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Everything, Everywhere, All in One New Jersey Return

by Open Weaver Banks

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by Open Weaver Banks

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In this article, Banks provides some highlights of New Jersey's unitary business case law and discusses the state's new statutory and regulatory definitions of a unitary business.

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Thirty years ago, in *Allied-Signal*, New Jersey asked the U.S. Supreme Court to abandon the unitary business principle.[1] Unlike more recent decisions, the Court was not persuaded to overrule decades of precedent, and it rejected New Jersey's theory that any business in a state, no matter how small or unprofitable, subjects all of a corporation's out-of-state income to apportionment.[2]

Following the 1992 decision in *Allied-Signal*, application of the unitary business principle has been outcome determinative in only three New Jersey corporate tax decisions. In each case, the unitary analysis was conducted for a different reason — but the court consistently found the absence of a unitary relationship.

For the first time in over a decade, the unitary business principle is primed to make a big comeback now that New Jersey has replaced its separate reporting corporate tax regime with combined reporting for unitary groups. This article provides some highlights of New Jersey's unitary business case law and discusses New Jersey's new statutory and regulatory definitions of a unitary business.

First — What Is the Unitary Business Principle?

For readers who are new to this concept, New Jersey's Tax Court described its understanding of the unitary business principle in 1990, in this passage from *American Home Products*,[3] which perhaps reveals a hint of frustration with the concept:

> The phrase "unitary business" eludes definition; none of the numerous decisions in both state and federal courts undertakes to define the phrase. It appears to be a make-weight judicially applied when a court has concluded that disputed items of income, and the capital producing it, are somehow functionally related to the in-state activities of the corporate recipient and owner of the capital . . . so that the income and capital in dispute which are allegedly beyond the taxing state's jurisdiction, are includible in the relevant tax base and apportionable to the taxing state.[4]

Stated this way, the unitary business principle gives the taxing state the right to include out-of-state income in the tax base. Whether thought of as

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[1] *Allied-Signal Inc. v. Director, Division of Taxation*, 504 U.S. 768, 783 (1992).

[2] *Id.* at 784.

[3] *American Home Products Corp. v. Director, Division of Taxation*, 11 N.J. Tax 287 (1990), *aff'd*, 13 N.J. Tax 120 (App. Div. 1992).

[4] *Id.* at 298 (1990).

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a "make-weight" or the "linchpin of apportionability,"[5] the unitary business principle serves as a "device for ascertaining whether a State has transgressed its constitutional limitations," and it provides a "necessary limit on the States' authority to tax value or income that cannot in fairness be attributed to the taxpayer's activities within the State."[6] Thus, in situations in which tax nexus exists and a company is subject to a state's corporate income tax, the unitary business principle serves to identify the company's out-of-state income that is not within the taxing state's jurisdiction because it was earned outside the unitary business that is conducted within the state.

In *Allied-Signal*, New Jersey argued that the Supreme Court should overrule its decisions recognizing the unitary business principle, precisely because it served as a limiting principle in that case. *Allied-Signal* fell into the well-populated category of unitary business principle cases that address whether income received from a corporation's sale of a minority interest in another corporation is apportionable. The parties had stipulated that the companies at issue "were unrelated business enterprises each of whose activities had nothing to do with the other."[7] So the only way for New Jersey to prevail in its mission to tax the income from the sale of the minority interest was to persuade the Court to discard the unitary business principle altogether. The Court did not agree, finding that it would be "unworkable in practice" for the Court "to abandon [its] settled jurisprudence defining the limits of state power to tax under the unitary business principle."[8]

Far from going away, the unitary business principle is now a key component of New Jersey's combined reporting regime. By limiting the mandatory filing group to members that are unitary with one another, New Jersey avoids crossing the constitutional line that was reaffirmed in *Allied-Signal.*

Post-*Allied-Signal* Unitary Business Decisions in New Jersey

The only true unitary business case in New Jersey since *Allied-Signal* is *Central National-Gottesman*,[9] a decision nearly as old as *Allied-Signal*. In *Central National-Gottesman*, the taxpayer prevailed on what might be the most difficult of unitary business arguments: convincing a court that two divisions within the same company are not unitary.

The taxpayer in *Central National-Gottesman* was subject to New Jersey tax on its income from its forest products division but contended that since there was no nexus between its separate investment division and New Jersey, and because the activities of the two divisions were not unitary, the income of the investment division was not subject to New Jersey tax under the unitary business principle. The tax court agreed, relying on the following facts as evidence that the two divisions operated separately:

- the divisions had separate operational officers and controllers;
- the divisions had separate sales forces (or portfolio managers);
- the businesses of the divisions were not related in any way;
- the divisions maintained separate books;
- the divisions maintained separate computer systems;
- the divisions maintained separate bank assets; and
- the forest products division secured its own financing.[10]

Despite some sharing of officers and functions, such as payroll and employee benefits, the court found that the taxpayer proved by clear and cogent evidence that, under the three-part test for a unitary relationship affirmed in *Allied-Signal*, there was a lack of functional integration, centralization of management, and economies of scale between the two divisions.[11] In particular, the tax court noted that there was no evidence of

[5] *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425, 439 (1980).

[6] *Allied-Signal*, 504 U.S. at 773, 780.

[7] *Id.* at 774.

[8] *Id.* at 785.

[9] *Central National-Gottesman Inc. v. Director, Division of Taxation*, 14 N.J. Tax 545 (1995), *aff'd*, 291 N.J. Super. 277 (1996), *certif. denied*, 146 N.J. 569 (1996).

[10] *Id.* at 557.

[11] *Id.* at 560.

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cost savings resulting from shared programs and facilities,[12] the common senior executives did not make "day-to-day" investment decisions,[13] and isolated incidents were not enough to cause the divisions to be treated as a unitary business.[14]

Central National-Gottesman is a typical unitary business decision, although not necessarily in terms of outcome because taxpayers have a heavy burden when trying to convince a court that "unitariness"[15] is lacking. But in terms of the relevant evidence, *Central National-Gottesman* examines the typical facts that taxpayers and tax departments argue about, both in published decisions and in audits that are resolved without litigation. *Central National-Gottesman* is also typical because the unitary business principle is most often relevant when taxpayers seek the right to cordon off some of their income as not subject to state taxation because a unitary business is lacking, as was the case in *Allied-Signal*.

The other New Jersey unitary business decisions from recent years do not fit the mold of the typical unitary business dispute. In *Chiron Corp.*,[16] the New Jersey Tax Court considered the relationship between a corporate partner and its partnership to determine the correct apportionment method for the corporate partner's partnership income. New Jersey regulations provided that if the business of the partnership was part of a single unitary business including a business carried on directly by the foreign corporate partner, "flow through accounting apportionment" should be used regarding the incomes of the two entities.[17]

The tax court in *Chiron* held that the relationship between the corporation and the partnership was not unitary. The court based its unitary analysis on factors the division set forth in a 1991 technical bulletin and not on a review of U.S. Supreme Court law. Relevant factors included (1) that the corporation and partnership were not in the same line of business, and (2) the insubstantial overlap of employees and offices.[18]

More recently, in *BIS LP Inc.*,[19] the tax court again applied the unitary analysis in the partnership context, but this time to determine whether nexus could be attributed from a partnership to a corporate partner. New Jersey regulations provided that a foreign corporate limited partner of a limited partnership doing business in New Jersey is considered subject to New Jersey tax if "the business of the partnership is integrally related to the business of the foreign corporation."[20] For this analysis the tax court relied on an example in the division's regulations and essentially equated the "integrally related" requirement with a unitary business requirement.[21]

After reviewing U.S. Supreme Court unitary business decisions, the court in *BIS* held that the corporate partner and partnership were not unitary because the corporation was a passive investor in the partnership, the corporation had no control or potential for control over the partnership, and the corporation and partnership were not in the same line of business.[22]

If you are keeping track, taxpayers are 3-0 on unitary business disputes in New Jersey since *Allied-Signal*, which is an impressive result given the unique challenges of unitary business audits and appeals.[23] However, the value and relevance of

[12] *Id.* at 557.

[13] *Id.* at 558.

[14] *Id.* at 559.

[15] Credit goes to Leah Robinson for convincing me that "unitariness" is a word. It was used by the tax court in *Central National-Gottesman* ("The finding of unitariness requires that 'there be some bond of ownership or control uniting the purported "unitary business."'"). *Id.* at 556. "Unitariness" also appeared in a footnote in *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 177 (1983) ("In any event, although potential control is . . . not 'dispositive' of the unitary business issue . . ., it is relevant, both to whether or not the components of the purported unitary business share that degree of common ownership which is a prerequisite to a finding of unitariness, and also to whether there might exist a degree of implicit control sufficient to render the parent and the subsidiary an integrated enterprise.").

[16] *Chiron Corp. v. Director, Division of Taxation*, 21 N.J. Tax 528 (2004).

[17] N.J. Admin. Code section 18:7-7.6(g).

[18] *Chiron Corp.*, 21 N.J. Tax at 548.

[19] *BIS LP Inc. v. Director, Division of Taxation*, 25 N.J. Tax 88 (2009), *aff'd*, 26 N.J. Tax 489 (App. Div. 2011).

[20] N.J. Admin. Code section 18:7-7.6(c)4.

[21] *BIS*, 25 N.J. Tax at 105. Example 4 of N.J. Admin. Code section 18:7-7.6(k) provides, "Corporation LMN holds a limited partnership interest. . . . The corporation and the partnership are not part of a unitary business, and the limited partnership does not have liabilities to third parties. LMN is not subject to corporation business tax in New Jersey since it is a true limited partner."

[22] *BIS*, 25 N.J. Tax at 105.

[23] The results would be 4-0 if this discussion included a pre-*Allied-Signal* tax court decision that was affirmed after *Allied-Signal*. *See American Home Products*, 11 N.J. Tax 287 (1990), *aff'd o.b. per curiam*, 13 N.J. Tax 120 (App. Div. 1992).

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Chiron and *BIS* to future unitary business disputes is questionable, given that these cases conducted a unitary analysis in the context of New Jersey partnership regulations that borrowed the unitary concept for purposes of determining apportionment methodology and nexus.

Renewed Relevance of the Unitary Business Principle

After more than a decade of silence[24] on this topic, the unitary business principle is a hot topic in New Jersey again. For tax periods ending on or after July 31, 2019, New Jersey adopted mandatory combined reporting. A New Jersey combined group means the group of all companies that have common ownership and are engaged in a unitary business, in which at least one company is subject to the corporation business tax.[25] As a result of this regime shift, New Jersey has adopted a statutory definition of a unitary business[26] and recently promulgated regulations interpreting the statute.[27]

Audits of the first combined group filings for 2019 and later years have begun. The division is conducting examinations of combined returns through its office audit group, its out-of-state audit group, and two field audit groups. Historically, New Jersey corporate tax audits focused on what items to include in or exclude from the base and apportionment. In this new era, New Jersey auditors have to consider whether any entities were improperly included in or excluded from the combined return.[28] Assuming that the common ownership requirement is not in controversy, the New Jersey auditor's focus will be on whether the entities engaged in a unitary business.

To prepare for this new audit focus, the division provided its corporation business tax auditors with in-house training on the unitary business principle. While New Jersey's auditors had a lot of learning to do on the unitary business principle, multistate corporate taxpayers are likely to be well-versed in these issues from their experiences in other states. And to make it "easier," New Jersey's statute and regulations follow principles employed in other states, with little variation. To help taxpayers gear up for New Jersey unitary audits, below is a breakdown of how the state's statute and regulation define a unitary business.

New Jersey's Definition of a Unitary Business Is Consistent With Other States'

The first sentence of New Jersey's definition of a unitary business tracks the Multistate Tax Commission's model definition that has been adopted in several states[29]:

> "Unitary business" means a single economic enterprise that is made up either of separate parts of a single business entity or of a group of business entities under common ownership that are sufficiently interdependent, integrated, and interrelated through their activities so as to provide a synergy and mutual benefit that produces a sharing or exchange of value among them and a significant flow of value among the separate parts.[30]

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[24] Although as recently as 2017 the tax court revisited the *BIS* corporate limited partner nexus issues in *Preserve II Inc. v. Director, Division of Taxation*, 30 N.J. Tax 133, 168 (2017), *aff'd*, 32 N.J. Tax 201 (App. Div. 2020), that decision does not read like a unitary business case because the tax court held that the corporate partner had nexus with New Jersey because the lines between the corporate limited partner, general partner, and partnership "were far from sharp and distinct and in fact were completely blurred." On appeal, the appellate court upheld the nexus finding under N.J. Stat. Ann. section 54:10A-2, which subjects a foreign corporation to the corporation business tax for "'the privilege of deriving receipts from sources within this State' as long as such taxation falls within federal constitutional limits and no statutory exemption applies." 32 N.J. Tax at 216. The appellate court opinion did not discuss the unitary business principle.

[25] N.J. Stat. Ann. section 54:10A-4(z). Common ownership means that more than 50 percent of the voting control of each member of a combined group is directly or indirectly owned by a common owner or owners, either corporate or noncorporate, whether or not the owner or owners are members of the combined group. N.J. Stat. Ann. section 54:10A-4(aa).

[26] N.J. Stat. Ann. section 54:10A-4(zz).

[27] 54 N.J. Reg. 1819(a), R.2022 d.116 (eff. Sept. 19, 2022).

[28] The exception to this rule would be for taxpayers electing the affiliated group method of filing, in which a unitary relationship is not required. If the managerial member elects to determine the members of a combined group on an affiliated group basis, the taxable members "shall take into account the entire net income or loss and allocation factors of all of the members of its affiliated group, regardless of whether such members are engaged in a unitary business, that are subject to tax or would be subject to tax under this chapter, if doing business in this State." N.J. Stat. Ann. section 54:10A-4.11.

[29] *See* MTC Model General Allocation & Apportionment Regulations, Reg. IV.1(b)(1)(A), as amended July 25, 2018.

[30] N.J. Stat. Ann. section 54:10A-4(gg). Legislation proposed on March 20, 2023, would make a slight modification to the definition to provide that the business entities must be "sufficiently interdependent, integrated, *or* interrelated." N.J. Assembly Bill 5323 (emphasis added).

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Given that the unitary business principle is a constitutional concept, it is curious that New Jersey, and other states, have adopted a statutory definition that does not explicitly reference the three indicia cited by the U.S. Supreme Court as the "constitutional test" for a unitary business: (1) centralized management, (2) functional integration, and (3) economies of scale.[31]

At the end of the day the absence of the three factors from the New Jersey statutory definition likely does not matter because, as discussed below, the division's regulations incorporate the Supreme Court's three-factor analysis.[32] And even if the New Jersey statute and regulations omitted the three factors that are considered the hallmarks of a unitary relationship, those factors would still be highly relevant because the Supreme Court says they are.[33]

New Jersey's Definition of a Unitary Business Includes Statutory Construction Guidance

New Jersey's definition of a unitary business contains guidance on how the statute itself should be interpreted: "'Unitary business' shall be construed to the broadest extent permitted under the Constitution of the United States."[34] States do not routinely include this language in their definition of a unitary business.[35]

The Legislature's directive to construe the definition of a unitary business to the broadest extent permitted likely means taxpayers are not going to have much success in arguing for strict or limiting interpretations of the definition. But interpreting the statute to the "broadest extent permitted" does not mean the statute is automatically interpreted against the taxpayer, as in the case of an exemption statute.[36] For one thing, the division might argue that an entity should be *excluded* from a combined group because of the lack of a unitary relationship. Also, the New Jersey Supreme Court has recognized that the division is not entitled to deference in its interpretation of strictly legal issues.[37] While the typical unitary business analysis involves a bevy of facts, a strictly legal issue could arise in the context of interpreting Supreme Court decisions.[38]

In terms of relevant case law, pre-2019 unitary business decisions such as *Central National-Gottesman* should be relevant to the interpretation of the statute because these New Jersey decisions have drawn a "line in the sand" that marks when the division's unitary business finding transgressed what is "permitted under the Constitution of the United States," as that phrase is used in the new statute. It is also possible that New Jersey courts will look to the decisions of other states that have adopted the same or similar definitions of a unitary business.[39]

New Jersey Is Among a Minority of States That Adopted Two Regulatory Tests for Unitariness

New Jersey regulations start with a general discussion of the unitary business principle and a recognition of the three constitutional hallmarks of a unitary business: functional integration, centralization of management, and economies of scale.[40] From there, the regulations set forth two tests under which entities can be considered unitary. If entities meet either the interdependence of functions test or the unity of

[31] *Allied-Signal*, 504 U.S. at 783 ("In the course of our decision in *Container Corp*., we reaffirmed that the constitutional test focuses on functional integration, centralization of management, and economies of scale."). *See also MeadWestvaco Corp. ex rel. Mead Corp. v. Illinois Department of Revenue*, 553 U.S. 16, 30 (2008); *Barclays Bank PLC v. Franchise Tax Board of California*, 512 U.S. 298, 304 f. 1 (1994); *Container Corp.*, 463 U.S. 159, 179; and *F.W. Woolworth Co. v. Taxation and Revenue Department of New Mexico*, 458 U.S. 354, 364 (1982).

[32] N.J. Admin. Code section 18:7-21.2(a)(2).

[33] *See* note 31, *supra*.

[34] N.J. Stat. Ann. section 54:10A-4(gg).

[35] For examples of states that have adopted the same statutory construction provision in their unitary definition, see Ky. Rev. Stat. Ann. section 141.202; Mass. Gen. Laws Ann. ch. 63, section 32B; R.I. Gen. Laws Ann. section 44-11-1; and Wis. Stat. Ann. section 71.255.

[36] New Jersey courts recognize that tax exemptions are to be strictly construed against the claimant. *Metromedia Inc. v. Director, Division of Taxation*, 97 N.J. 313, 326 (1984). New Jersey courts also recognize that the division's determinations are entitled to a presumption of correctness. *Atlantic City Transportation Co. v. Director, Division of Taxation*, 12 N.J. 130 (1953).

[37] *American Fire & Casualty Co. v. Director, Division of Taxation*, 189 N.J. 65, 79 (2006) (when the issue is strictly legal, New Jersey courts are not bound by the agency's interpretation of a statute).

[38] For example, in *McKesson Water Products Co. v. Director, Division of Taxation*, 408 N.J. Super. 213, 220-21 (App. Div. 2009), the appellate court rejected the director's interpretation of *MeadWestvaco* as requiring a unitary business analysis *before* determining the statutory issue of whether the taxpayer recognized operational or nonoperational income.

[39] *Cooperstein v. Director, Division of Taxation*, 13 N.J. Tax 68, 82-83 (1993).

[40] N.J. Admin. Code section 18:7-21.2(a)(2).

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use and management test, they are part of a unitary business.[41]

New Jersey is not unique with its two regulatory tests; both Rhode Island and Vermont have the same two tests in their regulations.[42] Being one of the most recent states to adopt combined reporting, there was no reason for the division to reinvent the wheel and come up with a unique set of guidelines, especially when other states have attempted to distill the constitutional standards into regulatory guidance. The Rhode Island/Vermont model might have the most appeal because it covers a broad range of theories for unitariness.

Under the interdependence of functions test, the division looks to 10 circumstances that indicate that an interdependence of functions may exist:

1. same general line of business;
2. presence of a vertically structured business;
3. centralized management;
4. non-arm's-length pricing between entities;
5. benefits (such as discounts) from joint, shared, or common activity;
6. the relationship of joint, shared, or common activity to income-producing operations;
7. transfers or sharing of technical information or intellectual property;
8. significant common or intercompany financing;
9. significant intercompany sales, exchanges, or transfers of products, services, and/or intangibles; and
10. the exercise of control by one entity over another entity is indicative of a unitary relationship.[43]

Under the alternative unity of use and management test (also referred to as the unity of operations and use test in the regulations), the division follows what is known more commonly as the three unities. In this case it is only two of the three unities at issue, because the third unity (ownership) is presumed satisfied by the separate common ownership requirement in the combined group definitions. Unity of operations is evidenced, generally, by centralized management or use of centralized policies.[44] Unity of use means there is functional integration among the entities and is evidenced generally by shared support functions.[45]

The existence or nonexistence of a nonexclusive list of 22 factors assists "in the determination of whether unity of use and management exist with respect to a combined group."[46] The 22 factors include 18 factors that involve the following shared or common assets or activities: purchasing, advertising, employees, accounting, legal support, retirement plan, insurance coverage, marketing, cash management, research and development, offices, manufacturing facilities, warehousing facilities, transportation facilities, computer systems, financing support, management, and policy or training manuals.[47] Three factors relate to control or approval: control of major policies, budgetary approval, and capital asset purchase approval.[48] The last factor looks to the existence of intercompany transactions.[49]

According to the regulations, the unity of use and unity of management or operations tests for unitariness are overlapping, and the indicators of each test indicate the existence of interdependence of functions.[50] Essentially, no matter what you call the test, "all roads lead to Rome."

Businesses that have experienced unitary audits in other states will recognize the 10-factor and 22-factor tests as summarizing everything that an auditor could possibly ask for to prove the existence or nonexistence of a unitary relationship. New Jersey has the benefit of decades of unitary audits conducted by other states.

[41] N.J. Admin. Code section 18:7-21.2(a)(5).

[42] Vt. Code R. 1-3-104:1.5862(d)-6 and 280 R.I. Code R. 20-25-10.8.

[43] N.J. Admin. Code section 18:7-21.2(b).

[44] N.J. Admin. Code section 18:7-21.2(c).

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

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It will be left to auditors and taxpayers to argue over how many of these factors are required in any given situation to demonstrate that a unitary relationship exists. Obviously, the more factors that are satisfied, the more likely it is that the entities are unitary. But the regulations acknowledge that a unitary analysis is both quantitative and qualitative,[51] and is not a simple checklist. For that reason, the factors should not be weighted equally. The absence of a key unitary factor recognized by the Supreme Court, such as centralized management, should be more significant to the unitary analysis than the presence of several less important factors. And as held in *Central National-Gottesman*, isolated incidents should not be sufficient to deem two businesses unitary.[52]

New Jersey Has Adopted Presumptions for Reorganization Situations and Holding Companies

When the common ownership standard (more than 50 percent) is first met by reason of merger, acquisition, or business formation, the regulations presume that a unitary business relationship exists immediately.[53] Unity is also generally presumed for newly acquired or newly formed entities.[54] Although the regulations do not address overcoming the presumption, taxpayers can take the position that these presumptions are rebuttable — as opposed to conclusive — because a conclusive presumption should only exist when an ultimate fact is presumed to be true upon proof of another fact, and no evidence, no matter how persuasive, can rebut it.[55] The existence of so-called "instant unity" when an entity is acquired is not a foregone conclusion because it may take a while for a newly acquired business and an existing business to become integrated and interdependent.

The regulations also provide that if a member of a combined group is "completely spun off" from the group, that spun-off business entity and the combined group must show, "to the Director's satisfaction," that a unitary business relationship no longer exists.[56] This provision implicitly assumes that the spun-off business remains commonly owned. But often a spun-off business is sold shortly after the spin. In that case, it is difficult to understand how this provision would play out because it seems more than likely that a completely spun-off entity would no longer be includable in the combined group because of a lack of common ownership, wholly aside from whether a unitary relationship might somehow still exist. On the other hand, the regulations acknowledge that former members of a combined group will no longer be presumed unitary if sold to an unrelated third party.[57]

Finally, regarding holding companies, the regulations provide that a parent holding company that directly or indirectly controls one or more operating company subsidiaries engaged in a unitary business "shall be deemed" to be engaged in a unitary business and includable in a combined report with the subsidiary or subsidiaries.[58] And an "intermediate holding company" shall be deemed to be engaged in a unitary business with the parent and subsidiary or subsidiaries and includable in a combined report with them.[59] The division's choice of the word "deemed" in these holding company provisions (as opposed to "presumed") might signal that it is unlikely to find any holding company not unitary with its subsidiaries. In the context of legislation, whether the word "deemed" creates a conclusive presumption or a rebuttable presumption is likely to depend on the intent of drafters, which is unclear in this situation.[60]

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[51] N.J. Admin. Code section 18:7-21.2(a)(1).

[52] *Central National-Gottesman*, 14 N.J. Tax at 559.

[53] N.J. Admin. Code section 18:7-21.2(d)(2).

[54] *Id.*

[55] *Steelcase Inc. v. Director, Division of Taxation*, 13 N.J. Tax 182, 192 (1993).

[56] N.J. Admin. Code section 18:7-21.2(f).

[57] N.J. Admin. Code section 18:7-21.2(g).

[58] N.J. Admin. Code section 18:7-21.2(d)(3).

[59] *Id.*

[60] *Switz v. Kingsley*, 69 N.J. Super. 27, 33 (Law Div. 1961), *aff'd*, 37 N.J. 566 (1962).

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New Jersey Recognizes the Holding in *Central National-Gottesman*

Regulations provide that "it is possible that a portion of a member's business operations are independent of the unitary business activity of the combined group."[61] This appears to be an acknowledgment of the holding in *Central National-Gottesman* that two divisions in the same company are not necessarily unitary.[62] In that situation, the regulations provide that only the income, attributes, and allocation factors related to the portion of a company's operations that are part of a unitary business of the combined group are included in the calculation of the combined group's entire net income and allocation factor.[63] The remaining (independent) portion of a member's business operations may be subject to tax separately from the combined group if the member conducts business in New Jersey individually or with another combined group.[64]

The regulations also provide that a commonly controlled group of companies may be engaged in more than one unitary business.[65] In that case, the group may contain more than one combined group that must file more than one New Jersey combined return.

Practical Perspective and Final Thoughts

Although corporations have been battling states for decades over the unitary business issue, one of the difficulties with fighting this fight is that there are a lot of nontax reasons why being unitary is a good thing for businesses. So it can be helpful to look at these cases from a business perspective and ask, why does it make sense for these two businesses to operate separately?

Circumstances rooted in business decisions that have been helpful in convincing auditors that a unitary business is lacking include the following:

1. the businesses had a good reason to not become integrated — as in the situation in which a successful target is brought into a conglomerate organization that does not want to change the way the target is running its business (why mess with a good thing?);
2. the businesses are engaged in very different activities, such as retail sales of pet supplies and the manufacture of airplane engines;
3. the businesses have some level of competition with each other that precludes sharing information and resources; and
4. the owner behaves like a passive investor and limits oversight to stewardship activities — consisting of the types of activities that any owner would take to safeguard an investment.

This last situation occurs when an "orphan" business is acquired as part of a strategic acquisition of a larger enterprise, and the intention is for the orphan business to be sold off by the acquirer as soon as practicable.

If the business reasons for integration are not present, then the tax argument in favor of non-combination is going to be a lot easier. A lack of unitariness usually is not a happy accident, but the result of deliberate decisions that make sense for the businesses. ■

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[61] N.J. Admin. Code section 18:7-21.2(e).

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] N.J. Admin. Code section 18:7-21.2(a)(4).

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