STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
TD HOLDINGS II, INC.	:	DECISION DTA NO. 825329
for Redetermination of a Deficiency or for Refund of Franchise Tax on Banking Corporations under Article 32 of the Tax Law for the Tax Year Ended October 31, 2007.	:	

The Division of Taxation (Division) filed an exception to the determination of the Administrative Law Judge issued on January 22, 2015. The Division appeared by Amanda Hiller, Esq. (Bruce D. Lennard, Esq., of counsel). Petitioner, TD Holdings, II, Inc., appeared by McDermott Will & Emery LLP (Arthur R. Rosen, Esq., and Lindsay M. LaCava, Esq.).

The Division filed a brief in support of its exception. Petitioner filed a brief in opposition. The Division filed a brief in reply. Oral argument was heard in New York, New York on October 8, 2015, which date began the six-month period for the issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner was required, pursuant to former Article 32 of the Tax Law, to use a net operating loss deduction to decrease its entire net income in a year in which its banking corporation franchise tax liability was not measured by entire net income, but rather another applicable basis.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified findings of fact 13, 14, 15 and 18 to more clearly reflect the record and we have added an additional finding of fact, numbered 19. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional finding of fact appear below.

1. Petitioner, TD Holdings II, Inc., is, and at all relevant times was, a Delaware corporation with a principal place of business in New York, New York. During the years 2005 through 2007, petitioner was subject to tax under Tax Law former Article 32, the franchise tax on banking corporations.

2. TD Securities (USA) LLC and Toronto Dominion (Texas) LLC are wholly-owned subsidiaries of petitioner (subsidiaries) and are treated as disregarded entities for federal income tax and New York banking corporation franchise tax purposes.

3. Petitioner properly filed its New York banking corporation franchise tax returns for the tax years 2005 through 2007.[1] These returns included the income, deductions, and apportionment factors of petitioner and its subsidiaries.[2]

4. For the years 2005 through 2007, petitioner and its subsidiaries were included in a consolidated return with a larger group of entities for federal income tax purposes.

5. In order to determine their New York banking corporation franchise tax liability for the years 2005 through 2007, petitioner and its subsidiaries prepared pro forma federal income tax

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[1] The tax years discussed in this decision run from November 1 of the prior year through October 31 of the referenced year (e.g., the tax year 2007 runs from November 1, 2006 through October 31, 2007).

[2] As petitioner's subsidiaries are disregarded entities, petitioner filed the New York returns at issue in its name.

returns (pro forma returns) that properly reflected the income and deductions that they would have reported if they had filed their own consolidated federal income tax returns.

6. Petitioner used the amounts reflected on the pro forma returns in order to compute its New York banking corporation franchise tax liability for the years 2005 through 2007.

7. Based on the pro forma returns, petitioner and its subsidiaries incurred a loss of $11,747,046.00 during the 2005 tax year for federal income tax purposes (2005 Federal NOL).

8. Petitioner and its subsidiaries incurred a loss of $9,259,151.00 during the 2005 tax year for New York banking corporation franchise tax purposes (2005 New York NOL).

9. For federal income tax purposes, based on the federal taxable income reflected on the pro forma returns, petitioner was properly entitled to carry forward and use $3,767,459.00 of the 2005 Federal NOL for the 2006 tax year and carry forward and use the remaining $7,979,587.00 of the 2005 Federal NOL for the 2007 tax year.

10. Petitioner did not use any of the 2005 New York NOL on its 2006 New York banking corporation franchise tax return. Instead, it carried forward and used the entire 2005 New York NOL on its 2007 New York banking corporation franchise tax return.

11. The federal and New York NOL deductions reported by petitioner based on the pro forma returns and New York banking corporation franchise tax returns are summarized as follows:

	2005 Tax Year	**2006 Tax Year**	**2007 Tax Year**
Federal Taxable Income /(Loss) Reflected on the Pro Forma Returns	($11,747,046)	$3,767,459.00	$33,346,431.00

Federal NOL Deduction Based on Income/(Loss) Reflected on the Pro Forma Returns	$0	($3,767,459.00)	($7,979,587.00)
New York Entire Net Income/(Loss) Reflected on Article 32 Returns	($9,259,151.00)	$6,608,498.00	$34,605,022.00
New York NOL Deduction Reflected on Article 32 Returns and Applied in Computing Entire Net Income	$0	$0	($9,259,151.00)

12. During the period at issue, pursuant to Tax Law former § 1455, New York banking corporation franchise tax was imposed on one of the following four alternate bases, whichever resulted in the highest tax: (1) 7.5% of allocated entire net income; (2) 0.0001 of each dollar of taxable assets or portion thereof allocated to New York; (3) 3% of alternative entire net income (i.e., entire net income with certain adjustments) or portion thereof allocated to New York; or (4) $250.00, which served as a minimum tax.

13. For the tax year 2005, petitioner calculated and paid New York banking corporation franchise tax in the amount of $1,291,219.00 based on its taxable assets allocated to New York. As petitioner's allocated entire net income for that year was a negative number (***see*** finding of fact 8), it was not used as a basis for the tax.

14. For the tax year 2006, petitioner calculated New York banking corporation franchise tax in the amount of $907,043.00 based on its taxable assets allocated to New York. Petitioner's 2006 reported tax based on allocated entire net income was $416,787.00. Its reported tax based on its allocated alternative entire net income was a lesser amount.

Accordingly, petitioner paid its 2006 New York banking corporation franchise tax based on its allocated taxable assets.

15. Petitioner's 2006 entire net income as reported did not include any New York NOL deduction. That is, petitioner did not carry forward any of the 2005 New York NOL to its 2006 return.

16. For the 2007 tax year, petitioner paid New York banking corporation franchise tax in the amount of $2,217,729.00 based on its entire net income. This amount exceeded the tax on either petitioner's asset base or its allocated alternative entire net income base. Petitioner used its entire 2005 New York NOL as a deduction in calculating its entire net income for 2007.

17. Following an audit of petitioner's banking corporation franchise tax returns for the years 2005, 2006 and 2007, the Division issued to petitioner a notice of deficiency, dated August 3, 2012, asserting additional banking corporation franchise tax of $241,444.00, additional metropolitan transportation business tax under Tax Law § 1455-B in the amount of $49,254.00, and interest in the amount of $82,596.83 for the 2007 tax year.

18. In arriving at the deficiency, the Division reduced the amount of petitioner's 2005 New York NOL available to be carried forward and used for tax year 2007 from $9,259,151.00 to $5,491,692.00. The Division took the position that $3,767,459.00 of the reported 2007 NOL deduction was required to be used in the 2006 tax year to offset petitioner's entire net income (before subtracting the NOL deduction) of $6,608,498.00.

19. Although it claimed a New York NOL deduction of $9,259,151.00 on its 2007 return, petitioner concedes that if it prevails herein, the additional tax and interest reflected in the notice of deficiency should be adjusted by using a New York NOL deduction of $7,979,587.00 in

calculating its entire net income for the 2007 tax year. As noted in finding of fact 11, petitioner claimed a federal NOL deduction of $7,979,587.00 for the 2007 tax year.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Following a review of the relevant statutes, the Administrative Law Judge determined that former Article 32's NOL deduction provision (Tax Law former § 1453 [k-1]) did not require petitioner to use any portion of its 2005 New York NOL to compute its 2006 entire net income when such entire net income was already low enough to require the use of an alternative base. The Administrative Law Judge found support for this conclusion in ***Matter of Brooke-Bond Group (U.S.), Inc***., (Tax Appeals Tribunal, December 28, 1995), as well as in the legislative history and public policy underlying the New York NOL deduction, from which he drew the general rule that "the applicability of the NOL deduction must be tied to a taxpayer's income." The Administrative Law Judge thus concluded that the full amount of petitioner's 2005 NOL could be carried forward to the 2007 tax year and that, therefore, the subject notice of deficiency should be modified in accordance with finding of fact 19.

In reaching his conclusion, the Administrative Law Judge noted that the Division's construction of Tax Law former § 1453 (k-1) was too narrow and that its reading of ***Matter of Brooke-Bond Group*** was too expansive. The Administrative Law Judge found that the Division's reasoning was flawed because it failed to account for a critical distinction between federal income tax and New York franchise tax. That is, that while the federal tax is always income-based, the franchise tax is not. Given this distinction, the Administrative Law Judge concluded that a New York NOL deduction was not required where, as in the present matter, the payment of franchise tax is not based on entire net income, and such a deduction has no impact on the taxpayer's liability for that year.

ARGUMENTS ON EXCEPTION

The Division contends that the absence of statutory language prohibiting action may not be interpreted as language authorizing action where, as here, the statute is properly construed against the taxpayer. More specifically, the Division argues that the phrase "presumably the same as" as used in Tax Law former § 1453 (k-1) means that the New York NOL deduction is the same as the federal NOL deduction, except for the New York adjustments expressly provided for in Tax Law former § 1453 (k-1) (1). Contrary to the determination and petitioner's contention herein, the Division contends that the "presumably the same" language is not an invitation to use an available New York NOL to deduct from entire net income only so much as will result in a tax computed on an alternative basis.

The Division notes that the relevant statute requires a taxpayer to determine its entire net income and the tax due thereon before determining whether an alternative tax base will be applicable. According to the Division, such a determination of entire net income must include the appropriate New York NOL deduction.

The Division also asserts that its interpretation of the "presumably the same as" language in Tax Law former § 1453 (k-1) means that petitioner must follow the ordering rules in IRC (26 USCA) § 172. The Division contends that such rules require that an available NOL must be carried to the earliest of the taxable years to which such a loss may be carried and must be used to the maximum extent possible. The Division notes that its business corporation franchise tax regulations mirror such ordering rules.

The Division also contends that both the Administrative Law Judge and petitioner misinterpret ***Matter of Brooke-Bond Group***. According to the Division, that decision holds that a taxpayer is required, to the extent possible, to use an available New York NOL to reduce its

entire net income to zero in computing its franchise tax liability. The Division thus asserts that ***Matter of Brooke-Bond Group*** supports its position in the present matter.

In sum, the Division asserts that its position is reasonable because it is consistent with established law requiring conformity with the federal NOL deduction as to amount and source year, and with the requirement of reducing income to zero, or to the extent possible, in accordance with the federal ordering rules. The Division thus contends that petitioner has failed to meet its burden to prove that its position is the only reasonable interpretation of the law.

Petitioner contends that where, as here, a taxpayer pays banking corporation franchise tax on its taxable assets, its New York NOL deduction need not be any larger than necessary to reduce the taxpayer's income to the point at which the tax on an alternative base is greater than the tax on the entire net income base. Petitioner argues that, as its entire net income played no role in determining its 2006 franchise tax liability, its use of a New York NOL deduction for that year would be meaningless and any NOL so deducted would be lost.

Petitioner asserts that the Tax Law contains no provision expressly requiring a taxpayer to use an available New York NOL carryforward to reduce entire net income when entire net income has no impact on the taxpayer's bank franchise tax liability. Petitioner argues that the use of the phrase "presumably the same as" in Tax Law former § 1453 (k-1), coupled with the NOL cap in Tax Law former § 1453 (k-1) (3), makes clear that a New York NOL deduction may be less than the corresponding federal deduction for the same tax year.

Petitioner contends that deviations from federal NOL conformity are not restricted to the adjustments specifically referenced in Tax Law former § 1453 (k-1) (1). Petitioner claims that Tax Law former § 1453 (k-1) (1) contains no language expressly indicating the adjustments therein are the only allowable adjustments. Petitioner argues that ***Matter of Brooke-Bond***

Group supports its position that other adjustments lowering a taxpayer's New York NOL in addition to those specified in Tax Law former § 1453 (k-1) (1) are allowable. Petitioner further asserts that ***Brooke-Bond*** is consistent with its specific position herein.

Petitioner also argues that its position does not contravene the federal NOL ordering rules in IRC (26 USCA) § 172. Such rules require an NOL to be carried forward to the next taxable year in which there is positive taxable income. Petitioner contends that such rules are not applicable during tax years where a franchise tax is computed on a non-income base. Hence, petitioner asserts that where a bank franchise tax is computed using a tax on assets, there is no positive taxable income to offset.

Petitioner also contends that its statutory interpretation is consistent with the legislative history and the policy behind the statute. In petitioner's view, to require it to use its New York NOL deduction in a year when its tax liability is not tied to income results in a permanent disallowance of that NOL deduction. According to petitioner, such an outcome is at odds with the legislative history and policy behind the New York NOL statute.

Petitioner thus asserts that its position herein is the only reasonable interpretation of the statute and that the Division's opposing view is not rational.

OPINION

At all times relevant, former Article 32 of the Tax Law imposed a franchise tax on banking corporations (Tax Law former § 1451).[3] As correctly noted in finding of fact 12, taxpayers were required to compute their tax on four alternative bases and then to pay pursuant to the base that resulted in the highest tax (Tax Law former § 1455). The four bases were the basic tax on entire

[3] Article 32 of the Tax Law (§§ 1450 to 1468) was repealed by L 2014, c 59, effective January 1, 2015. Its provisions, however, remain in full force and effect with respect to tax years beginning before January 1, 2015 and thus remain in effect for the period at issue. Effective for tax years commencing January 1, 2015, corporations formerly taxable under Article 32 are subject to tax under Article 9-A (***see*** L 2014, c 59).

net income; a tax measured by taxable assets; a tax on alternative entire net income; or a fixed minimum tax of $250.00 (***id***.).

The instant matter focuses on the proper computation of petitioner's entire net income for the tax year 2006. As defined in former Article 32, entire net income means total net income from all sources, which is, generally, "the same as" federal taxable income, with various addition and subtraction adjustments (***see*** Tax Law former § 1453). The proper treatment of one such adjustment, the New York NOL deduction, is at the crux of the dispute herein.

Tax Law former § 1453 (k-1) provided for a New York NOL deduction, in relevant part, as follows:

> `"A net operating loss deduction shall be allowed which shall be presumably the same as the net operating loss deduction allowed under section one hundred seventy-two of the internal revenue code, except that in every instance where such deduction is allowed under this article:
>
> (1) any net operating loss included in determining such deduction shall be adjusted to reflect the inclusions and exclusions from entire net income required by the other provisions of this section,
>
> (2) such deduction shall not include any net operating loss sustained during any taxable year beginning prior to [January 1, 2001], or during any taxable year in which the taxpayer was not subject to tax impose by this article,
>
> (3) such deduction shall not exceed the deduction for the taxable year allowed under section one hundred seventy-two of the internal revenue code . . . , and
>
> (4) the net operating loss deduction allowed under section one hundred seventy-two of the internal revenue code shall . . . be determined as if the taxpayer had elected under such section to relinquish the entire carryback period with respect to net operating losses."

The New York NOL deduction under Tax Law former § 1453 (k-1) was enacted in 1997 and was intended to serve the same purpose as the Article 9-A NOL deduction (***see*** Senate Committee on Rules Memorandum S. 5785 [August 3, 1997], Legislative Bill Jacket, L 1997, c

389, ["This type of deduction is presently permitted for all other New York State corporations."]). The Article 9-A NOL deduction's purpose is to "conform New York State law to Federal law with respect to NOL deductions in order to protect corporations with cyclical fluctuations in earnings from the disadvantage of paying relatively higher taxes in good years without receiving credit for losses in bad years (citations omitted)" (***Matter of Brooke-Bond Group***).[4] Similarly, the federal NOL deduction's purpose is "to permit a taxpayer to set off its lean years against its lush years, and to strike something like an average taxable income computed over a period longer than one year" (***Lisbon Shops, Inc. v Kohler***, 353 US 382, 386 [1957], ***rehearing denied*** 354 US 943 [1957]). The federal NOL deduction is contained in IRC (26 USCA) § 172.

A taxpayer's federal NOL deduction is the starting point for the computation of the NOL deduction under Tax Law former § 1453 (k-1) (***see Matter of Lehigh Valley Indus., Inc***., Tax Appeals Tribunal, May 5, 1988). This means that the computation starts with the New York NOL deduction matching the federal NOL deduction with respect to both amount and source year (or years) (***id.***). We observe that this starting point is consistent with the principle of federal conformity upon which Tax Law former § 1453 (k-1) is based, as well as the statutory phrase "presumably the same as."

From the federal deduction starting point, Tax Law former § 1453 (k-1) (1) through (4) require certain specific adjustments that may cause the New York NOL deduction to deviate from the federal NOL. As relevant here, the most pertinent of these is Tax Law former § 1453

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[4] The former Article 32 NOL provision at issue contains nearly identical language to the Article 9-A NOL provision in effect during the period at issue (***compare*** Tax Law former § 1453 [k-1] with Tax Law former § 208 [9] [f]). Accordingly, we find these statutes to be in pari materia and thus properly construed in a like manner (***see*** McKinney's Cons Law of NY, Book 1, Statutes § 221; ***see also Matter of Brooke-Bond Group*** [NOL provisions under Article 33 and 9-A are in pari materia]).

(k-1) (3), which limits the New York NOL deduction to the amount of the federal NOL deduction for the same year.

In ***Matter of Brooke-Bond Group***, this Tribunal determined an additional adjustment allowable under Tax Law former § 1453 (k-1). In that case, the taxpayer's entire net income before its NOL deduction was less than its federal NOL deduction. The Division argued that Tax Law former § 208 (9) (f) (the Article 9-A NOL deduction statute) required that the taxpayer's New York NOL deduction be equal to its federal NOL deduction, even if such equality resulted in negative entire net income. This Tribunal disagreed and held that, under such circumstances, a taxpayer's New York NOL deduction need not equal its federal NOL, but may be limited to the amount of its entire net income for that year. In reaching this conclusion, we noted the principle of federal conformity upon which the New York NOL deduction is premised. We noted further that federal NOL deductions are limited to the amount required to bring taxable income to zero (***see*** IRC [26 USCA] § 172 [b] [2] [B]) and determined that this federal rule was properly applicable to New York NOL deductions. We thus reasoned that conformity to this federal NOL rule took precedence over conformity to the amount of the federal deduction. Moreover, we found that this outcome was consistent with the legislative purpose underlying Tax Law former § 208 (9) (f), as discussed above. We also noted that our conclusion was consistent with Tax Law former § 208 (9) (f), as that provision did not preclude a New York NOL deduction from being less than the federal deduction.

New York NOL deductions under Tax Law former § 1453 (k-1) are also subject to the ordering rules in IRC (26 USCA) § 172 (b) (2). Such rules require a taxpayer to carry any available New York NOL to the earliest of the taxable years to which it may be carried and to use

it as a deduction for that year to the maximum extent possible (***see Matter of Refco Properties, Inc.***, Tax Appeals Tribunal, July 11, 1996).

Petitioner bears the burden to establish the propriety of the claimed New York NOL deductions at issue (***see Matter of Five Star Equip., Inc.,*** Tax Appeals Tribunal, April 15, 2015; ***Matter of Royal Indem. Co. v Tax Appeals Trib***., 75 NY2d 75, 78 [1989]). A deduction is a type of tax exemption and, therefore, the rules of construction pertaining to exemptions are applicable (***Matter of Grace v New York State Tax Commn.***, 37 NY2d 193, 197 [1975], ***rearg denied*** 37 NY2d 708 [1975], ***lv denied*** 338 NE2d 330 [1975]). Specifically, deduction and exemption statutes must be strictly construed against the taxpayer (***see e.g. Matter of 677 New Loudon Corp. v State of NY. Tax Appeals Trib.***, 19 NY3d 1058 [2012], ***rearg denied*** 20 NY3d 1024 [2013] ***cert denied*** 134 S Ct 422 [2013]). "An exemption [or deduction] from taxation 'must clearly appear, and the party claiming it must be able to point to some provision of law plainly giving the exemption'" (***Matter of Grace***, 37 NY2d at 196 quoting ***People ex rel. Savings Bank of New London v Coleman***, 135 NY 231 [1891]; ***see also Matter of Impath, Inc***., Tax Appeals Tribunal, January 8, 2004). Moreover, petitioner must prove that the Division's interpretation herein is irrational and that its interpretation of the statute is the only reasonable construction (***see Matter of Brooklyn Navy Yard Cogeneration Partners, L.P. v Tax Appeals Trib. of State of N.Y.***, 46 AD3d 1247 [2007], ***lv denied*** 10 NY3d 706 [2008]; ***Matter of Refco Properties, Inc***). Nevertheless, construction of a deduction statute should not be so narrow as to defeat the provision's settled purpose (***Matter of Grace***, 37 NY2d at 196).

Pursuant to the following discussion, we find that the Division's interpretation of the New York NOL provision at issue is reasonable. Accordingly, we conclude that petitioner has not met its burden to establish entitlement to its claimed NOL deductions.

We note first that, contrary to petitioner's contention, ***Brooke-Bond*** provides little support to its position. As noted previously, that case held that where a taxpayer's entire net income before its NOL deduction is less than its federal NOL deduction, its New York NOL deduction may be limited to the amount of its entire net income. The basis for this holding was the federal rule that NOL deductions are limited to the amount required to bring taxable income to zero (***see*** IRC [26 USCA] § 172 [b] [2] [B]). We determined that New York corporate taxpayers should benefit from this federal rule, given the legislative intent to conform New York law to federal law with respect to NOLs.[5] Viewed more abstractly, ***Brooke-Bond*** establishes that the former NOL provisions permitted adjustments to the federal NOL deduction in addition to, but not inconsistent with, the adjustments expressly prescribed therein. ***Brooke-Bond*** does not, however, tie the NOL deduction to the payment of tax on an alternative basis.

Petitioner's position in the present matter is premised on the basic distinction between the federal income tax and the franchise tax, the payment of which may be non-income based. Petitioner reasons that the statute does not require an offset of entire net income if entire net income plays no role in determining its tax liability.

In our view, there is simply no language in Tax Law former § 1453 (k-1) limiting the NOL deduction in the manner proposed by petitioner. As noted previously, a tax deduction "'must clearly appear, and the party claiming it must be able to point to some provision of law plainly giving the exemption'" (***Matter of Grace***, 37 NY2d at 196 quoting ***People ex rel. Savings Bank of New London v Coleman***). The Legislature was certainly aware of the alternative franchise tax

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[5] Indeed, our holding in ***Brooke-Bond*** is consistent with and thus provides some support to the Division's position here. As noted, the Division asserts that petitioner must reduce its 2006 entire net income to zero while paying tax on an alternative base. The petitioner in ***Brooke-Bond***, having reduced its entire net income to zero by taking its New York NOL deduction, necessarily paid franchise tax on an alternative basis. We do not consider ***Brooke-Bond*** as dispositive, however, because the issue in the present matter was not addressed in that decision.

bases when it enacted Tax Law former § 1453 (k-1) in 1997, and could have chosen to limit the NOL deduction accordingly, but did not do so.

We further observe that petitioner's construction, if correct, would have a wide impact. Given the $250.00 minimum tax and the 7.5% rate on allocated entire net income during the period at issue (***see*** finding of fact 12), all taxpayers with entire net incomes greater than $3,333.00 could be affected. We think it reasonable to expect that such a broadly applicable benefit would be clearly set forth in the statute. Hence, a practical construction of the statute weighs against petitioner's position (***Matter of 1605 Book Ctr. v Tax Appeals Trib. of State of N.Y.***, 83 NY2d 240, 244, 245 [1994], ***cert denied*** 513 US 811 [1994]).

We also reject petitioner's argument that its position is consistent with the federal ordering rules in IRC (26 USCA) § 172. Specifically, IRC (26 USCA) § 172 (b) (2) requires that a federal NOL be carried forward to the next taxable year in which there is positive taxable income. Applying that rule to New York, petitioner contends that it was not required to carry any portion of its 2005 NOL to 2006 because, as it paid franchise tax on its asset base for that year, it had no income subject to tax (i.e., taxable income). As discussed above, however, there is no language in former Article 32 linking the NOL deduction to the payment of tax on an alternative basis. Moreover, pursuant to Tax Law former § 1455, petitioner was required to compute its entire net income for the 2006 tax year whether or not it ultimately paid its tax on that base. Such a requirement plainly contemplates that entire net income be computed inclusive of any applicable NOL deductions. With respect to tax year 2006, petitioner had positive entire net income before the application of any New York NOL deduction. Tax Law former § 1453 (k-1) and IRC (26 USCA) § 172 (b) (2) thus required petitioner to use its available 2005 NOL to reduce its 2006

entire net income to zero. Accordingly, the use of a portion of petitioner's 2005 NOL to reduce its 2006 entire net income was consistent with the federal ordering rules.

The corporate tax reform legislation enacted in 2014 (L 2014, c 59) also supports our interpretation of Tax Law former § 1453 (k-1) herein. As noted previously, that legislation made major changes to the Tax Law, including the repeal of Article 32, and the inclusion of former Article 32 corporations within Article 9-A as amended. That legislation also made a significant change to the New York NOL deduction provision. Specifically, under the new law, the amount of a New York NOL deduction is no longer limited to the amount of the federal deduction (Tax Law § 210 (1) (a) (ix) [1]). Rather, the maximum allowable New York NOL deduction under the new statute is "the amount that reduces the taxpayer's tax on the apportioned business income base to the higher of the tax on the capital base or the fixed dollar minimum" (Tax Law § 210 [1] [a] [ix]).[6] The express language of the new statute thus comports with petitioner's interpretation of the former statute.

It is a fundamental rule of statutory construction that "[w]hen the Legislature amends a statute, it is presumed that the amendment was made to effect some purpose and make some change in the existing law" and that "[b]y enacting an amendment of a statute and changing the language thereof, the Legislature is deemed to have intended a material change in the law" (***Matter of Stein***, 131 AD2d 68, 72 [1987], ***citing*** McKinney's Cons Laws of NY, Book 1, Statutes §§ 191, 193, ***appeal dismissed*** 72 NY2d 840 [1988]). "Moreover, a statute will not be held to be a mere reenactment of a prior statute if any other reasonable interpretation is attainable" (***id.***). Additionally, we note that there is no indication that the change to the New

[6] "Business income," replaces entire net income as one of the bases upon which taxpayers must calculate their franchise tax under the new law. It is similar to entire net income (***see*** Tax Law § 208 [8]). The capital base and minimum tax are the alternative bases under the new law (***see*** Tax Law § 210 [1]).

York NOL statute was intended to explain ambiguities in the former NOL statute (***see*** McKinney's Cons Laws of NY, Book 1, Statutes § 193 [b]).

In our view, the recent change to the New York NOL statute evinces a clear legislative intent to limit the use of the New York NOL deduction to the extent that the deduction impacts tax liability. The former NOL statutory language lacked any indication of such an intent. Pursuant to the above-noted principles of statutory construction, it is reasonable to conclude that the Division's construction of Tax Law former § 1453 (k-1) is consistent with the legislative intent underlying the former provision, while petitioner's is not.

Finally, we note that petitioner did not benefit in any way from the use of the 2005 New York NOL on its 2006 return. Such a consequence, however, is not inconsistent with a proper reading of the NOL statute (***see Matter of American Employers' Ins. Co. v State Tax Commn.***, 114 AD2d 736, 738 [1985]; ***Royal Indem. Co. v Tax Appeals Trib.***; ***Matter of Five Star Equip., Inc.***).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;

2. The determination of the Administrative Law Judge is reversed;

3. The petition of TD Holdings II, Inc. is denied; and

4. The notice of deficiency, dated August 3, 2012, is sustained.

DATED: Albany, New York
April 7, 2016

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner