STATE OF NEW YORK

DIVISION OF TAX APPEALS

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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.

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DETERMINATION
DTA NO. 829691

Petitioners, Charter Communications, Inc., and combined affiliates, f/k/a Time Warner Cable, Inc., and combined affiliates, filed a petition 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.

A hearing was held in Albany, New York, on February 2, 2022, with all briefs to be submitted by June 2, 2022, which date began the six-month period for issuance of this determination. Petitioners appeared by Eversheds Sutherland, LLP (Eric S. Tresh, Esq., and Jeremy P. Gove, Esq., of counsel), and the Division of Taxation, appeared by Amanda Hiller, Esq. (David Markey, Esq., of counsel).

After reviewing the entire record in connection with this matter, Nicholas A. Behuniak, Administrative Law Judge, renders the following determination.

## *ISSUE*

Whether petitioners meet the definition of a "qualified emerging technology company" as defined in Tax Law § 210 (1) (a) (vi), such that they may compute their tax using the rates applicable to qualified emerging technology companies.[1]

## *FINDINGS OF FACT*

The parties executed a stipulation of facts and documents in connection with this matter. Such stipulated facts have been substantially incorporated into the findings of fact set forth herein. In addition, petitioners, Charter Communications, Inc., and combined affiliates, f/k/a Time Warner Cable, Inc., and combined affiliates, submitted 78 proposed findings of fact. Petitioners' proposed findings of fact 1 thorough 10, 12 through 19, 21 through 51, 53, 54, 62, and 67 through 78 are accepted and have been substantially incorporated into the findings of fact. Proposed findings of fact (or material parts thereof) 11, 20, 52, and 55 through 58 are not supported by the record cited to by petitioners, or the citations provided are insufficiently precise to verify the accuracy of the assertions made therein and are included to the extent deemed appropriate. Proposed findings of fact 59 through 61, and 63 through 66 are rejected as irrelevant and/or redundant. The Division of Taxation (Division) submitted 11 proposed findings of fact. The Division's proposed findings of fact 1 and 2 are accepted and have been substantially incorporated into the findings of fact. Proposed findings of fact 3 through 11 are rejected as redundant.

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

[1] The parties executed a partial stipulation of facts and documents in January of 2022, stipulating that this was the sole issue in this matter.

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 “qualified emerging technology company.”

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 “qualified emerging technology company” 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 qualified emerging technology companies.

8. The Division determined that petitioners did not qualify as a “qualified emerging technology company” 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 qualified emerging technology companies.

9. The Division determined that petitioners did not qualify as a “qualified emerging technology company” 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 qualified emerging technology companies.

10. The Division also made other adjustments unrelated to the determination that petitioners do not qualify as a "qualified emerging technology company," 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 related conciliation conference on March 14, 2019.

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

14. Petitioners timely appealed 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 "qualified emerging technology company" and cannot compute their tax using the rates applicable to qualified emerging technology companies, petitioners would owe the amounts on the notice.

17. If it is determined that petitioners meet the definition of a "qualified emerging technology company" such that they may compute their tax using the rates applicable to qualified emerging technology companies, 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)[2] |
| 2014 | ($26.00) | ($48.00) | ($74.00) |
| Total | ($165,151.00) | $364,117.00 | $198,965.00[3] |

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.

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.

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[2] The math provided in the stipulation does not add up correctly, however, the error is deemed immaterial.

[3] ***Id.***

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 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 qualified emerging technology company 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 qualifying emerging technology company 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."

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 qualified emerging technology company 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.

## *CONCLUSIONS OF LAW*

A. Article 9-A of the Tax Law imposes a franchise tax on every corporation doing business in New York State (***see*** Tax Law § 209 [1]). In the case of a taxpayer filing on a combined basis, such as petitioners, the franchise tax is computed, in part, on the highest one of four alternative bases (***see*** Tax Law §§ 210 (1); 211 (4); 20 NYCRR 3-1.3).[4] The parties agree that, for the years at issue, the net income base yielded the greatest tax of the four alternative bases. During the years at issue, Tax Law § 210 (1) (a) (vi) provided that the tax imposed on the net income of "qualified New York manufacturers" was to be computed on certain reduced rates. The relevant statute provided in part that a "qualified emerging technology company" as defined in the New York State Public Authorities Law, would qualify as a "qualified New York manufacturer" eligible for the certain reduced tax rates. The issue in this matter is whether petitioners were a "qualified emerging technology company" for the years at issue, as that term is defined in Tax Law § 210 (1) (a) (vi) and subsection (c) of § 3112-e the Public Authorities Law.

B. Initially it is noted that petitioners have the burden of proof in this matter to show that the notice is erroneous (***see Matter of TransCanada Facility, USA, Inc.***, Tax Appeals Tribunal, May 1, 2020; ***Matter of John Grace & Co., Inc.***, Tax Appeals Tribunal, September 13, 1990; ***Matter of Grace v New York State Tax Commn.***, 37 NY2d 193, 195 [1975] ***rearg denied*** 37 NY2d 816 [1975], ***lv denied*** 338 NE2d 330 [1975]; Tax Law § 1089 [e]). However, the parties dispute what petitioners must show in this matter in order for their interpretation of what qualifies as a "qualified emerging technology company" to prevail. The Division contends that

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[4] Article 9-A was extensively amended by chapter 59 of the Laws of 2014 and chapter 59 of the Laws of 2015. All references to provisions in Tax Law § 210 herein will therefore refer to the versions in effect during the years at issue.

the special tax rates applicable to qualified emerging technology companies in Tax Law § 210 (1) (a) (vi) are in the nature of an exemption or exclusion and, therefore, petitioners must show that their interpretation of the term "qualified emerging technology company" is the "only reasonable construction," citing ***Grace***, 37 NY2d 193 (1975), ***Golub Service Station, Inc. v Tax Appeals Trib.,*** 181 AD2d 216 (3d Dept 1992) and ***Matter of Brooklyn Navy Yard Cogeneration Partners, L.P.*** (Tax Appeals Tribunal, May 9, 2006, ***confirmed*** 46 AD3d 1247 [3d Dept 2007]). Petitioners assert that the statute in question is a statute which levies a tax and is to be construed most strongly against the government and in favor of the taxpayer.

In ***Matter of TransCanada***, the Tax Appeals Tribunal (Tribunal) determined that a tax cap was not an exemption, exclusion or deduction that operated to negate a taxpayer's obligation to pay an otherwise applicable tax. Accordingly, in ***Matter of TransCanada***, the Tribunal concluded that the tax cap provision of Tax Law former §§ 209 and 210 (1) (b) (1) was to be "construed most strongly against the government and in favor of the citizen" (***Matter of TransCanada***, citing ***Grace***, 37 NY2d at 196). The Division argues that the lower tax rates available to qualified emerging technology companies at issue in this case are not a tax cap and are more akin to an exemption, exclusion or deduction than a tax cap. The Division's argument in this regard is rejected as the reduced rates in this case are in fact more akin to a tax cap than an exemption, exclusion or deduction because Tax Law §§ 209 and 210 (1) (a) (vi) impose a franchise tax on a taxpayer and do not negate the taxpayer's obligation to pay the otherwise applicable tax, but rather define the applicable tax rate that may be imposed (***see Matter of TransCanada***, citing ***Golub***, 181 AD2d at 219).

Accordingly, the statutory provision at issue in this case is to be construed most strongly against the government and in favor of the taxpayer (***see Matter of TransCanada***).

C. For the years at issue Tax Law § 210 (1) (a) (vi) provided two separate methods by which a party could be classified as a "qualified New York manufacturer." In particular Tax Law § 210 (1) (a) (vi) provided in relevant part:[5]

> "for taxable years beginning on or after January thirty-first, two thousand seven, the amount prescribed by this paragraph for a taxpayer which is a *qualified New York manufacturer*, shall be computed at the rate of six and one-half (6.5) percent of the taxpayer's entire net income base." (emphasis added).

**METHOD ONE:** Tax Law § 210 (1) (a) (vi) provided the following method (Method One) for taxpayers to be classified as a "qualified New York manufacturer:"

> "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 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" (emphasis added).

**METHOD TWO:** Tax Law § 210 (1) (a) (vi) also provided a second method (Method Two) in which taxpayers could be classified as a "qualified New York manufacturer." The statute notes:

> "*In addition, a 'qualified New York manufacturer*' means *a taxpayer* which is defined as a *qualified emerging technology company* under paragraph (c) of subdivision one of

[5] Former Tax Law § 210 (1) (a) (vi) was amended in 2014; however, the amendments did not affect the relevant parts of the statute for the analysis of this case other than the applicable tax rate (***see*** L.2014, c. 59, pt R, § 10; ***see also*** findings of fact 7, 8 and 9).

> section thirty-one hundred two-e of the public authorities law regardless of the ten million dollar limitation expressed in subparagraph one of such paragraph (c)" (emphasis added).

Finally, Tax Law § 210 (1) (a) (vi) provided:

> "The commissioner shall establish guidelines and criteria that specify requirements by which a manufacturer may be classified as an eligible qualified New York manufacturer. Criteria may include but not be limited to factors such as regional unemployment, the economic impact that manufacturing has on the surrounding community, population decline within the region and median income within the region in which the manufacturer is located. In establishing these guidelines and criteria, the commissioner shall endeavor that the total annual cost of the lower rates shall not exceed twenty-five million dollars."

Petitioners are made up of several companies that file a New York state tax return as one combined taxpayer. Petitioners concede that they do not meet the criteria to be a "qualified New York manufacturer" under Method One. Petitioners also concede that not all of the companies which make up the combined group are located in New York State and therefore not each and every corporation that makes up petitioners are separately a "qualified emerging technology company." Petitioners assert that the attributes of a combined group taxpayer should be aggregated and considered together to meet the criteria of being a "qualified emerging technology company" under both Method One and Method Two, in order to utilize the lower tax rate available as a "qualified New York manufacturer." The Division asserts that in order to qualify as a "qualified New York manufacturer" under Method Two, each and every component company of a combined group must independently be a "qualified emerging technology company."

Subsection (c) of § 3112-e the Public Authorities Law 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" (emphasis added).

Petitioners assert that a combined entity taxpayer should be able to qualify as a "qualified emerging technology company" as long as the combined unit's attributes taken together meet the criteria to be a "qualified emerging technology company" pursuant to subsection (c) of § 3112-e the Public Authorities Law. As support for their position, petitioners refer to the portion Tax Law § 210 (1) (a) (vi) for Method One that provides that "the combined group" shall be considered a "manufacturer" for purposes of the test if the combined group is principally engaged in certain requisite activities set forth in the subsection. Petitioners point out that under Method One a combined group shall be "principally engaged" in the requisite activities if more than fifty percent of the "gross receipts of the taxpayer or combined group" are derived from certain types of receipts. Petitioners correctly note that the relevant statute allows for a combined group's attributes to be considered together rather than individually for application of the applicable test.

Petitioners assert that this articulated aggregation method for application of the Method One test is likewise appropriate for the application of the Method Two test of whether a combined group taxpayer is a "qualified emerging technology company." Petitioners note that there is nothing in the Method Two test, either under Tax Law § 210 (1) (a) (vi) or subsection (c) of § 3112-e the Public Authorities Law, which prohibits the approach it advances. Petitioners also argue that the concept of combined reporting treats a unitary business as a single taxable entity and that separately analyzing the components of a combined taxpayer is antithetical to concept of combined reporting.

The Division argues that the two tests, Method One and Method Two, are separate and distinct and that in January of 2008, the Division provided guidance to the public in TSB-M-08 (1) C, which expressly stated that in order for a combined group taxpayer to pass the Method Two test, each and every individual corporation within the combined group had to be located in New York.[6]

D. In determining whether petitioners were a "qualified emerging technology company" under Tax Law § 210, we are guided by the fundamental rule of statutory construction, which is to effectuate the intent of the legislature (***Matter of TransCanada***, citing ***Matter of 1605 Book Ctr. v Tax Appeals Trib. of State of N.Y.***, 83 NY2d 240, 244 [1994], ***cert denied*** 513 US 811 [1994]). "[W]hen the language of a tax statute is unambiguous, it should be construed so as to give effect to the plain meaning of the words used (citation omitted)" (***Matter of TransCanada***, citing ***New York State Assn. of Counties v Axelrod***, 213 AD2d 18, 24 [3d Dept 1995], ***lv dismissed*** 87 NY2d 918 [1996]). Every word must, if possible, be given meaning (***Matter of TransCanada***, citing ***Sanders v Winship***, 57 NY2d 391, 396 [[1982]). This is because "[t]he statutory text is the clearest indicator of legislative intent" (***Matter of TransCanada***, citing ***Matter of DaimlerChrysler Corp. v Spitzer***, 7 NY3d 653, 660 [2006]).

The two methods, Method One and Method Two, that are utilized to potentially classify a taxpayer as a "qualified New York manufacturer" are both in the same section of the Tax Law. Since Method One and Method Two of Tax Law § 210 (1) (a) (vi) and Public Authorities Law §

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[6] "[T]he construction given to statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld" (***Matter of Astoria Gas Turbine Power, LLC v Tax Commn. of City of N.Y.*** 14 AD3d 553, 556 [2d Dept 2005], ***affd*** 7 NY3d 451 [2006], quoting ***Matter of Howard v Wyman***, 28 NY2d 434, 438 [1971]). As noted above, the legislature in Tax Law § 210 (1) (a) (vi), expressly articulated that "[t]he commissioner shall establish guidelines and criteria that specify requirements by which a manufacturer may be classified as an eligible qualified New York manufacturer."

3112-e (c) deal with the same subject, such sections are in pari materia (***Matter of TransCanada***, citing ***Matter of Piccolo v New York State Tax Appeals Trib.***, 108 AD3d 107, 110 [3d Dept 2013], and they should be construed together and applied consistently (***id.***). The statutory text for Method One clearly and unambiguously articulates that a combined group may qualify as a "qualified New York manufacturer" and the test for that method is applied on the entire combined group's gross income which is an attribute of the entire combined group compiled together. Likewise, Method One also articulates that in order for a taxpayer to qualify under that method an entity must have either a certain amount of property in New York with a certain adjusted basis value or have all of its real and personal property located in the State. Clearly, in enacting Method One under Tax Law § 210, the legislature made very specific State property requirements and also specified if and when it was appropriate to use a combined group's aggregate attributes to fulfill the criteria to be a "qualified New York manufacturer" under that test. In stark contrast, the same Tax Law section does not articulate that a combined group's attributes, in particular all of its various component entity physical locations, should be used to meet the required criteria of the Method Two test. The "failure of the legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended" (***Matter of TransCanada***, citing McKinney's Cons Laws of NY, Book 1, Statutes § 74). Furthermore, the relevant section of the Public Authorities Law specifically refers to a singular "company" for the proper application of the "qualified emerging technology company" test and similarly does not articulate that a combined group's characteristics should be used to meet the qualifications of that test (***see*** Public Authorities Law § 3112-e [c]). Rather the relevant provision refers to a "qualified emerging technology company" as "a company located in New York." Petitioners desire to apply Public Authorities Law § 3112-e [c] to a combined group's

overall attributes must be rejected without an express provision by the legislature providing for such aggregation similar to what was articulated for the aggregation of gross receipts in Method One. When the Method One and Method Two tests are considered together, the logical conclusion is that the legislature rejected petitioner's proposed approach and instead required each company to independently satisfy the requirements of Public Authorities Law § 3112-e [c]. If the legislature had intended that a combined group's aggregate characteristics should be used for application of Method Two, it easily could have expressly provided for such. There is no ambiguity as to what the legislature clearly provided for in Method One and what the legislature did not provide for in Method Two. Furthermore, the conclusion that each entity of a combined group must be located in New York is consistent with the public pronouncements made by the Division.[7]

Petitioners' claim that requiring each and every separate entity of a combined group to be located in New York in order to qualify as a "qualified emerging technology company" somehow violates combined filing principles is also rejected. Combined reporting treats a combined group as one single taxable entity; however, petitioners cite to no authority that precludes the State from having certain requirements, like the one in question, in order for a combined group to take advantage of certain preferable reduced tax rates. The relevant statute is not decombining a taxpayer as petitioners imply, rather the statute is considering the components of the individual entities of a combined group for qualification of a reduced tax rate but otherwise is applying the appropriate tax rate, and all other aspects of the Tax Law, to the

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[7] The Division was expressly granted authority by the legislature to make such distinctions for Tax Law § 210 (a) (vi) (***see*** NY Bill Jacket, 2011 S.B. 50002, Ch. 56**;** ***see also*** TSB-M -08 [1] C [Summary of Corporation Tax Legislative Changes Enacted in 2007 and Expiring Tax Law Provisions]; TSB-M -08 [12] C [Summary of Corporation Tax Legislative Changes Enacted in 2008]; and TSB-M -15 [1] C [Summary of Budget Bill Corporation Tax Changes Enacted in 2014]).

combined group's income and other attributes. Petitioners have failed to meet their burden of proof to show that they qualify as a "qualified emerging technology company" pursuant to Tax Law § 210 (1) (a) (vi).

E. In their brief, petitioners assert that if the combined group does not qualify as a "qualified emerging technology company," then the Division should be required to calculate what the application of the "qualified emerging technology company" beneficial rate would be for the individual entities of petitioners' combined group that would separately qualify as a "qualified emerging technology company" and provide petitioners the amount of those benefits. In essence, it appears as if petitioners want the Division to decombine them for purposes of the "qualified emerging technology company" tax computation and credit back to petitioners the amounts which the individual companies would have independently benefited from under individual "qualified emerging technology company" classification. This question appears to be beyond the one issue the parties stipulated to as the sole issue in this case. Notwithstanding that fact, combined reporting treats a unitary business as a single taxable entity and separately breaking out individual component companies of a combined taxpayer would appear to create distortion (***see Matter of Disney Enterprises, Inc., v Tax Appeals Trib.***, 10 NY3d 392 [2008]; ***Matter of Sunguard Capital Corp., et al***, Tax Appeals Tribunal, May 19, 2015). In this case, petitioners are required to file a combined return. Petitioners fail to establish that decombining their combined returns would not result in distortion. Furthermore, there does not appear to be a provision in the Tax Law where a taxpayer may, without specific legislation to the contrary, decombine their return for favorable application of one portion of the Tax Law but otherwise file a combined return which incorporates the favorable portions of decombination that were beneficial. Accordingly, petitioners' alternative argument is likewise rejected.

F. In its brief, petitioners also argue that the Tax Law § 210 (1) (a) (vi) requirement that every company of a combined group must independently qualify as a "qualified emerging technology company" in order to take advantage of the reduced tax rates violates the Commerce Clause of the United States Constitution because the law discriminates against corporations which are not located in-state. Petitioners' argument in this regard amounts to a facial challenge to the law at issue, and the Division of Tax Appeals lacks jurisdiction to consider facial validity challenges of statutes (***see Matter of Fourth Day Enters***., Tax Appeals Tribunal, October 27, 1988).

G. The petition of Charter Communications, Inc., and combined affiliates, f/k/a Time Warner Cable, Inc., and combined affiliates is denied, and the notice of deficiency, dated May 23, 2018, is sustained.

DATED: Albany, New York
December 01, 2022

/s/ Nicholas A. Behuniak
ADMINISTRATIVE LAW JUDGE