TAX COURT OF NEW JERSEY

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Corrected Opinion Notice

Date: December 28, 2018

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From: Lynne E. Allsop

Re: ADP VEHICLE REGISTRATION, INC V. DIRECTOR, DIV. OF TAXATION
Docket number: 014946-2014

The attached corrected opinion replaces the version released on December 11, 2018 The Opinion has been corrected as noted below:

Page 2, line 2 –citation corrected to read N.J.S.A. 54:10A-1 to 32

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE TAX COURT COMMITTEE ON OPINIONS

Corrected 12/28/18 – pg. 2, ln. 2, citation

ADP VEHICLE REGISTRATION, INC., Plaintiff, v. DIRECTOR, DIVISION OF TAXATION, Defendant.	TAX COURT OF NEW JERSEY DOCKET NO. 014946-2014 Approved for Publication In the New Jersey Tax Court Reports

Decided: December 11, 2018

Hollis L. Hyans, admitted pro hac vice, for plaintiff (Morrison & Foerster, LLP, attorneys; Steven T. Rappoport, on the briefs).

Marlene G. Brown for defendant (Gurbir S. Grewal, Attorney General of New Jersey, attorney).

NUGENT, J.T.C.

This is the court's opinion regarding cross-motions for partial summary judgment filed by the parties on the underlying complaint challenging the corporate business tax ("CBT") assessed against plaintiff, ADP Vehicle Registration, Inc. ("Taxpayer" or "ADPVR"), by defendant, the Director, Division of Taxation ("Taxation"), for tax years ending June 2008 through June 2010. During the periods under appeal, Taxpayer was a wholly owned subsidiary of New Jersey-based ADP, Inc. ("ADP"), and claimed to operate as a California holding company that conducted no business and had no employees. Taxpayer's sole asset was an 80% general partnership interest in Computerized Vehicle Registration ("CVR"), a California general partnership operating nationwide. The only issue before this court is whether Taxpayer maintained a regular place of business ("RPOB") outside New Jersey during the years under appeal.

Corporations doing business in New Jersey are subject to CBT pursuant to N.J.S.A. 54:10A-1 to 32. Under the CBT Act, every domestic and foreign corporation,

> shall pay an annual franchise tax for each year . . . for the privilege of having or exercising its corporate franchise in this State, or for the privilege of deriving receipts from sources within this State, or for the privilege of engaging in contracts within this State, or for the privilege of doing business, employing or owning capital or property, or maintaining an office, in this State.
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> [N.J.S.A. 54:10A-2.]

If less than 100% of a corporation's activities and property are in New Jersey, its income inside and outside of New Jersey may be apportioned under a statutory formula. N.J.S.A. 54:10A-6. During the years at issue, a corporation that maintained an RPOB outside of New Jersey was entitled to apportion its income based on a three-factor formula comprising of the corporation's payroll, property, and sales inside New Jersey, as compared to its activity nationwide. If a corporation failed to maintain an RPOB outside the State, 100% of its income would be apportioned to New Jersey. Ibid. Taxation enacted a regulation to define RPOB. See N.J.A.C. 18:7-7.2. The parties' interpretation of the regulation forms the core of this dispute.

Here, Taxation contends that if the RPOB of Taxpayer is uncertain, then the court should find the credit it afforded for taxes paid to other jurisdictions represents a fair and reasonable allocation of Taxpayer's activities inside and outside the State. Otherwise, the court should remand the matter to Taxation for consideration of an alternate form of allocation adjustment pursuant to N.J.S.A. 54:10A-8 ("Section 8"), under which Taxation is granted statutory discretion to adjust the allocation factor. Taxation acknowledges that Taxpayer and CVR are engaged in a unitary business relationship, and thus pursuant to N.J.A.C. 18:7-7.6(h)(1), Taxpayer is deemed to have an RPOB wherever CVR maintains one.

Taxpayer contends it has demonstrated an RPOB through CVR's activities. Because of its unitary nature with CVR, Taxpayer's claim derives not from its own business activity but from that of CVR. Moreover, Taxpayer argues, in the event it fails to meet its burden to prove that CVR had an RPOB, it is entitled to allocate income on an alternative basis. According to Taxpayer, it is entitled to apportion income under Section 8, using the three-factor formula, to avoid the "palpable misapportionment" that results from Taxation's allocation of 100% of Taxpayer's income to this State. Hess Realty Corp. v. Dir., Div. of Taxation, 10 N.J. Tax 63, 81-82 (Tax 1988). In further reliance on Hess, Taxpayer claims Taxation not only has the discretion to act but "has an obligation to adjust a particular allocation formula if it is unfair in that it does not effect a fair and proper allocation of the [Taxpayer's] entire net income . . . reasonably attributable to the State." Ibid. (citing F.W. Woolworth Co. v. Dir., Div. of Taxation, 45 N.J. 466, 497 (1965) (internal quotation marks omitted). In Taxpayer's view, employment of the three-factor formula accounts for its proportionate business conducted both inside and outside of New Jersey. Taxation argues that such relief is entirely discretionary and not obligatory. The parties also differ as to the procedural mechanism required to trigger Section 8 relief. They presented arguments addressing Taxpayer's claim for relief under Section 8 in supplemental briefing to the court.

Taxpayer lastly claims that under the facts presented, Taxation's application of a tax based on 100% apportionment to New Jersey with credit for taxes paid to other jurisdictions is inconsistent with the statutory design and violates the Due Process and Commerce Clauses of the United States Constitution. Notably, Taxpayer provides a stark illustration of the difference between CVR's reported 2% allocation and Taxation's 100% allocation.

The court concludes Taxpayer has established an RPOB outside of New Jersey through the maintenance of an RPOB by CVR in California. As such, Taxpayer's statutory allocation through use of the three-factor formula was appropriate, and therefore, the court need not consider the alternative arguments presented.

Facts

The facts rely on submissions of the parties, including affidavits authored by both ADP and CVR employees.

I. Taxpayer's New Jersey CBT Filings and Audit

Taxpayer filed CBT-100 tax returns in New Jersey for the periods ending June 2008 through June 2011 using a three-factor allocation formula.[1] On their audit, Taxation identified four issues in Taxpayer's tax returns that were subject to dispute: pass-through income, royalty expense, RPOB, and the allocation factor, though only the finding on RPOB is at issue here. According to the audit report, "[t]he taxpayer did not maintain an RPOB inside or outside New Jersey for June 30, 2008 – June 30, 2010. The lease agreement named ADP, Inc. as tenant. In addition, all employees were in ADP, Inc.'s name." On that basis, Taxation determined Taxpayer did not maintain an RPOB and adjusted the allocation factor to 100% for the tax periods ending June 2008 – June 2010 and assessed additional taxes due, with credit for taxes paid to other jurisdictions.[2] Notably, in the tax period immediately following the audit at issue, and subsequent to repeal of the RPOB requirement, Taxation applied the three-factor apportionment formula to Taxpayer's reported income, and a refund issued. Taxpayer appealed the Final Determination by timely filing a complaint with this court.

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[1] Taxpayer acknowledged that in its initial filing it erred by failing to claim an RPOB on Schedule J, Part I, line (a).

[2] In 2008, N.J.S.A. 54:10A-6 was amended to remove the RPOB requirement, effective July 1, 2010. L. 2008, c. 120. Thereby, Taxpayer is not contesting tax year beginning July 1, 2010, and ending June 30, 2011.

II. CVR's Business Operations

During all relevant years, CVR operated a nationwide computerized business that provided electronic vehicle title and registration services through software developed to achieve its business model. CVR's partnership receipts constitute Taxpayer's sole source of income. CVR filed partnership tax returns in more than twenty states during the years at issue reporting wages attributable to at least 200 CVR employees nationwide. The facts reveal CVR had a business location in El Paso, Texas, which served as a customer service call-center, and a location in Portland, Oregon, where CVR software developers performed their duties. Not including California and New Jersey, the record offers sparse details on CVR's other business locations. Taxpayer focused largely on the operation of its California office as the basis of its RPOB claim.

Until January 1, 2009, CVR's California office was located at 12610 Park Plaza, Cerritos, California. Thereafter, CVR relocated its offices to 7000 Village Drive, Buena Park, California (collectively "the California office"). Upwards of sixty people worked at the California office full-time under the control and direction of CVR management, and ultimately reported to the on-site General Manager, Scott Herbers. CVR's General Manager and Vice President of Research and Development were among several members of CVR's management team at the California office. The California location also housed the office of the Controller, the contracts administration department, CVR auditors, and a majority of the research and development team. CVR's management team in California made managerial decisions affecting the day-to-day operation of CVR's business.

Business operations required CVR to contract with State departments of motor vehicles. CVR's contracts with both the New Jersey and Massachusetts motor vehicle agencies were executed at the California offices, listing CVR's California address. In its motion papers, Taxpayer identifies the location as CVR's "headquarters," and the California address appears on the CVR website. While Taxation admits that CVR conducted business at the California office for the years under appeal, the characterization of CVR's California location as its "headquarters" was met with Taxation's continuing objection.

According to the tax returns, the majority of CVR's total nationwide property was located in California: for 2008, 83.9099%; for 2009, 80.8280%; and for 2010, 85.9946%. Additionally, more than one third of CVR's total nationwide payroll was attributable to California: for 2008, 33.9525%; for 2009, 37.2513%; and for 2010, 42.010%. The majority of CVR's total nationwide sales were attributable to California: for 2008, 64.5834%; for 2009, 60.6058%; and for 2010, 60.6996%. A review of CVR's payroll records discloses contrasting figures regarding New Jersey activity. Six out of CVR's 210 employees worked in New Jersey in 2008; five out of 202 in 2009; and, five out of 170 in 2010. As reported on its tax returns, CVR's presence in New Jersey, as measured by the average of the three-factor business allocation formula, was limited to approximately two percent of CVR's nationwide presence, measured by the same averaged three factors.[3]

CVR's New Jersey employees served as account executives, salespeople, and territory managers who worked from their own homes or at client locations. During the years under appeal, CVR had no offices in New Jersey, and did not own or rent any real property in New Jersey. Additionally, CVR had no tangible personal property in New Jersey with the exception of business cards, laptop computers, and business telephones. According to one CVR Senior Account

[3] CVR's partnership returns reflect a fiscal year beginning July 1 and ending June 30. Where the opinion cites to a single tax year it represents the tax year with the corresponding fiscal year end.

Executive employed in New Jersey, her business card displayed the address of the California office to which she regularly referred her New Jersey customers when they encountered billing or accounting problems.

CVR's records reveal it occupied and paid rent for the California office space by a "cross-charge" to its books. According to Taxpayer, "ADP cross-charged CVR" for California rent due, and CVR was responsible for the payment of the rent. CVR's general ledger entries indicate that CVR recorded rental expenses for the California location for all years at issue. The space was rented pursuant to a lease and amendment listing ADP as tenant. ADP's President, James B. Benson, executed the leases on behalf of ADP. There was no signage identifying CVR at the California location, either on the outside of the building or in the building's interior. Lease documents show plans for a sign to display the ADP logo at the California office. Other entities within the ADP corporate group also occupied space in the buildings that housed CVR. Despite the leasing arrangement, Taxpayer maintains that CVR operated separately and distinctly from all other entities at the California office, and employees of other ADP-related entities played no role in the conduct of CVR's business. Taxpayer contends CVR operated as an entity separate and distinct from ADP due to its ownership structure – 80% owned by Taxpayer, and 20% owned by Reynolds Vehicle Registration, Inc., an unrelated entity.

Either ADP or the ADP-related entity known as Dealer's Services group performed some tasks on CVR's behalf. Both Taxpayer and CVR were identified as "members of the ADP corporate group." Affidavits submitted on Taxpayer's behalf explained ADP's role in CVR's operations as "stewardship functions common to many large corporate groups."

> "[B]ecause CVR was 80% owned by ADPVR [Taxpayer], a member of the Automatic Data Processing, Inc. corporate group ('ADP Corporate Group'), certain stewardship functions (such as tax return preparation and the centralized management of the

> corporate facilities function) were performed on ADPVR's behalf by other members and/or divisions of the ADP Corporate Group."

ADP prepared tax returns on behalf of both CVR and Taxpayer and listed only ADP's Roseland, New Jersey, address and a New Jersey telephone number on the documents. Taxpayer explained that Roseland, New Jersey, is the site of ADP's centralized tax department. ADP follows a uniform, company-wide practice that the Roseland, New Jersey, address appear on any tax return prepared by the centralized tax department, regardless of the underlying company's location. Taxpayer contends the address is not meant to represent the company's location, but rather the location of ADP's centralized tax department for administrative efficiency to ensure that any correspondence from State departments of revenue be directed to the tax department responsible for preparing the returns.

Similarly, with regard to compensation of CVR employees, the ADP payroll records read "ADP, Inc. – CVR." As explained by Taxpayer, ADP uses a centralized payroll system that performs all payroll tax reporting and employee payroll services, for all companies and all employees within the ADP corporate group. The centralized payroll system issues all employee paychecks, W-2s, and direct deposits. ADP assigns a company code to each entity allowing the system "to track and manage the payroll records of each separate entity to ensure that the amount of wages paid to employees is properly recorded on the separate books and records of each entity." Wages recorded on CVR's partnership tax returns filed with the California Department of Revenue for tax years ended June 2008 through June 2010 were $4,300,136; $4,632,312; and $4,405,750, respectively.[4]

[4] In Taxpayer's payroll records, the wage figures differed slightly: $4,352,939; $4,931,832; and $4,419,450, respectively.

CVR, Taxpayer, and ADP share some common corporate officers/directors. Assorted documents reveal that Gary Butler serves in roles as “Group President” of ADP, Inc., as “President” of ADPVR (Taxpayer), and as “General Partner” of CVR. In 1992, ADP and CVR entered into a sales agreement appointing ADP as the non-exclusive sales agent for CVR. In that role ADP agreed to “market CVR’s services, obtain[s] service agreements, provide software, provide sales services and train clients.” Gary Butler executed the agreement in New Jersey on behalf of Taxpayer as general partner of CVR. James Benson executed the California lease in New Jersey on behalf of ADP as a Director/Executive Officer. ADPVR’s Directors/Officers Report lists Benson as Director and Vice President/Secretary. Benson also serves as Taxpayer’s corporate Secretary, and as a General Partner in CVR.[5] Nonetheless, the businesses of ADP and CVR are distinct. While CVR was engaged in the business of providing electronic vehicle registration services, ADP was engaged in the business of offering payroll services, human resources software, and tax and compliance services for business, among others.

Taxpayer identified the “centralized management of facilities functions” as one of the “stewardship functions” provided to CVR by ADP Dealer Services. Dealer Services is as an unincorporated division of ADP, located in Hoffman Estates, Illinois. Taxpayer emphasized that any stewardship functions provided by the ADP affiliate did not emanate from New Jersey, but rather from Illinois. As outlined specifically by Taxpayer in affidavits, employees in the Dealer Services accounting department maintained CVR’s general ledger in the Oracle computer system.

Analysis

I. Summary Judgment Standard

[5] The opinion reflects the titles of the above individuals exactly as identified by the parties in the motion papers and exhibits, including as to the use of the quotation marks.

This court finds no need to engage in further fact finding in this matter. Where the material facts are undisputed the matter is ripe for summary judgment. R. 4:46-2(c). The standard set forth in Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), requiring the court "to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party" has been met and the matter is ripe for summary judgment.

II. Regular Place of Business

Under the relevant statute, multi-state taxpayers that maintained an RPOB, other than a statutory office, were entitled to apportion to New Jersey pursuant to statutory allocation formulas, portions of their net-worth and net-income tax bases for the purposes of computing their corporation business tax liability to the State. N.J.S.A 54:10A-6. Generally, "[t]he formula apportionment method apportions a corporation's income between the taxing jurisdiction and the rest of the world," through use of "a three-factor formula that weighs a multi-state corporate taxpayer's property, payroll and sales, a recognizably common, and constitutionally unremarkable, general approach." Whirlpool Properties, Inc. v. Dir., Div. of Taxation, 208 N.J. 141, 150 (2011) (internal citation omitted). "Each of the three factors in the so-called three-ply formula is expressed as a fraction" with the numerator consisting of "the taxpayer's New Jersey property, receipts, and payroll, and the denominator of which is the taxpayer's total property, receipts, and payroll generated by the operations of the entire enterprise." Metromedia, Inc., v. Dir., Div. of Taxation, 97 N.J. 313, 323 (1984). The "three fractions are then averaged, and the combined fraction . . . is then applied to the corporation's entire net worth and net income to determine the percentage of net worth and net income properly attributable, and thus taxable, to New Jersey."

Reuben H. Donnelley v. Dir., Div. of Taxation, 128 N.J. 218, 224 (1992).[6] Prior to repeal of the RPOB requirement, the statute mandated that "in the case of a taxpayer that does not maintain a regular place of business outside this state, other than a statutory office, the allocation factor shall be 100%." N.J.S.A. 54:10A-6.

In an effort to apply the "regular place of business" statutory requirement, Taxation enacted a regulation to define the term. N.J.A.C. 18:7-7.2. With each court challenge to Taxation's application of the regulation, the taxpayers' efforts to establish an RPOB failed; however, guiding parameters emerged as the case law developed. In amending the regulation in 1985, Taxation added four factors preceded by the language "[t]he following will assist in the determination of what is a regular place of business." N.J.A.C. 18:7-7.2(a). Under the amendment, the definition of RPOB remained the same. The regulation, as amended in 1985, reads in pertinent part as follows:

> Regular place of business; definition
> (a) A regular place of business is any bona fide office (other than a statutory office), factory, warehouse, or other space of the taxpayer which is regularly maintained, occupied and used by the taxpayer in carrying on its business and in which one or more regular employees are in attendance. The following will assist in the determination of what is a regular place of business.
>
> 1. Bona fide office: An office in which an employee in attendance performs significant duties related to the business of the taxpayer. A token office, space of the taxpayer or any place where an employee does not actually perform significant duties constituting part of taxpayer's business does not constitute a regular place of business.
> 2. Space of the taxpayer: The taxpayer must be directly responsible for the expenses incurred in maintaining the regular place of business and must either own or rent the facility in its own name and not through a related person or entity. The regular place of business should be identifiable as belonging to the taxpayer by, for example, reflecting the taxpayer's name on the exterior and interior of the building and being listed in the taxpayer's name in a telephone book.

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[6] As the Court in Donnelley explained, the Legislature eliminated tax on net worth for tax periods beginning after June 30, 1986 through a phase-out repeal, pursuant to L. 1982, c. 55. Reuben H. Donnelley, 128 N.J. at 223.

> 3. Regularly maintained, occupied and used by the taxpayer in carrying on its business: The taxpayer must regularly maintain, occupy and use the premises by employing one or more regular employees who are in attendance during normal working hours. Premises are not regularly maintained, occupied and used in the event employees are in attendance only on a part time basis and, in their absence, telephone messages are received by an answering service or recording device.
> 4. Regular employee: A regular employee must be under the control and direction of the taxpayer in transacting the taxpayer's business and/or performing work on behalf of the taxpayer. The officers of the taxpayer are generally deemed to be regular employees of the taxpayer while independent contractors and members of the taxpayer's board of directors are not regular employees of the taxpayer. The method or procedure by which a taxpayer reports the compensation paid to an individual (such as a W-2 form) shall not be conclusive as to whether the individual is a regular employee (see N.J.A.C. 18:7-8.14.) . . . .

When analyzing Taxation's actions, the court must recognize the well-settled principle that Taxation's determinations are presumed valid. Atlantic City Transp. Co. v. Dir., Div. of Taxation, 12 N.J. 130 (1953); Campo Jersey, Inc. v. Dir., Div. of Taxation, 390 N.J. Super. 366 (App. Div. 2007); L&L Oil Service, Inc. v. Dir., Div. of Taxation, 340 N.J. Super. 173 (App. Div. 2001). "New Jersey courts generally defer to the interpretation that an agency gives to a statute [when] that agency is charged with [enforcement]." Koch v. Dir., Div. of Taxation, 157 N.J. 1, 8 (1999) (internal citation omitted). However, "the final word on statutory interpretation is for the courts." Glukowsky v. Equity One, Inc., 180 N.J. 49, 66 (2004) (citation and internal quotation marks omitted.)

Taxation argues that Taxpayer has failed to overcome the presumption of correctness that attaches to the assessment. In measuring CVR's activities against the RPOB language, Taxation adopts a strict interpretation of the regulation and argues Taxpayer must meet all four RPOB factors listed above, but has not done so, for the reasons that follow. Per Taxation, Taxpayer must be directly responsible for the expenses in maintaining the premises, and rent or own the premises in its own name, with signs identifying the space as Taxpayer's on the building interior and/or exterior. Instead, Taxation points out, ADP rents, pays for, and holds out CVR's California locations as ADP sites; the leases list ADP as tenant; the California office displays only ADP's name and logo; and Taxpayer makes no reference to who paid the telephone, office furnishings, or other related expenses. In addition, Taxation contends, regular CVR employees did not staff the California office, and ADP paid all employees.[7]

Taxpayer argues both the legislative history and the language of the RPOB regulation should be read to mean that not each definitional aspect of the four factors need be met, suggesting they are not "non-exclusive but merely illustrative." In other words, in enacting the regulation, the agency sought to capture the basic factors developed in the case law, "focused on an inclusive, multi-factor analysis that weighed all available factors" rather than create an exhaustive list of absolute requirements.

In considering the arguments, it is important to examine prior case law where the court considered the RPOB statutory requirement. The appellate court first considered the regulation in Hoeganaes Corp. v. Dir., Div. of Taxation, 145 N.J. Super. 352 (App. Div. 1976). There, the taxpayer was a New Jersey specialty manufacturer with its principal office in New Jersey. The taxpayer operated its business through a full-time sales force of employee engineers strategically located in six other States that produced the highest volume of sales. The taxpayer required that each sales engineer worked from an office established at the engineer's home in those other States. In addition to sales efforts, the employees provided technical trouble-shooting advice and on-site customer service. The sales engineers spent the majority of their time at customer locations, and an answering machine handled telephone calls in their absence. There was no staff at the home

[7] The court finds no merit in Taxation's additional contention that because Taxpayer never disputed Taxation's authority to promulgate the regulation, its challenge to Taxation's application of the regulation is unsustainable.

office sites, no regular business hours were established, and the home offices lacked any signage to identify them as the location of the taxpayer's business. The taxpayer's principal office site in New Jersey provided nearly all support services to the sales force, including basic administrative tasks such as typing sales reports, receipt of sales orders, and necessary guidance for response to customer concerns.

The Division of Tax Appeals agreed with the taxpayer that it had an RPOB since the home-site employees were acting as the taxpayer's agents outside the State. The Appellate Division reversed the holding in favor of the taxpayer in an opinion marked by a dissent. The court noted Taxation had adopted the following policy: "in applying the regulatory definition of a 'regular place of business' . . . an office must be owned or rented by the taxpayer . . . [and] taxpayer further must regularly occupy the premises by employing one or more regular employees who are in attendance during normal working hours." Id. at 358. The court's majority found the out-of-state "[sales] 'offices' [were] maintained by the sales engineers for their own convenience, without any 'office hours' except those when they actually feel like using them." Id. at 360. The fact that the sales people used the space "in connection with their employment" was insufficient to establish that the locations were "regularly maintained and occupied and used by" the taxpayer. Ibid. The court interpreted the term "maintain" an office to mean "to 'bear the expense of' the subject, i.e., pay rent." Id. at 359.

In Rocappi, Inc. v. Dir., Div. of Taxation, 3 N.J. Tax 311 (Tax 1981), the Tax Court reached the same outcome. There, the taxpayer's parent company maintained the sales office. The taxpayer paid no rent but instead "reimbursed" the parent each time the taxpayer made a successful sale to cover the cost of office space and other sales-related expenses absorbed by the parent. Building exteriors, directories, and doors reflected only the parent's name. The office phone numbers were in the parent's name as well. Sales representatives did not keep regular hours and there were no employees in regular attendance at the premises. The court denied the taxpayer's claim that the out-of-state offices constituted an RPOB.

Years later, faced with similar circumstances, the Tax Court in N.J. Natural Gas v. Dir., Div. of Taxation, 24 N.J. Tax 59 (Tax 2008) found that the taxpayer had not established an RPOB, consistent with the holding in Hoeganaes. The court denied the taxpayer's claim because the out-of-state employees worked from their homes and conducted no business at the taxpayer's real property locations.

The court once more found an RPOB lacking in Shelter Development Corp. v. Dir., Div. of Taxation, 6 N.J. Tax 547 (Tax 1984). Shelter Development owned a commercial rental property in New Jersey. For the years at issue, its income consisted of rent and the proceeds from the sale of this property. Shelter Development, a subsidiary of Kenrich Corporation, used the address and phone number of an office located in New York, rented by Kenrich, on all of its company correspondence, and stored it books and records at the New York location. The negotiation, collection and deposit of rents, tenant complaints, and building maintenance issues were conducted from the New York location. All of the work was performed by individuals employed full-time by Kenrich-related corporations, not by Shelter Development or its employees, though the taxpayer paid to reimburse the cost for services performed on its behalf. Kenrich leased and paid for the New York office rent at no expense to Shelter Development. Though Shelter Development listed its name at the New York location, the court held that where the taxpayer paid no rent for out-of-state office leased by the taxpayer's parent, in which the employees were primarily the employees of the parent corporation, it did not maintain an RPOB. See also Hess Realty Corp., 10 N.J. Tax 63 (out-of-state gas stations owned by the taxpayer and leased to parent did not constitute RPOB outside New Jersey, nor did the taxpayer's New York "headquarters" leased and controlled by parent, for which the taxpayer paid no rent and where the taxpayer failed to maintain employees in regular attendance.)

Resolution of the issue presented requires that this court interpret and apply Taxation's regulation. In interpreting a regulation, courts abide by the same rules that govern statutory construction. Hoeganaes, 145 N.J. Super. at 359. "The paramount goal of all statutory construction is to give effect to the Legislature's intent." Cosmair, Inc. v. Dir., Div. of Taxation, 109 N.J. 562, 570 (1988). "As a general rule of statutory construction, we look first to the language of the statute. If the statute is clear and unambiguous on its face and admits of only one interpretation, we need delve no deeper than [its] literal terms to divine the Legislature's intent." State v. Butler, 89 N.J. 220, 226 (1982). "Absent a legislative intent to the contrary, [statutory] language is to be given its ordinary meaning." GE Solid State v. Dir., Div. of Taxation, 132 N.J. 298, 307 (1993). "The duty of [Taxation], and this court, is to give meaning to the wording of the statute and, where the words used are unambiguous, apply its plain meaning in the absence of a legislative intent to the contrary." Sutkowski v. Dir., Div. of Taxation, 312 N.J. Super. 465, 475 (App. Div. 1998); see also Koch , 157 N.J. at 7.

As noted, the RPOB regulation first defines what an RPOB is. After the definition, the regulation (as amended in 1985) reads, "[t]he following will assist in the determination of what is a regular place of business." The four factors then follow. Each of the four factors explain certain specific terms used in the definitional portion of the regulation, including, "Bona fide office;" "Space of the taxpayer;" "Regularly maintained, occupied and used by the taxpayer in carrying on its business;" and "Regular employee." There is no directive in the regulation to require each phrase or term in the explanatory factors. Based on a reading of the regulation's plain language the court finds Taxpayer's interpretation of the regulation to be more persuasive. The plain language of the regulation supports Taxpayer's argument that the regulation did not intend the listed factors to be absolute. Webster's Dictionary defines the word "assist" as "to aid." Webster's II New College Dictionary 68 (1999). By its language, the regulation directs that the factors will "assist" or serve to guide the court in its analysis of whether a taxpayer's business activities and manner of operation equates with an RPOB. The four factors more properly read as characteristics of an RPOB rather than exclusive factors that must be met.

Giving due regard to the legislative history of the regulation, Taxation amended the regulation in order to "capture the basic factors developed in the case law and give them precise meaning." 17 N.J.R. 476(b) (February 19, 1985). Promulgation of the amendment was in response to the case law where the court examined the issues of employee home offices as a means of satisfying the RPOB test, with home sales offices neither controlled by the taxpayer nor staffed by regular employees in attendance. It is an objective standard: do the activities at the premises lead the reasonable person to believe the location is an RPOB. Hoeganaes, 145 N.J. Super. at 362 (application of the regulation depends upon an analysis of relevant factors when "[v]iewed objectively" to characterize a location as a "regular place of business.").

The Legislature intended to permit an entity able to establish the existence of an RPOB to allocate income away from the State. Courts are cautioned against applying the law in a manner that thwarts the intent of the Legislature. Taxation's interpretation would result in the denial of a taxpayer's claim where strict compliance is unmet, yet an objective view of the facts reveal that the taxpayer operates a bona fide office outside of the State, as here.

This result finds further support in the case law. In N.J. Natural Gas, the court restated:

> The ascertainment of whether the taxpayer maintains an office outside of the state to which gross receipts may be assigned depends

> entirely upon the circumstances. There are many factors that might constitute the maintenance of an office for the purpose of allocation. But what might be sufficient in one case would be inadequate in another; it is usually the combination of factors that add up to the necessary requirement. In other words the essentials may differ with the type of business, the type of agency or employment contract involved or the manner in which the taxpayer conducts its business.
>
> [24 N.J. Tax at 78 (quoting Hoeganaes, 145 N.J. Super. at 361).][8]

Also of note is the dissenting opinion in Hoeganaes that criticized the majority's strict interpretation of the RPOB regulation, suggesting a taxpayer could meet the regulation's objective without strict adherence to the words contained therein. 145 N.J. Super. at 362. The nature of the office does not determine whether an RPOB exists, the dissent reasoned. The dissent implied that the majority should have focused on the tasks performed by the engineers, rather than the fact that the employees worked from their homes and not from separate rented offices, i.e., form over substance should not control. For example, if the taxpayer performed those very same activities using the very same employees, but "by renting a room in an office building at each location and

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[8] After that statement, the Hoeganaes majority cited to the following factors as relevant to the issue of regular place of business:

> (1) Name of taxpayer in telephone directory, on building directory if there is one, on door leading to entrance of office or otherwise displayed on the office exterior.
> (2) Stationery and calling cards showing office address.
> (3) Storage of inventories or display samples at location in question.
> (4) A written or oral lease for the space involved and the direct or indirect payment of rent.
> (5) A written or oral agreement for the maintenance of an office by the agent or agency on behalf of the taxpayer.
> [145 N.J. Super. at 361-62, citing Commonwealth v. Hellertown Mfg. Co., 264 A.2d 382, 387 (Pa. 1970).]

Hoeganaes noted that these factors were listed by the Pennsylvania Supreme Court in Hellertown. The Hellertown Court took the factors from a treatise that listed the factors as a checklist and did not adopt them but looked to them as guidance or "assistance in supplying proof" of an RPOB, and actually disagreed with some of them. See 264 A.2d at 387-388. Notably, not all factors from the treatise appear in the RPOB regulation at issue.

by hiring a telephone answerer to be present therein for an eight-hour day at minimal expense," Taxation would have accepted that the taxpayer established an RPOB. Id. at 363.

In sum, this court disagrees with Taxation's interpretation of the regulation, and finds that it does not contain a list of absolute requirements. Instead, the regulation provides factors to assist the court to determine whether a taxpayer's purported RPOB constitutes a bona fide office as defined by the regulation. The court will next measure CVR's activities to determine whether they comport with an objective finding that Taxpayer established an RPOB.

As its primary focus, Taxation contends that Taxpayer has failed to establish an RPOB since it lacks employees, and does not lease or rent the premises. To constitute an RPOB, "one or more regular employees" must "regularly maintain, occupy and use" the premises "during normal working hours" while "under the control and direction of the taxpayer in transacting the taxpayer's business and/or performing work on behalf of the taxpayer." N.J.A.C. 18:7-7.2 (a)(3) to (4).

Taxation initially adopted inconsistent positions in this matter apparently designed to justify the tax on the California-based Taxpayer resulting in a conflated argument as to the "regular employee" factor. For example, Taxation acknowledges the unitary nature of CVR and Taxpayer, and agrees that Taxpayer meets with the RPOB regulation provided it establishes that CVR maintains an RPOB, yet it urges the court to find that Taxpayer has no regular employees at the California offices. This court rejects that position. The court's analysis of the "regular employee" factor of N.J.A.C. 18:7-7.2(a) will focus on the employees of CVR.

Taxation posits that ADP pays the CVR "employees," and all employees of ADP member groups. Those facts should convince the court that the individuals working at the California offices were ADP employees, and that CVR had no regular employees there. Taxation points to a sample W-2 form that lists the names of both ADP Inc. and CVR in the employer information section.

Taxation argues that because CVR did not directly pay the employees, they do not meet the definition of "regular employee" under N.J.A.C. 18:7-7.2(a)(4).

The court finds that CVR's method of employee remuneration recorded in the payroll records and on the W-2 as "ADP, Inc. – CVR" does not control the outcome. Taxation's argument contradicts the RPOB regulations. As per N.J.A.C. 18:7-7.2(a)(4), "[t]he method or procedure by which a taxpayer reports the compensation paid to an individual (such as a W-2 form) shall not be conclusive as to whether the individual is a regular employee." In that section of the regulation, the language references N.J.A.C. 18:7-8.14, titled "Definition of officers and employees," which reads in pertinent part:

> Generally, the relationship of employer and employee exists when the taxpayer has the right to control and direct the individual not only as to the result to be accomplished by him or her but also as to the means by which such result is to be accomplished. If the relationship of employer and employee exists, the designation or description of the relationship, and the measure, method or designation of the compensation, are immaterial.
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> [N.J.A.C. 18:7-8.14(b).]

The record contains ample proof to identify the employees as regular CVR employees who "regularly maintain, use, and occupy" CVR's California offices. The affidavit of CVR General Manager, Scott Herbers, is unrefuted. In the affidavit, Herbers explains that CVR had over sixty employees in regular attendance at the California office managed day-to-day by supervisors on site, including the general manager and the vice president of development and research. The court finds significant business operations were performed at the California office, including: research and development functions, the core of the company's business; contracts administration; and, the work of the company's internal auditors, all "under the control and direction of the taxpayer," as explicated by factor four of the RPOB regulation, and in the regulation that defines "employee."

Moreover, were the court to accept Taxation's argument, the section of CVR's California partnership returns where substantial wages are reported, would otherwise remain unexplained. Indeed, proof that the wages paid were reallocated or attributed to ADP by the California department of revenue is absent from the record.

In further support of the argument, Taxation relies on River Systems, Inc. v. Dir., Div. of Taxation, 19 N.J. Tax 599 (Tax 2001), aff'd, 358 N.J. Super. 287 (App. Div. 2003), and equates CVR's employees with those of that taxpayer. The taxpayer, New Jersey-based River Systems, utilized employees paid by a related company working from office space in a New York building owned by a second related company, in the sale of its products. River Systems reimbursed the companies for employee payroll expenses based upon relative sales and contributed to payment of the building expenses. This court finds River Systems is distinguishable and does not provide guidance under the facts presented.

Taxation next posits that Taxpayer's claim should be denied since ADP is the tenant on the lease and the rent is paid indirectly through a cross-charge to CVR's books, contrary to the regulation's language that the taxpayer "must be directly responsible" for maintaining the premises and "must own or rent" the space in its own name. N.J.A.C. 18:7-7.2 (a)(2). Taxation also argues that because ADP's name appears on the lease it provides proof that ADP asserts "operation, management and control" over CVR from New Jersey.

Taxpayer argues that the "space of the taxpayer" is just one of four factors used in the determination of whether an office constitutes an RPOB and the ability of the Taxpayer to comply with a strict reading of that factor should not dictate the outcome. It argues nonetheless that it meets this factor. Taxpayer concludes that the cross-charge is proof that CVR is financially responsible for the rent. Taxpayer further posits that paying the rent through a cross-charge to its books might be "indirect," but contends the case law supports such a view. Taxpayer emphasizes the phrase used by the Hoeganaes court allowing "the direct or indirect payment of rent," which language was later repeated by the court in N.J. Natural Gas. 24 N.J. Tax at 73 (citation omitted).

While there was no evidence produced by Taxpayer to dispute the fact that ADP leased the premises in its name, this court concludes that is not fatal to Taxpayer's claim. Prior cases where the court examined the leasing/rent requirement, and denied relief to the taxpayers, are distinguishable since in each the taxpayers occupied the premises free of any financial responsibility for rent. Unlike those cases, the record before this court contains convincing evidence to the contrary. CVR's general ledgers for all months during the years at issue reflect a rental expense for a facility located in Cerritos for June 30, 2008 through December 2008, and for Buena Park for each month from January 2009 through June 30, 2010. While ADP is the tenant on the lease, the court concludes that the property was "maintained" by CVR since CVR was financially responsible for payment of the rent.

Taxation alleges further support for denial of Taxpayer's claim because there was no sign identifying Taxpayer's business on either the inside or the outside of the California office ("the regular place of business should be identifiable as belonging to the taxpayer." N.J.A.C. 18:7-7.2 (a)(2).). Taxpayer acknowledges as much, and suggests that in listing the California premises as its headquarters on the website and on business cards, it did hold out the office as its own. Moreover, it contends signage is unnecessary since CVR operates an on-line business with no need for a sign to direct a customer to its physical location.

Although neither Taxpayer's nor CVR's name appeared on the exterior or interior of the building, the court finds that CVR's offices were identifiable as belonging to CVR through its website, employee business cards, department of motor vehicle contracts, and the nature of CVR's business itself. CVR's website listed the California offices as its headquarters and CVR's New Jersey employees had business cards reflecting CVR's California office address. The nature of the services performed by CVR was the development of software to allow online registration with departments of motor vehicles. According to Taxpayer, CVR conducted business via telephone, email or other electronic means, such as CVR's website. Therefore, it is reasonable for the court to infer that CVR's customers were unlikely to visit the offices and that there would be no practical reason to identify the buildings as the location of CVR's business.

Moreover, the language of the regulation illustrates that Taxation was less concerned with how the location was identified ("the location 'should' have a sign . . . .") and more concerned that the location was the actual site of a taxpayer's business. While there was no physical signage to indicate that CVR occupied the premises, the court concludes the intent of the regulation has been met where the facts sufficiently establish that CVR conducted its business at the California site, through CVR's employees.

While Taxation's focus is based on the audit results that identified "ADP, Inc. – CVR" employees as belonging to ADP, and concluded that only ADP's name appeared on the California lease, Taxation's argument in the motion papers was still more expansive. For example, Taxation urges that this court consider that common officers and directors overlap the three organizations who operate, manage and control CVR from New Jersey, including: leasing the premises, paying the California employees, and operating a common system of tax preparation. Taxpayer kept its corporate books and records in New Jersey, and all of its tax returns, which list only a New Jersey telephone number, were prepared in New Jersey. Taxation contends only New Jersey addresses appear on all documents of record. Taxation submits that CVR did not maintain an RPOB since the proofs reveal that ADP operates, manages and controls all CVR out-of-state activities and locations from this State. As such, Taxation argues that Taxpayer and CVR have an indisputable nexus with New Jersey, and Taxpayer does not meet the RPOB requirement. Taxation concludes, "New Jersey was, in greatest measure, [Taxpayer's] place of business" and that New Jersey "breathed life" into Taxpayer and "New Jersey is the state that most contributed to Taxpayer's income."

In its approach, Taxation adopts a broad construction of nexus between New Jersey and the California-based Taxpayer. However, this court's determination does not depend upon the concept of nexus. Taxation further argues the court must abide by the regulation without adding or subtracting from its language, yet seeks to expand the factors by its argument. Moreover, Taxation's conclusion excludes consideration of the fact that CVR employees perform significant duties that constitute its business operations at the California office, supported by the website, business cards, and contracts that list the CVR California office address as its place of business. Inter-affiliate services and agreements do not detract from the court's finding that CVR, and thus Taxpayer, had an RPOB in California.

The regulation defines "bona fide office" as "an office in which an employee in attendance performs significant duties related to the business of the taxpayer." N.J.A.C. 18:7-7.2 (a)(1). On the contrary, a "token office" is a space of the taxpayer or any place where an employee does not actually perform significant duties constituting part of the taxpayer's business, and does not constitute an RPOB. By the language of the regulation, Taxation sought to avoid a taxpayer's reliance on a home office; on a token office space, such as space intended for business activity primarily by someone other than the taxpayer; or on space designated for another's use and used only incidentally by the taxpayer.

Objectively viewing the facts, if the court were to deny Taxpayer's claim because ADP leased the space or because of the rent cross-charged to CVR's books, the court would simultaneously be required to deny the existence of compelling facts that show CVR does fulfill the objective of the regulation. Taxpayer provided sufficient evidence that sixty full-time workers regularly occupied and conducted business, under the supervision and management of senior staff, engaged in deciding company policy at the California office, sufficiently identified as CVR's office and for which CVR paid rent.

Conclusion

This court finds CVR's California office constitutes an RPOB, which entitles ADPVR to apportion its income under N.J.S.A. 54:10A-6. Having found an RPOB exists, the court need not address the argument whether Taxpayer is entitled to relief under Section 8 or that 100% apportionment of its income to New Jersey violates the Due Process Clause and Commerce Clause.

An Order shall enter denying Taxation's motion for partial summary judgment and granting Taxpayer's motion for partial summary judgment.