STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition

of

CHARTER COMMUNICATIONS, INC. AND COMBINED AFFILIATES, F/K/A TIME WARNER CABLE, INC. AND COMBINED AFFILIATES

for a Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Period January 1, 2012 through December 31, 2014.

DECISION
DTA NO. 829691

Petitioners, Charter Communications, Inc., and combined affiliates, f/k/a Time Warner Cable, Inc., and combined affiliates, filed an exception to the determination of the Administrative Law Judge issued on December 1, 2022. Petitioners appeared by Eversheds Sutherland, LLP (Eric S. Tresh, Esq., and Jeremy P. Gove, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (David Markey, Esq., of counsel).

Petitioners filed a brief in support of the exception. The Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Oral argument was heard in Albany, New York on July 27, 2023, 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.

ISSUES

I. Whether, during the 2012 and 2013 tax years, petitioners' combined group was a qualified emerging technology company (QETC) and therefore a qualified New York manufacturer pursuant to Tax Law former § 210 (1) (a) (vi), such that the group was permitted to compute the tax on its combined entire net income base using the rate applicable to qualified New York manufacturers.

II. Whether, during the 2014 tax year, petitioners' combined group was a QETC pursuant to Tax Law former § 210 (1) (a) (vii), such that the group was permitted to compute the tax on its combined entire net income base using the rate applicable to QETCs.

III. Whether, alternatively, those members of petitioners' combined group that were QETCs during the years at issue should be permitted to compute their tax on their entire net income base at the reduced rate applicable to such companies on an individual basis.

IV. Whether denials of qualified New York manufacturer status for petitioners' combined group for the 2012 and 2013 tax years and QETC status for petitioners' combined group for the 2014 tax year discriminates against interstate commerce in violation of the dormant Commerce Clause.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. Those facts appear below.

1. Petitioners are an affiliated group of companies doing business in various states, including New York State.

2. Petitioners, Charter Communications, Inc., and combined affiliates, f/k/a Time Warner Cable, Inc., and combined affiliates, filed New York State combined returns in 2012, 2013 and 2014 (the years at issue).

3. On their combined returns for each of the years at issue, petitioners reported corporation franchise tax using the entire net income base, along with a sum of fixed dollar minimum taxes from subsidiaries.

4. On their combined returns for each of the years at issue, petitioners calculated their corporation franchise tax on the entire net income base using the reduced tax rate as a QETC.

5. The Division audited petitioners' returns for the years at issue.

6. The Division issued notice of deficiency, notice no. L-048121314, dated May 23, 2018 (the notice), imposing additional tax for the years at issue of $5,991,774.00 and interest of $1,859,310.54. No penalties were asserted.

7. The Division determined that petitioners did not qualify as a QETC for the year ended December 31, 2012 and applied a 7.1% tax rate to petitioners' entire net income base, rather than the 6.5% rate applicable to QETCs.

8. The Division determined that petitioners did not qualify as a QETC for the year ended December 31, 2013 and applied a 7.1% tax rate to petitioners' entire net income base, rather than the 6.5% rate applicable to QETCs.

9. The Division determined that petitioners did not qualify as a QETC for the year ended December 31, 2014, and applied a 7.1% tax rate to petitioners' entire net income base, rather than the 5.9% rate applicable to QETCs.

10. The Division also made other adjustments unrelated to the determination that petitioners do not qualify as a QETC, none of which are in dispute in this matter.

11. Petitioners timely filed a conciliation request protesting the notice with the Bureau of Conciliation and Mediation Services (BCMS).

12. BCMS held a conciliation conference on March 14, 2019.

13. On August 9, 2019, BCMS issued a conciliation order sustaining the notice (BCMS order).

14. Petitioners timely protested the BCMS order by filing a petition with the Division of Tax Appeals.

15. The Division timely filed an answer to the petition. Petitioners filed a reply to the Division's answer.

16. If it is determined that petitioners do not meet the definition of a QETC and cannot compute their tax using the rates applicable to QETCs, petitioners would owe the amounts on the notice.

17. If it is determined that petitioners meet the definition of a QETC such that they may compute their tax using the rates applicable to QETCs, petitioners would owe the following amounts for the years at issue:

	Franchise Tax (Overpayment)	MTA Surcharge (Overpayment)	Total Tax Due (Overpayment)
2012	$157,923.00	$409,434.00	$567,357.00
2013	($323,049.00)	($45,269.00)	($368,317.00)[1]
2014	($26.00)	($48.00)	($74.00)
Total	($165,151.00)	$364,117.00	$198,965.00[2]

18. Petitioners were a unitary affiliated group of companies with their headquarters and principal executive offices located at Columbus Circle in New York, New York, during the years at issue.

1 The stipulated total is off by $1.00.

2 ***Id.***

19. Petitioners are among the largest providers in the United States of video, high-speed data, and digital voice services (Services) to both residential and business customers with cable systems located mainly in five geographic areas: New York State (including New York, New York); the Carolinas; the Midwest (including Ohio, Kentucky, and Wisconsin); Southern California; and Texas.

20. To provide the Services in New York, and elsewhere, petitioners implemented, designed, and deployed their fiber-optic broadband technology in New York, which relied on statistical multiplexing, high-volume information storage and retrieval, data compression, broadband switching, digital signal processing and spectrum technologies.

21. In recognition of their technological developments that established a fiber optic broadband network in New York, and elsewhere, petitioners received several Emmy and other awards, and received several patents.

22. These technological developments and innovations allowed petitioners to provide the Services to customers in New York during the years at issue.

23. Petitioners' video services provide their customers with hundreds of channels of video programming delivered to subscribers' homes, and through mobile applications and websites that allow subscribers to view petitioners' cable television programming through internet-connected devices.

24. Petitioners also provide a broad array of advanced services, such as video-on-demand (VOD), which allow customers greater control over the programming they view and when they view it.

25. VOD allows subscribers access to a wide selection of movies and programming for viewing at the subscribers' convenience. Based on technological developments prior to and

during the years at issue, petitioners drastically increased the quantity of VOD programming by designing and implementing regional VOD storage architecture.

26. Petitioners offer high-speed data services, with speeds ranging from 2 to 300 megabits per second.

27. Petitioners' high-speed data services also provide communication tools and personalized services, such as email, personal computer security, parental controls, and online radio, without any additional charge.

28. Petitioners' voice service is provided over a voice over internet protocol system.

29. Petitioners' voice service provides unlimited local and long-distance calling similar to traditional analog phone systems.

30. Petitioners also offer call waiting, call forwarding, and caller ID that is provided on the customer's telephone, computer, or television.

31. Petitioners' voice service also provides a free web portal that allows customers to customize their features, including setting up a caller identification on personal computers, as well as the ability to block unwanted numbers from calling.

32. Petitioners provide the Services over their dense wavelength division multiplexing (DWDM) network.

33. DWDM is a data compression process that allows multiple wavelengths of light to be carried on the network simultaneously, which increases the network's capacity to transport greater amounts of data more quickly across the network to customers.

34. Petitioners' use of a DWDM network allows them to provide all of the Services to customers by using the same underlying network infrastructure.

35. To supply video services to their customers, petitioners must collect, process, and distribute the content they receive from various providers (e.g., networks such as ESPN) into a signal that can be multiplexed and transported across the network.

36. Petitioners' network and content acquisition process begins with headends, many of which are located in New York, near major city centers or other highly populated areas.

37. Headends are where petitioners receive and process video signals that come from different providers in various formats, bit rates and qualities.

38. Upon receiving the signals from the providers, petitioners must process the signal through the process of statistical multiplexing so that each signal can be combined with other signals and delivered across petitioners' network to their customers.

39. Processing the signals requires petitioners to remove the null packets, which are bits of data included by the broadcaster, but which do not include any video information.

40. Next, petitioners must compress the data so that it can be combined with other video of the same bandwidth for transport across the network.

41. Compressing the data requires petitioners to take the content received from the broadcasters and run it through petitioners' proprietary systems.

42. This process allows petitioners to compress the data and reduce the bit rate of the transmission, while maintaining the quality of the broadcast.

43. By creating these bandwidth efficiencies through the use of data compression and broadband switching, petitioners are able to provide a greater amount of data and content across their network while maintaining quality.

44. After the signals are received and processed, they are in a digital format and sent over petitioners' high-capacity optical transport network to distribution hubs.

45. Distribution hubs are located in smaller townships and remote areas, and after receiving the signal from the headend, petitioners again multiplex the signals so that they can be directed to the various service areas that are targeted.

46. After multiplexing the signals, petitioners insert the signals into a quadrature amplitude modulator (QAM) where the signal is modulated so that it may be carried by laser across the network to an optical node.

47. The node that receives the optical laser signal then converts the signal into an electrical signal that petitioners distribute directly into customers' homes via their coaxial cable network.

48. Nodes are devices that typically reside in customers' neighborhoods, serving between 250 to 500 homes.

49. Petitioners' network is interactive because petitioners built their video service set top boxes to not only receive information, but also transmit information back to the network.

50. Petitioners' engineers located in New York developed switch digital video, which allowed customers' equipment to send signals to petitioners regarding what channels are being watched and when viewers change channels.

51. The network's interactivity, and information provided by the customers' equipment, allows petitioners to increase their network's available bandwidth through broadband switching and QAM sharing without physically increasing the size of the network.

52. Petitioners' network can carry ten video channels or programs on one six megahertz spacing through the network.

53. If content is not being viewed, bandwidth devoted to such channels can be reallocated to provide content that could or would be used.

54. Switch digital video allows petitioners to receive signals from customers' equipment regarding what video is actually being viewed, and through broadband switching and QAM sharing, channels that are not being viewed are not broadcast.

55. QAM sharing allows petitioners to reallocate available bandwidth, so that petitioners may provide increased quantities of content without physically changing their network.

56. This process creates efficiencies within the available bandwidth by reallocating available bandwidth in petitioners' network so that other content can be broadcast across the network using bandwidth that was previously occupied by video that was not being viewed. For example, if a customer wants to view VOD content, that VOD content is broadcast across petitioners' network instantaneously because bandwidth that was previously occupied by content not being viewed is now available to broadcast the VOD content.

57. The determination about how much bandwidth to make available and how to allocate the bandwidth was done by petitioners' engineers located in New York State, after reviewing the data returned to petitioners through the deployment of switch digital video.

58. Petitioners' New York engineers ultimately deployed code to automate this process, such that at a node-level, the network itself was able to determine the best organization of bandwidth being used and what content did not need to be broadcast at a given time.

59. Further, by creating additional bandwidth, switch digital video and QAM sharing allow petitioners to increase broadband internet speeds and have the ability to use their network to transmit telephone calls via voice over internet protocol.

60. These developments, coupled with petitioners' DWDM network, facilitated petitioners to move from a 2.5 gigabit per second total capacity network to a network with a total capacity of 400 gigabits per second.

61. Petitioners constructed two market data centers in Syracuse, New York, and New York, New York. At the market data centers, petitioners house high-capacity storage arrays that they developed to house petabytes of data for a VOD library, constituting thousands of hours of content for subscribers to view instantly.

62. Petitioners' VOD library grew to approximately 7,000 hours during the years at issue. This represents growth from a few thousand programs in the VOD library to nineteen thousand. Speed and performance upgrades were also made possible through petitioners' hardware upgrades that were developed and first deployed in New York.

63. One such hardware upgrade was petitioners' replacement of Fabry-Perot lasers in the nodes with distributed feedback lasers, which provide a higher signal to noise cancelling ratio. The higher noise cancelling ratio is another form of data compression, which allowed petitioners to transmit more bits per hertz in the network, i.e., transmitting at higher speeds.

64. Petitioners also designed and developed their own voice network to replace the prior network owned and managed by Sprint Corporation, Inc., that had handled all of the interconnections and translations with all of the other telephone providers.

65. During the years at issue, petitioners had thousands of employees and billions of dollars of property located in New York State.

66. Collectively, petitioners had New York payroll of $887,899,653.00 for the 2012 tax year, $917,747,874.00 for the 2013 tax year and $829,508,368.00 for the 2014 tax year.

67. Petitioners' New York real property and tangible personal property was valued at $3,141,364,212.00 for the 2012 tax year, $3,917,012,520.00 for the 2013 tax year, and $3,638,850,897.00 for the 2014 tax year.

68. New York State based engineers played an integral role in the development and deployment of the technology that allowed petitioners to provide the Services. New York State based engineers developed QAM sharing and broadband switching capabilities, built out the optical transport network, the voice network, and the market data center infrastructure which made high-capacity information storage possible. New York State based engineers also developed technologies patented and acquired by petitioners.

69. Petitioners' power fluctuation detection and analysis patent, which was developed in New York, enabled petitioners' interactive network to provide early warning detection for problems within the network. The technology allowed petitioners to collect and analyze information sent from millions of petitioners' devices in customer homes. Petitioners applied algorithms to the information they collected to determine if devices were functioning outside of their tolerable limits, and what in the network may be causing a decrease in performance. Thus, petitioners could dispatch personnel to address areas within the network prior to customers even realizing they are experiencing a drop in performance. After being developed and deployed in New York, the technology underlying petitioners' power fluctuation detection and analysis patent was used by petitioners throughout the country.

70. Further, petitioners' engineers in New York, developed and patented technology that provided for the methods and apparatus for analyzing and "scoring" the condition of nodes. This technology, which the patent calls "Methods and Apparatus for Scoring the Condition of Nodes," allowed petitioners to retrieve information from their network of nodes, and couple it with various other data points to determine the health of each node. By harvesting information from each node, the technology applied algorithms to cross reference that information with (i) data from petitioners' billing system regarding the devices being served by each node, (ii) any open

work orders related to each node, (iii) open customer service calls, and (iv) pending work orders to triangulate where problems within the network may be occurring. This information resulted in petitioners being able to more efficiently diagnose problems and dispatch maintenance personnel to serve the over 25,000 nodes located in New York State. It also allowed petitioners to diagnose problems more accurately, as they could isolate what may be causing problems, or what devices are experiencing issues.

71. Petitioners represent that the receipts from the sale of their qualified emerging technology products and services constituted at least 97% of their total revenue for each year of the years at issue.

72. Petitioners represent that during the 2012 tax year, petitioners generated approximately $21.3 billion in QETC revenue, representing 97.47% of their total revenue for the 2012 tax year.

73. Petitioners represent that in 2013, petitioners generated over $22 billion in qualified emerging technology revenue, which was 98.03% of their total revenue for the year.

74. Petitioners represent that their QETC revenue for 2014 was $22.7 billion, which was 98.38% of their total revenue for 2014.

75. The Division concluded that some member corporations of petitioners' combined group, including Oceanic Time Warner Cable, LLC, Time Warner Cable Texas, LLC, Coaxial Communications of Central Ohio, Inc., Time Warner Cable Midwest, LLC, Time Warner Cable Sports, Inc., and TWC Wisconsin Procurement, LLC, are not located in New York State, and therefore, the combined group does not meet the requirements to be considered a qualified New York manufacturer or a QETC.

76. Testifying at the hearing on petitioners' behalf as fact witnesses were Jamie Fenwick and Noel Dempsey.

77. Ms. Fenwick has been employed by petitioners for over sixteen years and is currently the Vice President of Strategic Tax at Charter Communications, Inc.

78. During the years at issue, Ms. Fenwick worked with the team that was responsible for compiling and filing petitioners' New York State tax returns and was responsible for reviewing the positions petitioners took on their other state income tax returns.

79. Ms. Fenwick advised petitioners regarding their qualification for the reduced corporate franchise tax rate afforded to qualified emerging technology companies for the years at issue.

80. Ms. Fenwick was also involved in the Division's audit of petitioners, defending petitioners' position that they were a QETC entitled to the reduced corporate franchise tax rate.

81. Mr. Dempsey has been employed by petitioners since 1996 and is the regional vice president of field operations for the upstate New York region.

82. Prior to holding this position, Mr. Dempsey served in a variety of technical roles overseeing outside plant construction, network expansion, building out infrastructure in additional locations, as well as supervising field operations.

83. During the years at issue, Mr. Dempsey also had hundreds of engineers located in New York State reporting to him.

84. Mr. Dempsey provided testimony explaining: (i) the technical operations involved in petitioners providing video, digital voice, and high-speed data services; (ii) petitioners' technological innovations during the years at issue allowing petitioners to increase the quantity of offerings such as VOD content, while also increasing speed and reliability, and (iii) various

patented technologies Mr. Dempsey helped develop during the years at issue with his team of New York State based engineers.

85. Time Warner Cable, Inc., was purchased by Charter Communications, Inc., and changed its name accordingly. Prior to its acquisition, Time Warner Cable, Inc.'s corporate headquarters was in New York, New York, with other corporate offices in Stamford, Connecticut; Charlotte, North Carolina; and Herndon, Virginia. At the time of the hearing, petitioners' headquarters were in Charlotte, North Carolina.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge first determined that Tax Law former § 210 (1) (a) (vi) (for the 2012 and 2013 tax years) and (vii) (for the 2014 tax year) are properly considered tax imposition statutes. Accordingly, the Administrative Law Judge found that the statutory language must be construed against the Division and in favor of petitioners. In support of this conclusion, the Administrative Law Judge cited ***Matter of TransCanada Facility USA, Inc.*** (Tax Appeals Tribunal, May 1, 2020). The issue in ***TransCanada*** was whether the petitioner was eligible to have its franchise tax under the capital base capped under Tax Law former § 210 (1) (b). Similar to the present matter, such eligibility turned on whether the petitioner was a qualified New York manufacturer.

Next, the Administrative Law Judge analyzed the relevant statutory language to determine whether petitioners' combined group should be treated as a QETC as defined in Public Authorities Law (PAL) § 3102-e (1) (c) and thereby qualify for a lower tax rate on its entire net income base. The Administrative Law Judge determined that, since not all of the members of the combined group met the definition of QETC under PAL § 3102-e (1) (c), the group failed to qualify for the lower tax rate. The Administrative Law Judge rejected petitioners' assertion that the aggregate activity of a combined group should be considered to determine whether the group meets the definition of a QETC under PAL § 3102-e (1) (c). The Administrative Law Judge noted the absence of any statutory language in either the PAL or the Tax Law expressly providing for consideration of a combined group in such a manner to determine whether the group meets the definition of a QETC. The Administrative Law Judge further noted that, in contrast, Tax Law former § 210 (1) (a) (vi) does expressly provide that a combined group that is a manufacturer under the statute may be deemed a qualified New York manufacturer so long as the combined group, considered as a whole, meets the requirements. The Administrative Law Judge also observed that PAL § 3102-e (1) (c) refers to a singular "company" in its definition of QETC.

The Administrative Law Judge rejected petitioners' contention that the Division's proposed interpretation of Tax Law former § 210 (1) (a) (vi) violates combined filing principles. The Administrative Law Judge found that petitioners cited no authority that precludes New York from imposing certain requirements for a combined group to gain a benefit.

The Administrative Law Judge also rejected petitioners' contention that, if the combined group does not qualify as a QETC, then the Division should apply the reduced rate to the entire net income of the members of the combined group that do qualify. The Administrative Law Judge noted that petitioners' combined group is required to file combined returns and found that petitioners have failed to show that de-combining the members of the group would not result in distortion. The Administrative Law Judge noted further that, where combined filing is required, there is no Tax Law provision permitting de-combination for some purposes.

Finally, the Administrative Law Judge found petitioners' argument that the foregoing interpretation of Tax Law former § 210 (1) (a) (vi) violates the Commerce Clause of the US

Constitution by discriminating against out-of-state corporations to be a challenge to the law's constitutionality on its face. The Administrative Law Judge concluded that the Division of Tax Appeals lacks jurisdiction to consider such a challenge.

ARGUMENTS ON EXCEPTION

Petitioners contend that the statutory language, properly construed, supports their interpretation that a combined group is considered a QETC for purposes of Tax Law former § 210 (1) (a) (vi) (for the 2012 and 2013 tax years) and (vii) (for the 2014 tax year) where the combined group, considered as a whole, meets the definition of a QETC under PAL § 3102-e (1) (c). Petitioners contend that they are thus entitled to compute their combined entire net income base at the reduced rates available to such companies.

Alternatively, petitioners contend that each member of the combined group's status as a QETC should be determined separately and that individual members of the combined group that qualify as such should receive the benefit of the favorable rate.

Petitioners also contend that the determination's interpretation of Tax Law former § 210 (1) (a) (vi) (for the 2012 and 2013 tax years) and (vii) (for the 2014 tax year) to require that each member of a combined group meet the definition of a QETC in PAL § 3102-e in order for the combined group to enjoy the lower tax rate discriminates against interstate commerce and thereby violates the dormant Commerce Clause. According to petitioners, this argument is an as-applied challenge to the constitutionality of the relevant statutes.

In their reply brief on exception, petitioners assert, for the first time in this matter, that the determination's statutory interpretation also violates the dormant Commerce Clause because it fails the internal consistency test.

The Division agrees with the Administrative Law Judge's analysis of the relevant statutory language and resulting conclusion that each member of a combined group must be a QETC in order for the combined group to be treated as such under Tax Law former § 210 (1) (a) (vi) (for the 2012 and 2013 tax years) and (vii) (for the 2014 tax year).

The Division also agrees with the Administrative Law Judge's conclusion that there is no authority under the Tax Law for individual members of a combined group to separately use the reduced rate in computing their entire net income base.

Regarding petitioners' constitutional argument, the Division contends that petitioners' argument is a challenge to the constitutionality of the relevant statutes on their face, and is therefore beyond the jurisdiction of the Division of Tax Appeals. Assuming that petitioners' constitutional argument is an as-applied challenge, the Division contends that petitioners have failed to prove that the application of the relevant statutes discriminates against interstate commerce.

OPINION

Article 9-A of the Tax Law imposes a franchise tax on all domestic and foreign corporations doing business, employing capital, owning or leasing property, or maintaining an office in New York State (Tax Law § 209 [1]). During the period at issue, corporations reported their article 9-A liability on the greatest of four alternative bases, one of which was entire net income (Tax Law former § 210 [1]). A corporation's entire net income base consisted of the sum of its business income allocated to New York pursuant to its business allocation percentage and its investment income allocated to New York by its investment allocation percentage (Tax Law former § 210 [3]).

Generally, every corporation is considered a separate taxpayer and must file its own report (Tax Law former § 211 [1]). Under certain conditions, however, combined reporting by a group of corporations is permitted or required in order to properly reflect tax liability under article 9-A (Tax Law former § 211 [4]). In calculating its liability under the entire net income base during the period at issue, a combined group was required to determine its aggregate business income with certain intercorporate transactions eliminated (***see*** 20 NYCRR former 3-2.10) and then to allocate such income to New York on an aggregate basis with certain intercorporate items eliminated (***see*** 20 NYCRR former 4-1.2).

As noted, petitioners filed on a combined basis during the three years at issue and reported their article 9-A tax liability on their entire net income base (***see*** finding of fact 3).

For the 2012 and 2013 tax years, the rate of tax on the entire net income base for most article 9-A taxpayers was 7.1% (Tax Law former § 210 [1] [a]). However, a taxpayer that was a qualified New York manufacturer paid tax on its entire net income base at a rate of 6.5% (Tax Law former § 210 [1] [a] [vi]). Tax Law former § 210 (1) (a) (vi) provided two ways to be considered a qualified New York manufacturer and thereby gain the benefit of the reduced tax rate: (1) as a manufacturer with New York property as described in the statute or (2) as a QETC as defined in PAL § 3102-e (1) (c).

For the 2014 tax year, New York continued to provide lower tax rates on the entire net income base for manufacturers and QETCs, but did so via separate provisions. Tax Law former § 210 (1) (a) (vi) was amended to provide for a rate of tax of zero on the entire net income base for a qualified New York manufacturer and was further amended to delete that portion of the subparagraph which defined a QETC as a qualified New York manufacturer. At the same time, Tax Law former § 210 (1) (a) (vii) was amended to provide for a rate of tax of 5.9% on the entire net income base for a QETC as defined in PAL § 3102-e (1) (c).

Petitioners seek the tax rate available to a qualified New York manufacturer as a QETC for the 2012 and 2013 tax years and the tax rate available to a QETC for the 2014 tax year.

Whether petitioners may be considered a qualified New York manufacturer for the 2012 and 2013 tax years as a QETC under Tax Law former § 210 (1) (a) (vi) or a QETC for the 2014 tax year under Tax Law former § 210 (1) (a) (vii) is a matter of statutory construction. Hence, our task is to ascertain and give effect to the Legislature's intent (***Matter of Yellow Book of N.Y., Inc. v Commissioner of Taxation & Fin.***, 75 AD3d 931, 932 [3d Dept 2010], ***lv denied*** 16 NY3d 704 [2011]). The best evidence of that intent is, of course, the statutory text (***Matter of Stewart's Shops Corp. v New York State Tax Appeals Trib.***, 172 AD3d 1789, 1792 [3d Dept 2019]). We note that "the language of a statute is generally construed according to its natural and most obvious sense, without resorting to artificial or forced construction" and that "meaning and effect should be given to all of its language" (McKinney's Cons Laws of NY, Book 1, Statutes §§ 94 and 231). Ultimately, proper statutory interpretation focuses on "the precise language of the enactment in an effort to give a correct, fair and practical construction that properly accords with the discernable intention and expression of the Legislature [citation omitted]" (***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]).

In addition to the foregoing principles, we note our acceptance of the Administrative Law Judge's finding that Tax Law former § 210 (1) (a) (vi) is properly construed as a tax imposition statute; that is, most strongly against the government and in favor of the citizen (***Matter of TransCanada Facility USA citing Matter of Grace v New York State Tax Commn.***, 37 NY2d

193, 196 [1975] ***rearg denied*** 37 NY2d 816 [1975], ***lv denied*** 338 NE2d 330 [1975]). We note that, as the Division has not taken exception to this part of the determination, this issue is not before us.

Furthermore, as the issue presented is one of pure statutory construction, we do not defer to the Division's proposed interpretation (***Matter of Balbo v New York State Tax Appeals Trib.***, 163 AD3d 1364, 1366 [3d Dept 2018]).

Finally, the foregoing approach to statutory construction notwithstanding, petitioners bear the burden of proving that the notice of deficiency at issue is erroneous (Tax Law § 1089 [e]; 20 NYCRR 3000.15 [d] [5]).

The relevant text of Tax Law former § 210 (1) (a) (vi) as in effect for the 2012 and 2013 tax years provides:

> "The term 'manufacturer' shall mean a taxpayer which during the taxable year is principally engaged in the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture or commercial fishing. However, the generation and distribution of electricity, the distribution of natural gas, and the production of steam associated with the generation of electricity shall not be qualifying activities for a manufacturer under this subparagraph. Moreover, the combined group shall be considered a 'manufacturer' for purposes of this subparagraph only if the combined group during the taxable year is principally engaged in the activities set forth in this paragraph, or any combination thereof. A taxpayer or a combined group shall be 'principally engaged' in activities described above if, during the taxable year, more than fifty percent of the gross receipts of the taxpayer or combined group, respectively, are derived from receipts from the sale of goods produced by such activities. In computing a combined group's gross receipts, intercorporate receipts shall be eliminated. A 'qualified New York manufacturer' is a manufacturer which has property in New York which is described in clause (A) of subparagraph (i) of paragraph (b) of subdivision twelve of this section [the investment tax credit provision] and either (I) the adjusted basis of such property for federal income tax purposes at the close of the taxable year is at least one million dollars or (II) all of its real and personal property is located in New York. In addition, a 'qualified New York manufacturer' means a taxpayer which is defined as a qualified emerging technology company under [Public Authorities Law (PAL) § 3102-e (1) (c)]

> regardless of the ten million dollar limitation expressed in subparagraph one of such paragraph (c)" (emphasis added) (***id.***).

Tax Law former § 210 (1) (a) (vi) thus first defines the term manufacturer. The subparagraph then sets forth the circumstances under which a combined group may be considered a manufacturer. Next, the subparagraph defines qualified New York manufacturer as a manufacturer that meets a New York property requirement. Finally, the subparagraph provides that a qualified New York manufacturer also includes a taxpayer that is a QETC under PAL § 3102-e (1) (c).

PAL § 3102-e (1) (c), as referenced in Tax Law former § 210 (1) (a) (vi), provides:

> "'Qualified emerging technology company' shall mean a company located in New York state: (1) whose primary products or services are classified as emerging technologies and whose total annual product sales are ten million dollars or less; or (2) a company which has research and development activities in New York state and whose ratio of research and development funds to net sales equals or exceeds the average ratio for all surveyed companies classified as determined by the National Science Foundation in the most recent published results from its Survey of Industry Research and Development, or any comparable successor survey as determined by the department, and whose total annual product sales are ten million dollars or less."

The PAL does not define either "company located in New York" or "primary products or services." The Division, however, has interpreted "company located in New York" for purposes of PAL § 3102-e (1) (c) to mean that, during the relevant tax year, the relevant corporation, partnership or limited liability company, or other entity, owned or rented real property used in its emerging technology primary products or services business in New York State (***see*** TSB-M-99[2.1] ["Qualified Emerging Technology Company Tax Credits"] [September 18, 2000]). Additionally, the Division has interpreted "primary products or services" to mean that more than 50% of a taxpayer's receipts from products or services derived from emerging technology products or services during the relevant tax year (***id.***). Petitioners do not contest the Division's interpretation of these terms.

As noted, petitioners are a combined group seeking QETC status. There is no dispute that petitioners use emerging technologies, as defined in PAL § 3102-e (1) (b), to provide their services. The record establishes that more than 50% of the combined group's revenue was attributable to qualified emerging technology during the tax years at issue (***see*** findings of fact 71 through 74). The record also shows that petitioners' combined group had a substantial physical presence in New York during those years (***see*** finding of fact 67), but that some members of petitioners' combined group were not located in New York (***see*** finding of fact 75). Accordingly, some members of petitioners' combined group were not themselves QETCs.

Petitioners argue that, for the 2012 and 2013 tax years, Tax Law former § 210 (1) (a) (vi) expressly extends qualified New York manufacturer status to a combined group consisting of one or more QETCs where the combined group, considered as a whole, meets the definition in PAL § 3102-e (1) (c). Petitioners point to the following sentence in Tax Law former § 210 (1) (a) (vi) in support of this argument: "Moreover, the combined group shall be considered a 'manufacturer' for purposes of this subparagraph only if the combined group during the taxable year is principally engaged in the activities set forth in this paragraph, or any combination thereof." Petitioners assert that "the activities set forth in this paragraph" include the activities engaged in by QETCs by the reference to PAL § 3102-e (1) (b). Petitioners observe that "the activities set forth in this paragraph" has a broader meaning than "the activities set forth above" in the subsequent sentence in Tax Law former § 210 (1) (a) (vi). Petitioners concede that "the activities set forth above" applies only to manufacturers. Petitioners also note that the subsequent sentence defines "principally engaged" for manufacturers and assert that there was no need for the Legislature to include QETCs in such a definition because PAL § 3102-e (1) (c) includes a similar "primary products or services" test for those companies.

Petitioners' proposed construction of Tax Law former § 210 (1) (a) (vi), as in effect for the 2012 and 2013 tax years, is erroneous. The sentence upon which petitioners rely pertains to the circumstances under which a combined group may be considered a manufacturer ("Moreover, the combined group shall be considered a 'manufacturer' for purposes of this subparagraph . . .").[3] The term manufacturer has a specific definition in the subparagraph and petitioners are not manufacturers under that definition.[4] Furthermore, the sentence uses the term "principally engaged" to define when a combined group is considered a manufacturer. In the language of Tax Law former § 210 (1) (a) (vi), manufacturers are "principally engaged" in the production of goods. In contrast, QETCs have "primary products or services" under PAL § 3102-e (1) (c). Hence, the sentence upon which petitioners rely cannot reasonably be interpreted to refer to a QETC.

Tax Law former § 210 (1) (a) (vi), as in effect during the 2012 and 2013 tax years, thus does not provide that a combined group may be treated as a QETC by considering the group in the aggregate. Rather, in contrast to the language providing that a combined group may be considered a manufacturer and that a manufacturer may be considered a qualified New York manufacturer, the subparagraph simply provides that "a taxpayer" that is a QETC under PAL § 3102-e (1) (c) may be considered a qualified New York manufacturer. As used in article 9-A, a taxpayer is any corporation subject to tax under that article (Tax Law § 208 [2]). A corporation is similarly defined as a single entity (Tax Law § 208 [1]).

[3] The next sentence in Tax Law former § 210 (1) (a) (vi) also refers to the circumstances under which a taxpayer or combined group may be considered a manufacturer. Specifically, the phrase "the activities described above" refers to the previously listed activities of a manufacturer. Additionally, the phrase "receipts from the sale of goods" refers to manufacturing because the sale of goods is a necessary element of the statutory definition of manufacturer but not of a QETC.

[4] Petitioners expressly concede that they are not manufacturers under the statute.

The Legislature thus did not include language in Tax Law § 210 (1) (a) (vi), as in effect during the 2012 and 2013 tax years, to provide for a combined group to be considered a QETC based on the combined activity of the group and therefore a qualified New York manufacturer. In the same subparagraph, however, the Legislature expressly included language providing for a combined group to be considered a manufacturer and therefore eligible to be a qualified New York manufacturer. This juxtaposition indicates that such legislative silence regarding QETCs was intended (***Matter of Robert Bruce McLane Assoc. v Urbach***, 232 AD2d 826 [3d Dept 1996], citing to ***Pajak v Pajak***, 56 NY2d 394, 397 [1982], citing McKinney's Cons Law of NY Book 1, Statutes § 74). The use of the term taxpayer, a single corporation under Tax Law § 208 (2), to define a QETC for purposes of Tax Law former § 210 (1) (a) (vi) further indicates an intent to treat manufacturers and QETCs differently for purposes of the reduced rate provision.

Accordingly, pursuant to the plain meaning of the statutory language and the canons of statutory construction, we find that the Legislature chose to permit combined groups consisting, at least in part, of some non-manufacturers to be treated as a whole and thereby be considered manufacturers under certain circumstances. The Legislature did not extend a similar opportunity to combined groups consisting in part of corporations that were not QETCs. We find, therefore, that the Division's and the Administrative Law Judge's construction of Tax Law former § 210 (1) (a) (vi) and PAL § 3102-e (1) (c), by which all members of a combined group must be QETCs in order for the group to be considered a QETC, is consistent with the statutory language and thus reasonable.[5] Furthermore, we find petitioners' proposed statutory interpretation to be at odds with the statutory language.

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[5] The Division has taken the same position since the enactment of Tax Law former § 210 (1) (a) (vi) (***see*** TSB-M-08[1]C [January 31, 2008]). Additionally, the Division adopted new corporation franchise tax regulations during the pendency of this exception (***see*** tax.ny.gov/bus/ct/corp_tax_reform.htm). Section 6-2.1 (e) of the newly

We reach the same conclusion with respect to the 2014 tax year. As noted, for that year, Tax Law former § 210 (1) (a) (vi) was amended to provide for a rate of tax of zero on the entire net income base for a qualified New York manufacturer and Tax Law former § 210 (1) (a) (vii) was also amended to provide for a rate of tax of 5.9% on the entire net income base for a QETC as defined in PAL § 3102-e (1) (c) (***see*** L 2014 ch 59, part A). The definition of qualified New York manufacturer in the amended Tax Law former § 210 (1) (a) (vi) was limited to manufacturers that met the New York property requirement. The subparagraph as amended continued to set forth the circumstances under which a combined group may be considered a manufacturer. Additionally, as was the case during 2012 and 2013, Tax Law former § 210 (1) (a) (vii) as amended for the 2014 tax year contains no language regarding the circumstances under which a combined group may be considered a QETC. Hence, there is no basis to reach a different conclusion.

Contrary to petitioners' contention, we see no inconsistency in the use or meaning of the terms taxpayer, combined group and company in our interpretation of these provisions. In our view, Tax Law former § 210 (1) (a) (vi) refers to a taxpayer where it means a single corporation and refers to a combined group where it means a group of corporations. PAL § 3102-e (1) (c) defines a QETC as a "company" and contains no language to suggest this singular term includes more than one entity. Even if PAL § 3102-e (1) (c) were interpreted to include the possibility of more than one entity within the definition of company, Tax Law former § 210 (1) (a) (vi) (for 2012 and 2013) and (vii) (for 2014) clearly limits the meaning of company to a taxpayer for purposes of treatment as a qualified New York manufacturer or a QETC.

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adopted regulations is likewise consistent with the Division's position herein: "For a combined group to be eligible for the preferential tax treatment available to [QETCs], every member of the combined group must be a [QETC]."

We also disagree with petitioners' assertion that the term taxpayer as used in article 9-A includes a combined group. As noted, that term is expressly defined as a corporation (Tax Law § 208 [2]). Although a combined group is *treated* as a single corporation for purposes of reporting tax due on a combined return and every member is jointly and severally liable for the tax due on a combined return (***see*** Tax Law § 210-B [4], [6]; ***Matter of Disney Entrs. Inc. v Tax Appeals Trib. of State of N.Y.***, 10 NY3d 392, 395 [2008]), our review of article 9-A indicates that the term taxpayer as used therein refers to a single corporation. Petitioners offer no examples of the use of the term taxpayer in article 9-A that refer to a combined group of corporations. We note that the members of petitioners' combined group, other than Charter (the named entity), reported and paid the fixed dollar minimum franchise tax on the combined returns for the years at issue (***see*** finding of fact 3) and that each did so because each such corporation was a taxpayer (20 NYCRR former 3-5.3 [a]).

Our construction of the relevant statutes herein does not thwart the legislative purpose announced in the legislation creating PAL § 3102-e, as petitioners assert (***see*** L 1998, c 56, pt A, § 30 [statement of legislative findings and intent]). The Legislature clearly intended to provide a benefit to QETCs in the form of a lower tax rate, but, as the statutory language shows, intended a benefit for such companies narrower in scope than that created for manufacturers.

We reject petitioners' alternative argument that those members of petitioners' combined group that were QETCs during the years at issue should be permitted to compute their tax on their entire net income base at the reduced rate applicable to such companies on an individual basis. The Tax Law prescribes the manner by which a combined group must compute its franchise tax liability. As noted previously, during the period at issue, in order to accurately report its tax liability, a combined group was required to determine its aggregate business income with certain intercorporate transactions eliminated (***see*** 20 NYCRR former 3-2.10) and then to allocate such income to New York on an aggregate basis with certain intercorporate items eliminated (***see*** 20 NYCRR former 4-1.2). Petitioners' alternative proposal is inconsistent with these requirements. Further, under petitioners' proposal, the combined group would be decombining, at least in part. Petitioners cite no authority under the Tax Law to do so. Additionally, a combined group must continue to file on a combined basis absent a change in circumstances (***see*** 20 NYCRR former 6-2.4 [c]). There is no evidence of any change in petitioners' filing status.

Petitioners also assert that their construction of Tax Law former § 210 (1) (a) (vi) is consistent with Tax Law former § 210 (12-E), the QETC employment credit. Like the favorable tax rate under Tax Law former § 210 (1) (a) (vi), the employment credit is available to a taxpayer that is a QETC. The QETC employment credit may be computed on a separate basis by a member of a combined group and applied against the combined tax (***see*** instructions for form DTF-621 claim for QETC employment credit). In our view, however, the distinction in the treatment of a combined group with respect to the rate of tax and the same combined group with respect to the employment credit is justified by the statutorily prescribed manner by which a combined group was required to compute its entire net income base and the lack of similar requirements in the computation of credit.[6]

Turning now to petitioners' constitutional argument, while we may consider whether a statute as applied to the relevant facts is constitutional, our jurisdiction does not extend to a

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[6] Petitioners also note a similar provision in the instructions to the QETC capital tax credit under Tax Law former § 210 (12-F) (***see*** instructions for form DTF-622). However, as the capital tax credit is available to investors in QETCs and not QETCs themselves, the QETC capital credit is not relevant to petitioners' argument.

constitutional challenge to a statute on its face (***Matter of Eisenstein***, Tax Appeals Tribunal, March 27, 2003).

As noted, petitioners contend that Tax Law former § 210 (1) (a) (vi) (for the 2012 and 2013 tax years) and (vii) (for the 2014 tax year) together with PAL § 3102-e as applied to petitioners discriminates against interstate commerce and thereby violates the dormant Commerce Clause because, under those provisions, all members of the combined group must be located in New York for the group to be considered a QETC and to receive the benefit of a lower tax rate.

The Commerce Clause gives Congress affirmative authority to regulate commerce between the states and with foreign nations. The clause also has an imputed component that limits State authority to "regulate in a manner which affects interstate commerce" (***Matter of Tamagni v Tax Appeals Trib. of State of N.Y.***, 91 NY2d 530, 539 [1998], ***cert denied*** 525 US 931 [1998]). In ***Complete Auto Transit, Inc. v Brady*** (430 US 274 [1977] ***rehearing denied*** 430 US 976 [1977]), the Supreme Court outlined a four-pronged test to determine whether a state tax violates the dormant Commerce Clause. To be valid, a state tax must: (1) have a substantial nexus with the taxing state; (2) be fairly apportioned; (3) not discriminate against interstate commerce; and (4) be fairly related to the services provided by the state (***id.*** at 279). Petitioners assert that the statutes at issue fail the third prong of the test.

A facial challenge to a statute's constitutionality reaches beyond the particular circumstances of the petitioners (***see John Doe No. 1 v Reed***, 561 US 186, 194 [2010]). In other words, a facial challenge would show that no set of circumstances exists under which the subject provision is constitutional (***United States v Stevens***, 559 US 460, 472 [2010]).

We agree with the Administrative Law Judge's conclusion that petitioners are making a facial challenge to the relevant statutes' validity. Although petitioners frame their argument in terms of their specific circumstances, i.e., requiring all members of a combined group to be located in New York discriminates against interstate commerce, their argument is that the New York requirement itself discriminates against interstate commerce. That is, petitioners argue that such an interpretation provides an advantage to local businesses at the expense of interstate business. With respect to status as a QETC, however, such an advantage would be present whether a corporation was part of a combined group or a single filer. Further, if such an advantage were determined to discriminate against interstate commerce, it would so discriminate in either situation.

Petitioners' claim of discrimination against interstate commerce thus reaches beyond the present circumstances and is therefore a facial challenge to the relevant statutes (***John Doe No. 1 v Reed***, 561 US at 194).[7] Accordingly, we lack jurisdiction to consider it (***Matter of A & A Serv. Sta., Inc***., Tax Appeals Tribunal, October 15, 2009).

We do not consider petitioners' argument that the determination's statutory interpretation also violates the dormant Commerce Clause because it fails the internal consistency test. Internal consistency is the test for whether a tax is fairly apportioned under the four-pronged test of ***Complete Auto Transit, Inc. v Brady***. Petitioners made this argument for the first time in their reply brief on exception. Hence, the Division did not have the opportunity to respond.

Raising an issue in a reply brief is not permitted in appellate practice (***e.g.***, ***State Farm Fire and Cas. Co. v LiMauro***, 103 AD2d 514, 521 [2d Dept 1984] ***affd*** 65 NY2d 369 [1985])

[7] We note that many of the cases petitioners cite in support of their position address the *facial* validity of state laws that provide advantages to local businesses (***see e.g. Fulton Corp. v Faulkner*** (516 US 325 [1996]; ***Armco, Inc. v Hardesty***, 467 US 638 [1984], ***rehearing denied*** 469 US 912 [1984]; ***Boston Stock Exch. v State Tax Commn.***, 429 US 318 [1977]).

and is clearly inappropriate at this quasi-appellate stage of our two-tier administrative process (***see Matter of United States Life Insurance Company in the City of New York***, Tax Appeals Tribunal, March 24, 1994). Petitioners had ample opportunity to raise this issue before the Administrative Law Judge or even, assuming it is strictly a legal issue, in its initial brief on exception (***see Matter of Garcia***, Tax Appeals Tribunal, December 1, 2016). As we have stated in related contexts, "[i]n order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final" (***Matter of Schoonover***, Tax Appeals Tribunal, August 15, 1991; ***see also Matter of Yim***, Tax Appeals Tribunal, October 7, 2021). We invoke that principle here in declining to consider this argument.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Charter Communications, Inc., and combined affiliates, f/k/a Time Warner Cable, Inc., and combined affiliates, is denied;

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

3. The petition of Charter Communications, Inc., and combined affiliates, f/k/a Time Warner Cable, Inc., and combined affiliates, is denied; and

4. The notice of deficiency, dated May 23, 2018, is sustained.

DATED: Albany, New York
January 25, 2024

/s/ Anthony Giardina
Anthony Giardina
President

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner

/s/ Kevin A. Cahill
Kevin A. Cahill
Commissioner