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This Week in State Tax (TWIST)

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New Hampshire: Supreme Court rules combined group cannot share capital losses amongst group members

The New Hampshire Supreme Court reversed a lower court decision permitting one member of a combined group to carry back a capital loss to offset a capital gain earned by another member. The taxpayer's combined group reported a capital gain generated by one subsidiary on the group's original 2017 New Hampshire Business Profits Tax return. After a different group member recognized a capital loss from the sale of a subsidiary in a later year, the taxpayer amended its 2017 return to carry back the loss and offset the earlier gain. The Department of Revenue Administration (DRA) denied the refund, relying on its regulation limiting a capital loss carryback to offset only gains recognized by the same legal entity that generated the loss. The taxpayer ultimately prevailed in superior court, which held that combined reporting required the group to be treated as a single business organization and invalidated conflicting Department regulations, prompting the Department's appeal.

Under New Hampshire law, certain taxpayers must file a combined return "containing the combined net income of the water's edge combined group … as though the entire combined net income of the water's edge combined group was that of one business organization or … in such other manner as the commissioner shall determine to be equitable." A DRA regulation interpreted this statute to require each group member to compute its net income separately, with those member-level figures then added together to arrive at the group's combined net income. The taxpayer argued that this approach conflicts with the statutory language because it did not tax the combined group "as though [it was] one business organization", and that capital losses should therefore be sharable across group members.

The Supreme Court reversed the lower court decision, holding that the statute unambiguously prescribes a specific method of computing combined net income that does not permit sharing of capital losses. In the court's view, under the statute's definitions of "combined net income" and "water's edge method", each group member is required to begin by determining its own net income, including its use of capital loss carrybacks, before those incomes are aggregated. Because capital loss carrybacks are accounted for during this member-level net income computation stage, the court found that using one member's loss to offset another member's gain would be inconsistent with the statute's step-by-step computation of the tax base. The court rejected the taxpayer's argument that the combined group must be treated as a single taxpayer for all purposes, explaining that the statutory framework identifies specific stages at which group-level treatment applies, such as apportionment, while preserving separate entity computations at the net-income stage. The court further concluded that the Department's regulations requiring separate member-level income determinations were consistent with the statute.

Contact Jennifer Bates with questions about *Hologic, Inc. v. N.H. Department of Revenue*.

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