This Week in State Tax (TWIST)

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New York: Appeals tribunal says combined group not eligible for lower QETC rate as not all members qualify

In a recently issued determination, the New York Division of Tax Appeals (DTA) addressed the application of a recent appellate court decision *In the Matter of Charter Communications*—which upheld an administrative determination that the reduced corporate tax rate applicable to “qualified emerging technology companies” (QETCs) was only available to a combined group if each group member individually met the criteria for the reduced rate—to tax years following the state’s 2015 tax reform legislation. In *Charter Communications*, New York addressed the combined group’s eligibility for the reduced rate for QETCs for tax years 2012 through 2014 (i.e., pre-New York tax reform years). The taxpayer in the current case, a provider of financial services technology, filed combined New York corporate franchise tax returns for tax year 2017 using the QETC rate, asserting that more than fifty percent of the group’s receipts were derived from emerging technology activities, and thus the entire group qualified to use the QETC rate. Additionally, the taxpayer later sought to apply the QETC rate to tax years 2015 and 2016, claiming refunds for those years. On audit, the Division of Taxation (Division) concluded that not all members of the combined group independently met the QETC criteria under New York law and denied application of the QETC rate under the reasoning that was later upheld in *Charter Communications*.

Before the DTA, the taxpayer argued that *Charter Communications* was not applicable to tax years following the 2015 tax reform act. It was undisputed that the taxpayer’s primary products were emerging technologies and that those emerging technologies made up more than 50% of the combined group’s activities for the relevant tax years. Relying heavily on the reasoning in *Matter of Charter Communication*, the DTA concluded that New York law does not permit a combined group to be treated as a single QETC unless every member qualifies as a QETC individually. In the BTA’s view, although the New York tax reform requires that a combined report be filed by a designated agent, this did not change the fundamental definition of “taxpayer” as “a corporation subject to tax” (the language relied upon in *Charter Communications*.) Thus, while a combined group is generally treated as a single corporation for computational purposes, a taxpayer remains defined as a single corporation subject to tax. In the event the DTA found that the QETC determination is done at the individual corporation level, the taxpayer requested the Division use its discretionary power to split the taxpayer’s group into two subgroups, on. The DTA held that the letter provided was not a discretionary adjustment request, but rather a response to request for information as part of the audit. Moreover, the DTA found that there was no statutory basis to “correct distortion of the tax rate”. As a result, the taxpayer was required to compute tax for the years at issue at the standard corporate franchise tax rates, and the assessment of additional tax and interest attributable to the disallowance of QETC preferential rate treatment was upheld.

Please contact Aaron Balken and Alec Schwartz for more information on *Matter of Fidelity Nat’l Info. Servs. Inc.*

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