresident corporate partner consents to New Jersey taxation under N.J.S.A. 54:10A-15.7(a), the Division cannot require the partnership to follow N.J.S.A. 54:10A-15.11.

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corporate owners and that pays the taxes of any of its corporate owners that do not consent to New Jersey taxation . . . is relieved of any other obligations under the corporation business tax." A. Commerce, Tourism, Gaming and Military and Veterans' Affairs Comm. Statement to A. 3045 (June 4, 2001).

Notably, the statute does not impose additional obligations on the limited partnership and does not require it to police the limited partner's future refund claims or change of position regarding New Jersey taxation. The Division claims that MNJI's refund claim had "effectively revoked" its consent to taxation by New Jersey. To supports this contention, the Division points out that the statute and the regulation are silent regarding the obligations of the partnership when the partner later changes its position and files a refund claim stating that it does not maintain a regular place of business in New Jersey. The Division overlooks the fact that these are the actions of the partner, not the partnership. Extending the Division's reasoning, any refund claim filed by a partner "effectively revokes" forms filed with the original partnership return and subjects the partnership to liability.[10] This would be wholly illogical. The doctrine of implied revocation has limited use as an equitable remedy in the fields of estate, trust, and gift law, and is applied when a later instrument executed by a decedent, inconsistent with the original executed instrument, is viewed as a revocation of the earlier version.[11] The main reason for the existence of this remedy is the unavailability of the testator, and the ambiguity of the testator's final wishes resulting from his or her inconsistent actions.

Here, NADE (still functioning at the time of its audit) was the entity that filed with the Division the original Forms NJ-1065E. NADE has not filed an amended return for any years of the Relevant Period. Thus, each year NADE submitted a partnership tax return clearly stating that it is to be relieved of the duty to withhold and remit CBT for MNJI and has not submitted any later documents indicating a change of these intentions. There is simply no legal basis to find that Form

[10] While the Division's argument may have some credence had MNJI not filed a CBT return and not paid New Jersey taxes, this is not the case here.

[11] Implied revocation may also occur by operation of law (for example, a revocation of provisions of a will naming the former spouse as a beneficiary following a divorce under N.J.S.A. 3B:3-14), but in this case there is no statute (and the Division could not point to any) that states that a partner's filing of a refund claim operates as a revocation of Form NJ-1065E filed with the partnership return.

NJ-1065Es filed with NADE's partnership tax returns were "effectively revoked" by MNJI filing a refund claim. Moreover, to allow the Division to issue an assessment against the partnership every time a nonresident corporate limited partner files a refund claim goes against the provision of N.J.S.A. 54:10A-15.7(b), which requires the partnership to remit CBT only on behalf of nonconsenting partners. As NADE rightly points out, the partnership's only obligation is either to remit the CBT or collect the partner's consent via Form NJ-1065E, and any one of these actions effectively relieves the partnership from the duty to do anything further with regard to CBT on nonresident corporate limited partner's share of New Jersey income. Beyond this, the issue of deficiency and refund is between the Division and the partner that submitted the Form NJ-1095E.

The court finds that NADE fully satisfied its obligation under the CBT Act by submitting Form NJ-1065Es with the partnership returns at issue. Thus, it cannot be required to do anything else. As a result, the Division lacks statutory authority to impose an assessment on NADE for CBT on MNJI's share of NADE's partnership income.

Finally, the Division's claim that assessing a deficiency against NADE will protect New Jersey tax revenue and prevent the Division from relitigating the issue of nexus, should MNJI prevail in its litigation seeking refunds, is also incorrect. Even assuming that the refund claim operated as a revocation of MNJI's Form NJ-1065Es, the withholding obligation of the partnership does not exist in a vacuum and is limited to the nonconsenting partner's share because, as discussed above, partnerships are not taxable per se. Accordingly, the state cannot assess a deficiency against the partnership for not remitting the tax on behalf of the nonconsenting partner when no such tax is due. New Jersey law does not allow taxation in violation of the United States Constitution or federal statutes. N.J.S.A. 54:10A-2. Therefore, the issue of nexus between the nonresident corporate partner and New Jersey is potentially at issue regardless of whether the assessment is

against the partnership or the partner. Whether there is sufficient nexus between MNJI and New Jersey for purposes of imposing CBT on MNJI is an issue that should be and presently is being litigated between MNJI and the Division in the Manheim litigation. It is not a basis for imposing a CBT assessment on NADE.

Conclusion.

For all the reasons above, the court holds that Division lacks statutory authority to assess a deficiency against NADE for the years 2005-2009, and those assessments are invalid as a matter of law. NADE's motion for summary judgment is granted in its entirety.