



This Week in State Tax (TWIST)

5th February 2024



To listen to the podcast please [click here](#)

New York: All Combined Group Members must be Qualified Emerging Technology Companies (QETCs) to Utilize Lower Rate

The New York Tax Appeals Tribunal has upheld an Administrative Law Judge (ALJ) determination that a taxpayer combined group was not a “qualified emerging technology company” or QETC able to use the lower corporate rate applicable to Qualified New York Manufacturers for the 2012-2014 tax years at issue. The taxpayer, an affiliated group of companies providing video, high-speed data, and digital voice services to both residential and business customers, filed its New York combined returns using the rate applicable to QETCs. After an audit, the Division determined that the group was not a QETC and applied the regular 7.1 percent rate. Under New York law for the tax years at issue, a “qualified emerging technology company” was a “qualified New York manufacturer” eligible for reduced tax rates. There were two separate methods by which a party could be classified as a “qualified New York manufacturer.” The first (“Method One”), specifically measured a combined group’s overall activities; the second method (“Method Two”), which was applicable to QETCs, did not specifically state that the combined group’s attributes should be considered together. The dispute came before the Division of Tax Appeals and the ALJ ruled in the state’s favor. In the ALJ’s view, the legislature’s failure to include language specifically addressing the computation at the group level (Method One language) in the statutory section describing Method Two was deliberate. The ALJ also rejected the taxpayer’s position that if the combined group did not qualify as a QETC the individual entities of the group that separately qualified as QETCs should be allowed to use the lower rate. In the ALJ’s view, separately breaking out individual component companies of a combined taxpayer was not specifically authorized by statute, and the taxpayer had not proven that de-combination would not create distortion.

On appeal, the Tribunal reviewed the statutory language for both Method One and Method Two and ultimately agreed with the ALJ’s conclusion that each and every member of a combined group, tested separately, must be a QETC, for the group to be considered a QETC. This position, the Tribunal noted, was incorporated into the newly adopted corporate tax regulations (though those regulations are not applicable to pre 2015 tax years). With respect to whether the QETC group members individually could take advantage of the lower rate, the Tribunal determined that position was inconsistent with the rules addressing how a combined group computes its franchise tax liability and would in essence de-combine the group without express permission. After addressing the statutory arguments, the Tribunal next addressed a constitutional challenge made by the taxpayer that the ALJ had rejected. The Tribunal is precluded from considering a constitutional challenge on its face and the taxpayer, the Tribunal determined, was making a facial challenge when it argued that requiring all members of the combined group to be in New York for the group to be considered a QETC discriminated against interstate commerce.

Next Steps and Contacts: The taxpayer has the right to further appeal to an intermediate appellate court within four months of the Tribunal's decision. If the taxpayer appeals to the courts and ultimately loses, or if it chooses to not appeal, then the court's (or final Tribunal) decision would constitute binding precedent. It should be noted that the standard of review applied by the appellate courts to a decision by the Tribunal is generally a very deferential one, by which the Tribunal's decision would be affirmed unless it lacks a rational basis in its interpretation of the tax law. Please contact [Russ Levitt](#) or [Aaron Balken](#) with questions on *Matter of the Petition of Charter Communications, Inc. and Combined Affiliates, F/K/A Time Warner Cable, Inc. and Combined Affiliates* (N.Y. Tax App. Tribunal, Dkt. No. 829691, Jan. 25, 2024).

Learn about us:



[kpmg.com](https://www.kpmg.com)