STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
FIVE STAR EQUIPMENT, INC.	:	DETERMINATION DTA NOS. 824861
for Redetermination of Deficiencies or for Refund of Corporation Franchise Tax under Article 9-A	:	AND 825006
of the Tax Law for the Years 2007, 2008 and 2010.	:	

Petitioner, Five Star Equipment, Inc., filed petitions for redetermination of deficiencies or for refund of corporation franchise tax under Article 9-A of the Tax Law for the years 2007, 2008 and 2010.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 183 Main Street East, Suite 1500, Rochester, New York, on May 14, 2013, at 10:00 A.M., with all briefs to be submitted by September 16, 2013, which date commenced the six-month period for the issuance of this determination. By a letter dated February 25, 2014, this six-month period was extended for an additional three months (Tax Law § 2010[3]). Petitioners appeared by Hancock Estabrook LLP (Richard E. Scrimale, Esq., and James P. Youngs, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Robert J. Tompkins, Esq., of counsel).

ISSUES

I. Whether, pursuant to Tax Law § 208(9)(f)(3), petitioner's New York State net operating loss deduction for a given year may not exceed the net operating loss deduction taken on its

federal tax return for that year and must arise from the same source year as that federal net operating loss deduction.

II. Whether the Division of Taxation's disallowance of certain New York net operating losses carried forward and claimed as deductions by petitioner on its 2007, 2008 and 2010 corporation franchise tax returns, based on the foregoing net operating loss deduction limitation rules of Tax Law § 208(9)(f)(3), violated the Supremacy Clause, Commerce Clause or Privileges and Immunities Clause of the United States Constitution or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

FINDINGS OF FACT

1. Petitioner, Five Star Equipment, Inc., is a Pennsylvania corporation authorized to do business in New York State. Included among petitioner's business activities is the purchase of different types of heavy construction machinery and equipment, some of which is resold and some of which is rented.

2. Petitioner timely filed a U. S. Income Tax Return for an S Corporation (Form 1120S) and a New York State General Business Corporation Franchise Tax Return (Form CT-3) for each of the years 2004 through 2010, including the three years (2007, 2008 and 2010) at issue in this proceeding. The federal and New York State amounts of income and loss for these years follows:

YEAR	FED. INCOME	NYS INCOME	FED. NOL	NYS NOL
2004	(4,253,678.00)	912,234.00	(4,253,678.00)	0
2005	2,736,990.00	(3,332,175.00)	0	(3,332,175.00)
2006	715,147.00	(732,394.00)	0	(732,394.00)
2007	952,181.00	585,457.00	0	0

2008	(1,119,668.00)	431,706.00	(1,119,668.00)	0
2009	(88,043.00)	(572,860.00)	(88,043.00)	(572,860.00)
2010	489,321.00	4,135,647.00	0	0

3. For the years 2004 through 2010, petitioner utilized its net operating losses as follows:

YEAR	FED. NOL UTILIZED	SOURCE YEAR	NYS NOL UTILIZED	SOURCE YEAR
2004	0	n/a	0	n/a
2005	0	n/a	0	n/a
2006	$362,178.00	2004	0	n/a
2007	$952,181.00	2004	$585,457.00	2005
2008	0	n/a	$431,706.00	2005
2009	0	n/a	0	n/a
2010	$489,321.00	2004	$2,315,012.00	2005
2010	n/a	n/a	$732,394.00	2006
2010	n/a	n/a	$572,860.00	2009

4. As set forth above, for each of the three years in issue (2007, 2008 and 2010), petitioner reported New York State income and offset the same by claimed net operating losses, as follows:

> a) 2007: Petitioner reported New York State income in the amount of $585,457.00, and claimed an offsetting New York net operating loss deduction (NOLD) in the amount of $585,457.00, representing a portion of the $3,332,175.00 New York net operating loss (NOL) incurred in and carried forward from the year 2005.
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> b) 2008: Petitioner reported New York State income in the amount of $431,706.00, and claimed an offsetting New York NOLD in the amount of $431,706.00, representing a portion of the remaining $2,746,718.00 balance of the New York NOL incurred in and carried forward from the year 2005.
>
> c) 2010: Petitioner reported New York State income in the amount of $4,135,647.00, and claimed a partially offsetting New York NOLD in the amount of $3,620,266.00, based upon the remaining $2,315,012.00 balance

> of the New York NOL incurred in and carried forward from the year 2005, plus a $732,394.00 New York NOL incurred in and carried forward from the year 2006, and a $572,860.00 New York NOL incurred in and carried forward from the year 2009.

5. The Division of Taxation (Division) reviewed petitioner's franchise tax returns for each of the years in issue. On October 25, 2010, the Division issued to petitioner a Notice of Deficiency asserting additional corporation franchise tax due for the years 2007 and 2008 in the respective amounts of $26,660.00 and $16,667.00, plus interest. On February 2, 2012, the Division issued to petitioner a Notice of Deficiency asserting additional corporation franchise tax due for the year 2010 in the amount of $160,950.00, plus interest.

6. The foregoing deficiencies result from the Division's disallowance of the New York NOLDs claimed by petitioner for each of the years at issue because the same did not correspond to the source years and amounts of petitioner's Federal NOLDs for such years, as follows:

> a) 2007: Petitioner offset its Federal taxable income of $952,181.00 by a Federal NOLD in the same amount arising and carried forward from a Federal NOL for the year (source year) 2004. In contrast, petitioner's 2007 New York State income of $585,457.00 was offset by a New York NOLD in the same amount arising, carried forward from and consisting of a portion of petitioner's New York NOL ($3,332,175.00) for the year 2005 (source year). Since the source year (2005) of the New York NOLD claimed for 2007 differed from the source year (2004) of the NOL upon which the Federal NOLD claimed for 2007 was based, the Division disallowed the claimed 2007 New York NOLD.
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> b) 2008: Petitioner did not have Federal taxable income but rather had a current year (2008) Federal NOL ($1,119,668.00). In contrast, petitioner's 2008 New York State income ($431,706.00) was offset by a New York NOLD in the same amount arising, carried forward from and consisting of a portion of the remaining $2,746,718.00 balance of petitioner's New York NOL carried forward from the year 2005 (source year) Since petitioner had no Federal NOLD for 2008, the Division disallowed the claimed 2008 New York NOLD.
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> c) 2010: Petitioner offset its Federal taxable income of $489,321.00 by a Federal NOLD in the same amount arising and carried forward from a

> Federal NOL for the year (source year) 2004. In contrast, petitioner's 2010 New York State income of $4,135,647.00 was (partially) offset by a New York NOLD in the amount of $3,620,266.00 arising, carried forward from and consisting of:
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> i) the remaining $2,315,012.00 balance of petitioner's New York NOL ($3,332.175.00) for the year 2005 (source year);
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> ii) $732,394.00 representing petitioner's New York NOL for the year 2006 (source year); and
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> iii) $572,680.00 representing petitioner's New York NOL for the year 2009 (source year).
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> Since the source years (2005, 2006 and 2009) of the New York NOLD claimed for 2010 differed from the source year (2004) of the NOL upon which the Federal NOLD claimed for 2010 was based, the Division disallowed the claimed 2010 New York NOLD.

7. As described above, the deficiencies asserted by the Division are based on the facts that: a) the New York NOLD claimed by petitioner for 2007 was from a different source year than the federal NOLD claimed for 2007, b) there was no federal NOLD for 2008 and thus the amount of the New York NOLD claimed for 2008 exceeded the amount of the federal NOLD claimed for 2008, and c) the New York NOLD claimed for 2010 was from different source years and exceeded the amount of the federal NOLD claimed for 2010.

8. Petitioner attributes the variation in its annual federal versus New York State income or loss amounts, in large part, to the differences between the amounts of depreciation allowable as a business deduction at the federal level versus the amounts allowable under Tax Law Article 9-A. More specifically, the Internal Revenue Code (IRC) provides for various accelerated rates of

depreciation with respect to qualified business property.[1] In contrast, as of 2003 Article 9-A limited the amount of depreciation to that computed using the "straight-line" method of calculation. This limitation of New York depreciation versus federal depreciation, imposed by enactment of the New York State Legislature in 2003, is commonly referred to as federal/state "decoupling."[2] The differences in the amounts and timing of allowable depreciation deductions resulting from decoupling contribute (here significantly) to the year-to-year net income or net loss results for federal versus New York State purposes. In turn, and in conjunction with the net operating loss amount and source year deduction limitation rules of Article 9-A, these year-to-year differences can, and in this case did, result in the disallowance and loss of net operating loss deductions that would be available where federal and state income and loss years are more closely aligned.

SUMMARY OF PETITIONER'S POSITION

9. Petitioner challenges the Division's disallowances of its New York net operating loss deductions claimed for 2007, 2008 and 2010. Petitioner does not dispute the Legislature's authority to limit New York State depreciation by decoupling from the federal depreciation rules. However, petitioner maintains that the ensuing disallowance of net operating loss deductions is

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[1] It is undisputed that during the period 2004 through 2010 (and beyond) Congress enacted various provisions allowing, extending or expanding the amount of depreciation that could be deducted as a business expense. Hereinafter, for simplicity, federal depreciation may be generically referred to as "accelerated" or "bonus" depreciation.

[2] At the New York State level, this depreciation limitation is one of several "addition/subtraction modifications" required to be made in determining entire net income. In this instance, there is an addition (add-back) modification for federal depreciation and an accompanying subtraction modification for allowable New York depreciation (***see generally*** Tax Law § 208[9]). The resulting federal/state difference essentially reflects the federally available opportunity to "front-load" depreciation deductions resulting, in some instances, in federal net operating losses in earlier years as opposed to the operating results obtained from the relatively smaller depreciation deductions allowable but spread over a longer period of time at the New York State level under Article 9-A.

an unintended or unanticipated result of the interplay of such depreciation decoupling with the net operating loss amount and source year carry-forward and carry-back deduction limitation rules of Tax Law § 208(9)(f)(3). Petitioner points out that bonus depreciation was an incentive offered by Congress to stimulate national economic growth by encouraging investment in certain qualified property such as the large construction equipment purchased and rented by petitioner. Petitioner maintains it is placed at a competitive disadvantage as compared to other entities engaged in like businesses, since it is forced to choose between taking the benefit of accelerated federal depreciation deductions but in so doing faces the possibility of losing future New York State net operating loss deductions otherwise available to it. Petitioner argues that the possible consequence of losing future New York net operating loss deductions due to the potential misalignment of federal and state income and loss years based on post-decoupling depreciation deduction differences contravenes Congress's intent in enacting the various accelerated depreciation provisions available under the IRC. Petitioner asserts this result interferes with the goals and purposes of federal law in violation of the Supremacy Clause of the United States Constitution (art VI, cl 2), and should be preempted by implication.

10. In addition, petitioner argues that the combined effect of decoupling and the net operating loss deduction limitations of Tax Law § 208(9)(f)(3) imposes an impermissible burden on interstate commerce in violation of the Commerce Clause of the United States Constitution (art I, § 8, cl 3). Petitioner maintains specifically that entities like it, who do business both in and out of New York State are particularly disadvantaged because:

> a) competitors who do not engage in business in New York State may freely elect bonus depreciation without the consequent potential disallowance of future New York State net operating loss deductions and resulting increased

> tax liability and are therefor able to offer better pricing than petitioner to out-of-state customers and,
>
> b) competitors who do business only in New York State may freely elect to forgo bonus depreciation so as to avoid the consequent potential future disallowance of New York State net operating loss deductions and thus are able to offer better pricing than petitioner to in-state customers.

11. Petitioner also asserts that the limit on or possible forfeiture of New York State net operating losses as described discriminates against out-of-state residents in favor of New York residents in violation of the Commerce Clause (art I, § 8, cl 3), the Privileges and Immunities Clause (art IV, § 2) and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Petitioner claims that certain New York located taxpayers are exempted from the decoupling limits on bonus depreciation, while out-of-state taxpayers are required to either forego bonus depreciation or face the potential loss of New York net operating loss carry-backs or carry-forwards in future years.

12. Finally, petitioner notes that while the net operating loss deduction limitation language of Tax Law § 208(9)(f)(3) clearly provides an "amount limitation" ("such deduction *shall not exceed* the deduction for the taxable year allowed under [IRC § 172] . . . [emphasis added]), the "source year limitation" is not clearly set forth in the text of the Tax Law. Petitioner thus maintains that the source year limitation rule is an erroneous interpretation of the law whereby the Division imposes an additional requirement in excess of the intended scope of the statutory language.

CONCLUSIONS OF LAW

A. Tax Law § 208(9)(f) provides, in pertinent 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, or which would have been allowed if the taxpayer had not made an election under subchapter s of chapter one of the internal revenue code, except that in every instance where such deduction is allowed under this article:
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> * * *
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> (3) such deduction shall not exceed the deduction for the taxable year allowed under section one hundred seventy-two of the internal revenue code, or the deduction for the taxable year which would have been allowed if the taxpayer had not made an election under subchapter s of chapter one of the internal revenue code.

B. Regulations of the Commissioner of Taxation at 20 NYCRR 3-8.2(d) provide, in pertinent part, as follows:

> The third limitation on the net operating loss deduction for purposes of article 9-A is that in any year, it *may not exceed the deduction allowable for that year for Federal income tax purposes* under section 172 of the Internal Revenue Code, or the deduction which would have been allowable if the taxpayer had not made an election under subchapter S, adjusted to exclude any loss or portion thereof arising from any taxable year in which the corporation sustaining the loss was not subject to tax under article 9-A (see subdivision [b] of this section and section 3-8.1[b] of this Subpart) . . . (emphasis added).

C. The Division disallowed certain earlier year New York net operating losses carried forward and claimed by petitioner as deductions in 2007, 2008 and 2010, based directly on the foregoing net operating loss deduction amount and source year limitation rules of Tax Law § 208(9)(f)(3). These rules limit a taxpayer's current year New York deduction of net operating losses incurred in other years and carried forward or back to the current year to the extent that the deductible amount of such losses:

> a) must be equal to or less than the amount of the federal net operating loss deduction for the given year (amount limitation) and,
>
> b) must arise from the same source year or years as the federal net operating loss deduction for such given year (source year limitation).

Since the deficiencies at issue result directly from these limitation rules, the first question presented is whether such rules are valid.

D. The amount and source limitation rules of Tax Law § 208(9)(f)(3) have been raised, reviewed and upheld as valid by the Tax Appeals Tribunal and by the New York courts in numerous previous cases (***see Matter of Aetna Casualty and Surety Company v. Tax Appeals Tribunal***, 214 AD2d 238 [1995], ***lv denied*** 87 NY2d 811 [1996]; ***Matter of Refco Properties, Inc.***, Tax Appeals Tribunal, July 11, 1996; ***Matter of Lehigh Valley Industries, Inc***., Tax Appeals Tribunal, May 5, 1988; ***Matter of American Employers' Insurance Company v. State Tax Commn***, 114 AD2d 736 [1985]). In ***Matter of Royal Indemnity Company v. Tax Appeals Tribunal*** (75 NY2d 75 [1989]), the Court of Appeals upheld both the amount and source year limitation rules as valid, notwithstanding its specific recognition that because of such rules the taxpayer would never be able to deduct its claimed New York State net operating losses. Petitioner asserts in particular that the source year limitation rule is invalid because it is not explicitly stated or otherwise made clear in the text of Tax Law § 208(9)(f), and thus represents merely an erroneous interpretation and requirement imposed by the Division (***see*** Finding of Fact 12). This claim is rejected. In ***Matter of Lehigh Valley Industries, Inc.***, the Tribunal specifically upheld the source year limitation as a valid interpretation of Tax Law § 208(9)(f), in reliance on ***Matter of Eveready Insurance Company v. New York State Tax Commn.*** (129 AD2d 958 [1987], ***lv denied*** 70 NY 2d 604 [1987]). This conclusion concerning the source year limitation rule was revisited and again upheld as valid in ***Matter of Aetna Casualty and Surety Company v. Tax Appeals Tribunal***.

E. Petitioner principally blames decoupling as the underlying reason for the differences in net income or net loss reported on its federal and state returns over the years. Petitioner states, in its brief, that " [t]he variation of the federal income (loss) amounts from the New York income (loss) amounts are [sic] due *significantly* to New York decoupling from Federal bonus depreciation (emphasis added)." Notwithstanding this focus, such federal/state timing and amount differences are not unique or limited only to depreciation deductions resulting from decoupling. Petitioner's statement that the variation is due "significantly" to New York's decoupling from federal depreciation recognizes, at least tacitly, that such variations can and do occur for reasons other than decoupling. More to the point, even if the year-to-year net income or loss differences resulted *entirely* from year-to-year federal and state depreciation differences, the same would have no impact on the application of the amount and source year rules of Tax Law § 208(9)(f)(3). In ***Lehigh Valley***, the Tribunal cited to ***Matter of Eveready Insurance Company v. New York State Tax Commn.***, and observed that "there is nothing in ***Eveready*** indicating that the application of this rule [requiring source year and amount conformity] depends on the *reason* why the taxpayer's Federal and State net operating losses do not correspond . . . ." In fact, all of the cases upholding the validity of the limitation rules involved tax years prior to decoupling, and the "misaligned" net operating losses disallowed in those cases occurred for a variety of underlying reasons, e.g., the taxable versus exempt status of certain types of income (***see Matter of Aetna Casualty and Surety Company v. Tax Appeals Tribunal***), including but not limited to depreciation rate and timing differences then existing though not as significant as became the case after decoupling (***see Matter of Refco Properties, Inc.***). The foregoing cases make it clear that the underlying reason why a taxpayer's federal net income or loss in a given

year may differ from its state net income or loss for the same year has no impact on the validity of the loss limitation rules or on the outcome of their application. In sum, since the limitation rules have been repeatedly upheld as valid, the Division's disallowances of the net operating losses claimed as carry-forwards by petitioner for the years in issue based upon such limitation rules were proper.

F. Petitioner maintains that the result in this case is the unintended or unanticipated consequence of the conjunction of decoupling and the limitation rules. That is, the "bunching" of federal depreciation deductions available by federal election may cause a federal net operating loss in a given year, yet since New York State allows a lesser depreciation deduction due to decoupling there may not be a corresponding New York State net operating loss for that same year. The reverse may happen in future years, where there is a New York net operating loss but no corresponding federal net operating loss because federal depreciation deductions had been accelerated and used in earlier years. Thereafter, when that New York net operating loss is carried forward to be deducted in a subsequent year, there may be no corresponding federal net operating loss deduction, and the claimed New York net operating loss deduction will be disallowed per Tax Law § 208(9)(f)(3). The Legislature was presumably aware of the net operating loss limitation rules, and that New York net operating loss carry-back and carry-forward deductions could, as a consequence, be lost under a variety of circumstances including, though not limited solely to, the impact of federal/state depreciation deduction timing and amount differences (***see Matter of Refco Properties, Inc***). Notwithstanding this consequence, the Legislature still affirmatively acted in 2003 to decouple state depreciation rules from federal depreciation rules. Indeed, while the net operating loss disallowances in this case are in large

measure due to the underlying impact of decoupling, the result (loss disallowance or limitation) is no different from any other situations where deductions available at the federal level are unavailable or in some manner differ (e.g., in amount or timing) at the state level (***see Matter of Karlsberg v. Tax Appeals Tribunal***, 85 AD3d 1347 [2011], ***lv dismissed*** 17 NY3d 900 [2011] [upholding additional tax resulting from New York limitation under Tax Law § 615(f) on the full amount of federal itemized deduction allowable for gambling losses]). As explained earlier, the reason for such year-to-year federal/state operating income (loss) differences has no impact on the application of the net operating loss amount and source year deduction limitation rules of Tax Law § 208(9)(f)(3). Under circumstances such as those presented here, where the result occurs due to the Legislature's underlying policy choice to allow lesser depreciation deductions in early years than are available at the federal level, the remedy, if any, would appear to rest with the Legislature.[3]

G. Petitioner has challenged the net operating loss disallowances at issue here on a number of constitutional grounds, as described in Findings of Fact 9, 10 and 11. To the extent petitioner's arguments may be read to present facial constitutional challenges, the same are beyond the jurisdictional scope of this forum since the facial constitutionality of actions of the Legislature is presumed at the administrative level (***Matter of Finch, Pruyn and Company***, Tax Appeals Tribunal, April 22, 2004; ***Matter of Eisenstein***, Tax Appeals Tribunal, March 27, 2003).

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[3] As petitioner points out, other states, such as Pennsylvania, have chosen to allow a state net operating loss deduction as sought here by petitioner. "Curing" the claimed inequity resulting from the Legislature's decision to decouple while at the same time continuing the net operating loss limitation rules is not mandated based on resulting constitutional infirmities, as argued by petitioner, but rather properly rests within the ongoing policy prerogative of the Legislature.

However, the Division of Tax Appeals does have jurisdiction to determine if a statute is unconstitutional as applied (***Matter of David Hazan, Inc.***, Tax Appeals Tribunal, April 21, 1988, ***confirmed*** 152 AD2d 765 [1989], ***affd*** 75 NY2d 989 [1990]). In the "as applied" context, the taxpayer bears the burden of proving that a statute, as applied, is unconstitutional (***Matter of Brussel***, Tax Appeals Tribunal, June 25, 1992).

H. Petitioner seeks to invalidate the notices of deficiency via implied preemption (***see Fidelity Fed. Sav. & Loan Assoc. v. de la Cuesta***, 458 US 141, 153 [1982]), upon the argument that the disallowance of claimed net operating losses due to the interplay of decoupling and the limitation rules of Tax Law § 208(9)(f)(3) conflicts with the "full purposes and objectives of Congress" in adopting accelerated and bonus depreciation provisions (***see Balbuena v. IDR Realty LLC,*** 6 NY3d 338 [2006]; ***Crosby v. Natl Foreign Trade Council***, 530 US 363, 372-73 [2000]; ***see also Cipollone v. Liggett Group, Inc.***, 505 US 504 [1992]).[4] Petitioner's argument is that the potential for future forfeiture of New York net operating loss deductions has the effect of dissuading or discouraging taxpayers from electing accelerated or bonus depreciation as made available by enactments of Congress in order to encourage investment activity and stimulate the national economy.

I. Neither party disputes that elections allowing for bonus and accelerated depreciation for federal tax purposes were made available by Congress as an incentive to spur the national economy by encouraging investment. At the same time, taxpayers such as petitioner remained free to choose other federal depreciation methods more closely paralleling that available under Tax Law Article 9-A (straight line) so as to more closely match federal and state depreciation

[4] Petitioner admits that "express" preemption under the Supremacy Clause is not at issue in this case because the various federal accelerated or bonus depreciation provisions as enacted do not provide that different state depreciation rules are preempted by such federal provisions.

deduction amounts and, presumably, net income or loss amounts, on a year-to-year basis. There is no showing that New York in any manner directly prohibits or precludes a taxpayer from electing to participate in a federally allowable option such as accelerated or bonus depreciation. In fact, though the potential negative state level impact of electing to participate is perhaps heightened by decoupling, it is no different from any other instance where federal and state rules vary. The same impact complained of by petitioner, i.e., the loss of New York net operating loss deductions (including but not limited to those based to some extent on depreciation deductions), under the source year and amount limitation rules existed before the advent of decoupling in 2003 (***see e.g., Matter of Refco Properties, Inc.***). Accepting petitioner's position in this case means that an implied preemption argument could be advanced in virtually any instance where there was any departure from strict symmetry or mirroring between federal and New York State deductions, addition and subtraction modifications, allowable credits and the like.[5] Petitioner has pointed to nothing that suggests Congress either expressly or implicitly intended that the states were bound to follow its lead on bonus depreciation (***see Mobil Oil Corp. v. Commissioner of Taxes of Vermont***, 445 US 425 [1980]). While petitioner frames its position as being compelled to choose between bonus depreciation or net operating loss deductions, Congress simply did not mandate that taxpayers had to take bonus depreciation for federal purposes. Rather, taxpayers were allowed to either elect or forego the same, presumably based upon whatever projected present and future results best suited their particular needs.

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[5] For example, differences in the taxability of income earned on investments such as certain state and municipal bonds the interest from which may be includable in net income for New York purposes but exempt for federal purposes can lead to the same mismatching of federal and New York State income and loss operating results and consequent loss of net operating loss deduction carry-forwards or carry-backs under the limitation rules of Tax Law § 208(9)(f)(3) (***see Matter of Aetna Casualty and Surety Company v. Tax Appeals Tribunal***)

J. Petitioner's commerce clause argument proceeds from the premise that a company operating only in New York will simply choose to forego the up-front benefit of accelerated depreciation at the federal level in order to preserve its potential future New York net operating loss deductions. However, any company, either operating in-state only or located out-of-state but operating in New York and elsewhere, faces the same choice and potential consequence. That is, an entity operating only in New York State as well as one operating both within and without New York State might anticipate a future decline in its income that might cause a New York net operating loss. As noted above, either could opt to use a federal depreciation method that more closely matches New York's allowable depreciation method so as to minimize any operating result differences between the two systems. In so choosing, a taxpayer gives up the benefit of earlier year depreciation deductions but preserves the deductibility of possible future New York net operating losses. Each faces the same considerations, and there is thus no greater burden imposed on an out-of-state businesses versus an in-state business, no favoritism is directed toward in-state businesses, and no undue burden is added to interstate commerce. Petitioner is neither compelled to avail itself of the accelerated or bonus depreciation benefit available for federal tax purposes, nor is it precluded from doing so, and this same choice in not prohibited to some taxpayers while available to others (***compare R.J. Reynolds Tobacco Co. v. City of New York Dept. of Fin.***, 237 AD2d 6 [1997], ***lv dismissed*** 91 NY 2d 956 [1998], ***mot for reconsideration denied*** 92 NY2d 874 [1998] [provisions in New York City General Corporation Tax Law favored residents over nonresidents by disallowing deductions based on federal accelerated depreciation methods permitted under the IRC unless and only to extent that the depreciated property was "placed in service" in New York State]). In addition, to the extent petitioner argues it is at a

competitive disadvantage as against entities not operating in New York who are free to elect federal accelerated or bonus depreciation without regard to the impact of potential New York net operating loss mismatches, this claim can be made about any perceived New York tax disadvantage for any entity doing business in New York as compared to entities not doing business in New York.

K. Petitioner's equal protection claim is likewise rejected. First, such a claim was rejected in ***Matter of Aetna Casualty and Surety Company v. Tax Appeals Tribunal***. Further, it is clear that departures from strict federal/state conformity can lead to results such as the unavailability or disallowance of deductions without violating constitutional limitations. In this regard:

> Legislatures possess the greatest freedom in matters of taxation, and the resolution of equal protection claims is not achieved by demonstrating that a particular tax statute or regulation results in even flagrant unevenness (***Matter of Long Is. Light Co. v. State Tax Commn.***, 45 NY2d 529, 535 [1978]). The proper standard of review is a rational basis test, under which a statute will be upheld absent a showing that the different treatment of different persons is so unrelated to the achievement of a legitimate purpose that it becomes readily apparent that the Legislature's actions were irrational (***Vance v. Bradley***, 440 US 93, 97 [1979]). (***Matter of Greco Bros. Amusement Co. v. Chu***, 113 AD2d 622 [1986].)

While the net operating loss limitation rules may yield seemingly harsh or inequitable results, particularly in conjunction with the impact of decoupling, such inequities are insufficient to find an equal protection violation where a rational purpose may be seen in the broad legislative goal of assuring stability in state finances by, as in this instance, enactments such as decoupling legislation (***see Matter of Brady v. State of New York***, 80 NY2d 596 [1992], ***cert denied*** 509 US 905 [1993]). Since the result complained of in this case is equally likely to occur with regard to any taxpayer, resident or nonresident, doing business in New York and electing federal bonus depreciation, there is no unequal treatment. Absent a showing of unequal treatment, there can be

no equal protection violation (***see Trump v Chu***, 65 NY2d 20 [1985], ***lv dismissed*** 474 US 915 [1985]).[6]

L. The petitions of Five Star Equipment, Inc. are hereby denied, and the notices of deficiency dated October 24, 2010 and February 2, 2012, together with interest, are sustained .

DATED: Albany, New York
March 13, 2014

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

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[6] Petitioner's challenge based on the Privileges and Immunities Clause is likewise rejected upon the same reasoning.