NOT FOR PUBLICATION WITHOUT APPROVAL OF
THE TAX COURT COMMITTEE ON OPINIONS

| | | |
|---|---|---|
| FIFTH THIRD EQUIPMENT FINANCE COMPANY,<br><br>Plaintiff,<br><br>v.<br><br>DIRECTOR, DIVISION OF TAXATION,<br><br>Defendant. | : | TAX COURT OF NEW JERSEY<br>DOCKET NO. 013380-2018<br><br>Approved for Publication<br>In the New Jersey<br>Tax Court Reports |

Decided: February 23, 2021

Kenneth R. Levine argued the cause for plaintiff
(Reed Smith, LLP, attorneys, Kyle O. Sollie, attorney of record and on the brief; Matthew L. Setzer, on the brief).

Michael J. Duffy for defendant
(Gurbir S. Grewal, Attorney General of New Jersey, attorney).

SUNDAR, P.J.T.C.

This opinion decides the parties' respective summary judgment motions as to whether defendant (Taxation) properly granted only a portion of plaintiff's refund claim of Corporation Business Tax (CBT) for tax years 2010-2012. Most of the refund claim was based on plaintiff's methodology of carrying forward net operating losses (NOL) from tax years 1999-2002 pursuant to N.J.S.A. 54:10A-4(k)(6)(E) (hereinafter Subparagraph E). This statute disallowed a deduction of NOL carryovers for tax years 2002-2005 (100% for 2002 and 2003, 50% for 2004 and 2005), but also extended the normal seven-year period of the carryover losses for a period commensurate with the suspension period(s) "if and only to the extent" the NOL carryover deduction was disallowed under Subparagraph E.

Taxation's auditor denied plaintiff's NOL carryover-based refund claim in its entirety based on the regulation, N.J.A.C. 18:7-5.17(c). However, Taxation's Conference and Appeals

branch (CAB) followed a different methodology: one that was elucidated in a 2015 bench opinion of the Tax Court in an unrelated litigation that involved the interpretation of Subparagraph E.[1] Due to this change in position, CAB granted a portion of plaintiff's refund claim relating to the NOL carryover issue.

Plaintiff contends that (1) the plain language of Subparagraph E supports its methodology wherein the entire amount of an NOL carryover was disallowed or suspended for the four years 2002-2005, regardless of whether plaintiff had income in those years, and the normal seven-year carryover period was also extended for that same period; (2) Taxation's regulation is invalid in that it improperly limits the extension of only those NOL carryovers which would have expired in any one of the four suspension years; and (3) Taxation's decision to follow the bench opinion on the interpretation and methodology of Subparagraph E as opposed to its regulations is invalid rule-making under the Administrative Procedures Act.

Taxation argues that per the bench opinion, the extension period is never four years, and that the statute conditioned the extension to only those NOL carryovers which could have been used (deducted from income) during the suspension periods. Thus, if the NOL carryover could not have been used due to insufficiency of income, Subparagraph E would not apply. It contends that its decision to follow the bench opinion, while a change of its position, does not require formal rule adoption. It also notes that since it did not apply its regulation, the court should not rule on its validity as doing so would be an advisory opinion.

A secondary issue is whether plaintiff can claim a refund for the available tax credits under the Alternative Minimum Assessment (AMA) statute, which it could have used to offset its self-reported CBT for tax year 2010. Taxation contends the refund claim was not raised timely.

---

[1] That case was Amtopp Corp. v. Dir., Div. of Taxation, Docket No. 012139-2012 (Feb. 11, 2015).

For the reasons stated below, the court finds that (a) in light of the entire NOL carryover scheme set forth in N.J.S.A. 54:10A-4(k)(6), Taxation is correct that Subparagraph E does not allow for an extension if in a suspension period there was no income to absorb an NOL carryover; (b) Taxation is correct that consideration must be given to the first-in-line, first-in-time sequence of using an NOL carryover specified in N.J.S.A. 54:10A-4(k)(6)(B) for purposes of applying Subparagraph E; (c) plaintiff is incorrect that the extension period for NOL carryovers is four years for each NOL carryover that could have been used to offset income in the suspension year(s); (d) the court agrees, in part, with plaintiff's proffered computation of the NOL carryovers and extension periods under Taxation's construction of Subparagraph E except for extending the 1999 NOL carryover into tax year 2010 to offset $70,501,320 of income in that year; (e) N.J.A.C. 18:7-5.17(c) is invalid; (f) Taxation properly denied plaintiff's refund claim attributable to the AMA tax credits. Each party's summary judgment motion is therefore granted in part and denied in part.

**LAW ON NOL CARRYOVERS**

An NOL carryover is the NOL which is generated or incurred in one tax year, and which is allowed to be carried forward to successive future tax years, so that it can be used to absorb or offset the entire net income (ENI) earned in those successive years. N.J.S.A. 54:10A-4(k)(6)(A) ("there shall be allowed as a deduction for the privilege period the [NOL] carryover to that period"). For tax years ending before June 2009, the carryover period is seven years "following the period of loss." N.J.S.A. 54:10A-4(k)(6)(B). There can be no carryover in the NOL's eighth year. N.J.A.C. 18:7-5.13(a).

The methodology for using the NOL carryover amounts as a deduction from the ENI over the seven-year period is set forth in N.J.S.A. 54:10A-4(k)(6)(B). The "entire amount" of the NOL must be carried forward "to the earliest" tax year "to which" it can be carried. Ibid. Any loss that

is not absorbed ENI in that "earliest" tax year, gets further carried forward to "each" of the other remaining tax years. Ibid. The applicable regulation provides as follows:

> The [NOL] carryover is carried to each of the succeeding taxable years and is reduced in each such succeeding year by the amount of entire net income before [NOL] deduction and before exclusions, and is further reduced to zero seven years following the year of the loss taking into account the normal or extended due date for filing the return for the seventh year succeeding the year of the loss. The [NOL] carryover may not be carried back to any year preceding the year of the loss. For this purpose, taxable year shall mean the accounting period covered by the taxpayer's return. In no event may a [NOL] carryover be used for a net operating loss deduction on the eighth return succeeding the loss year.
>
> [N.J.A.C. 18:7-5.13(a).]

Note that under the above scheme of NOL carryovers, a successive tax year's NOL carryover must wait in line for the prior year's NOL carryover to be exhausted before it can be used to offset income. Thus, for example, if there was insufficient income to absorb the earliest tax year's NOL carryover (first-in-time first-in-line NOL carryover) for the seven years of its life, then the successive tax year's NOL carryover (next-in-time next-in-line NOL carryover) cannot be used during that period, but is carried over to its last year of life, i.e., its seventh year. If there is no income in that seventh year or insufficient income to absorb it, then that next-in-line NOL carryover is deemed unused and expires. This chain reaction happens to each successive tax year's NOL vis-à-vis the preceding tax year's NOL carryover. See N.J.A.C. 18:7-5.13, Example 2 (showing the "application of the [NOL] deductions in the proper sequence").

*Subparagraph E*

In 2002, as part of a revenue raising measure, the Legislature enacted Subparagraph E and disallowed a deduction for NOL carryovers in tax years 2002 and 2003. See L. 2002, c. 40 (the

Business Tax Reform Act or "BTRA"). At the same time, it allowed an extension of the normal carryover period. Subparagraph E (effective July 2, 2002) read:

> Notwithstanding the provisions of this paragraph (6) of subsection (k) of [N.J.S.A. 54:10A-4] . . . to the contrary, for privilege periods beginning during calendar year 2002 and calendar year 2003, no deduction for any net operating loss carryover shall be allowed. If and only to the extent that any net operating loss carryover deduction is disallowed by reason of this subparagraph (E), the date on which the amount of the disallowed net operating loss carryover deduction would otherwise expire shall be extended by two years.
>
> [N.J.S.A. 54:10A-4(k)(6)(E).]

See also Assembly Budget Comm. Statement to A. 2501 7 (June 27, 2002) (BTRA "suspends the application of net operating loss (NOL) deductions for tax years 2002 and 2003. The usual seven year carryforward . . . is extended for two years").

Taxation adopted a regulation, "Suspension of net operating loss carryover," which read:

> Except as provided below, for privilege periods beginning during calendar year 2002 and calendar year 2003, no deduction for any net operating loss shall be allowed. If and only to the extent that any net operating loss carryover deduction is disallowed by reason of this subsection, the date on which the amount of the disallowed net operating loss carryover deduction would otherwise expire shall be extended by two years . . . .
>
> [N.J.A.C. 18:7-5.17.][2]

When proposing the regulation, Taxation stated that Subparagraph E provided for a two-year "suspension of" NOL carryovers. Thus, "[i]f" a NOL carryover "would otherwise expire during the suspension period, a taxpayer may obtain relief in the extended year of expiration based

[2] There were no subsections to the regulation. Therefore the "[e]xcept as provided below" introduction is unclear. The last sentence in N.J.A.C. 18:7-8.17 stated: "This section shall not restrict the surrender or acquisition of [CBT] benefit certificates pursuant to N.J.S.A. 34:1B-7.42a and shall not restrict the application of [CBT] certificates pursuant to N.J.S.A. 54:10A:4-2." Four examples followed the regulation. Example 4 related to the last sentence of the regulation. It is possible that the last sentence and its example were the prefaced "[e]xcept as provided below."

upon the tax significance of the NOL's lost in 2002 and 2003." See 35 N.J.R. 1573(a) (Apr. 7, 2003) (emphasis added).

In 2004, the Legislature again amended Subparagraph E by limiting the NOL carryover deduction to 50% of the income for tax years 2004 and 2005 and amended the language as to the extension period. See L. 2004, c. 47 (effective June 29, 2004). Subparagraph E now read as follows: (amendments underscored)

> Notwithstanding the provisions of this paragraph (6) of subsection (k) of this section to the contrary, for privilege periods beginning during calendar year 2002 and calendar year 2003, no deduction for any net operating loss carryover shall be allowed, and for privilege periods beginning during calendar year 2004 and calendar year 2005, there shall be allowed as a deduction for the privilege period so much of the net operating loss carryover as reduces entire net income otherwise calculated by 50%. If and only to the extent that any net operating loss carryover deduction is disallowed by reason of this subparagraph (E), the date on which the amount of the disallowed net operating loss carryover deduction would otherwise expire shall be extended by a period equal to the period for which application of the net operating loss was disallowed by this subparagraph.

The legislative history to this amendment states:

> Assembly Bill No. 3110 limits the application of net operating loss (NOL) deductions under the corporation business tax (CBT) for privilege periods beginning in calendar years 2004 and 2005 to so much of the NOLs as reduce the entire net income subject to tax to 50% of what it would otherwise be.
> "Net operating loss" is a tax accounting concept; if a taxpayer has more business expense than business income in a tax year, the taxpayer has a [NOL] for that year. The [NOL] can be deducted in later years from taxable income to reduce tax liability. The [BTRA] . . . provided for a suspension of the application of [NOLs] for privilege periods beginning in calendar years 2002 and 2003; under current law, corporation business tax payers are allowed to begin to apply NOLs against income for privilege periods beginning in calendar year 2004.
> The Governor's Proposed Budget for State Fiscal Year 2004-2005 assumed that the total suspension of NOL application would be extended for privilege periods beginning in calendar years 2004 and

> 2005. This bill, however, allows the use of available NOLs for 2004 and 2005 for reducing taxable income by up to 50 percent, returning NOLs to full deductibility for privilege periods beginning in calendar year 2006.
> The bill extends the usual seven year carryforward (14 years for certain high-technology corporations) extended for the period of suspension . . .
>
> [Assembly Budget Comm. Statement to A. 3110 (June 22, 2004).]

The allowance of "deductions at" 50% was estimated to "maintain about $140 million of CBT revenue in FY 2005." Ibid.

In 2007, Taxation amended N.J.A.C. 18:7-5.17. New subsection (b) provided:

> For privilege periods beginning during calendar year 2004 and calendar year 2005, there shall be allowed as a deduction for the privilege period so much of the [NOL] carryover as reduces entire net income otherwise calculated by 50 percent. If and only to the extent that any [NOL] carryover deduction is disallowed by reason of this section, the date on which the amount of the disallowed [NOL] carryover deduction would otherwise expire shall be extended by a period equal to the period for which application of the [NOL] was disallowed by this section.
>
> [N.J.A.C. 18:7-5.17(b).]

New subsection (c) stated:

> Any net operating [loss] deduction that was disallowed by the prohibition, and would have expired in return periods beginning in 2002 and 2003 is extended for two years. Any net operating loss deduction that was disallowed by the prohibition, and would have expired in return periods beginning in 2004 and 2005, is extended for one return period for each return period that it was disallowed.
>
> [N.J.A.C. 18:7-5.17(c).]

Taxation noted that the 2004 amendment resulted in the NOL carryover for tax years 2004 and 2005 as "limited to 50 percent of the loss otherwise available." 39 N.J.R. 844(a) (Mar. 19, 2007). It repeated that the "date on which the amount of the disallowed [NOL] carryover deduction would otherwise expire is extended by a period equal to the period for which application of the

[NOL] was disallowed by this provision of law." Ibid. While "[p]roposed new subsection (b) reflects the suspension provided" under the 2004 amendment Subparagraph E, "proposed new subsection (c) provides guidance on the application of suspension periods referred to in subsections (a) and (b)." Ibid. It "declined to delete the phrase 'and would have expired' in the two places that it appeared in N.J.A.C. 18:7-5.17(c)," or alternatively "hold a hearing if [Taxation] did not agree to change the language in question based upon the comment submitted or was unsure what language to adopt." See 39 N.J.R. 3780(b) (Sept. 4, 2007).

**FACTS AND PROCEDURAL HISTORY**

Plaintiff is an Ohio corporation in the business of equipment leasing on a nation-wide basis. Tax years 1995-2002 were Loss Periods with losses totaling $2,755,471,168. Tax years 2003-2012 were Profit Periods with income totaling $1,865,421,798.

When plaintiff filed its CBT returns for tax years 2010-2012, it did not claim a deduction for the NOL carryovers from tax years 1999-2001 due to its alleged reliance on the regulations. Subsequently, it recomputed its NOL carryovers, and on September 1, 2015 filed refund claims for 2010-2012 tax years and used the NOLs in 1999, 2000, and 2001 to reduce the ENI for tax years 2010-2012 to zero. The refund claims totaled $1,298,868, which was the CBT paid for each tax year 2010-2012 ($581,563 + $495,810 + $221,595), plus interest.

Taxation denied the refund claims as the NOL "carryover deductions as currently applied, with no amounts available to deduct on the 2010, 2011, or 2012 returns, are in accordance with New Jersey statutes and regulations." In a separate Notice of Assessment Related to Final Audit Determination for tax years 2010 and 2011, Taxation found that there was "no NOL available to use," and "[o]nly NOL's that were disallowed by the prohibition and would have expired are extended." As part of the audit adjustment, the auditor allowed plaintiff a credit for the AMA tax

against the CBT liabilities of $1,288 and $2,188 for each tax year 2010 and 2011, although plaintiff had $109,444 in carried forward AMA credits.

Plaintiff protested the refund denial and audit determination to CAB. It argued that the NOL carryover period should be extended by four years per Subparagraph E, thus, its 1999-2001 NOLs should be allowed as a deduction in tax years 2010-2012. Plaintiff also sought a refund of $109,444 (plus interest), the available AMA tax credits, which it claimed should have been used to reduce its self-reported CBT for tax year 2010.

The CAB agreed that plaintiff was entitled to a partial refund of $82,723 based on the NOL carryover issue. In its conference report, the CAB in rejecting plaintiff's settlement offer, stated:

> In the court case *AmTopp v. Director, Division of Taxation* 012139-2012, the court extended NOL from 1997 an additional two periods and applied NOL amounts to 2006. The court expired the remaining amounts from 1997. The court did the same thing with the amounts from 1998 applying the NOL amounts to 2007 with an extension of only two years. The AmTopp decision indicates that NOL amounts can only be extended two periods, not four periods like [plaintiff] is requesting.

The CAB also rejected plaintiff's request to offset its 2010 self-reported CBT by $109,444 of the carried forward AMA tax credits because (i) it never requested this refund in its initial refund request; and (2) such credits cannot be used to create refunds.[3]

Taxation's final determination agreed with the AMA issue, and as to the NOL issue stated:

> Due to the suspension years the NOL from 1998 is extended an additional two periods. This causes a portion of the NOL from 1999 to expire so the amount that could have been used extends an additional year. This happens again to the NOL from 2000, 2001 and 2002. The amount from 2002 that is extended an additional year is $40,890,930 and is applied to the first year in question 2010. This results in a refund being issued in the amount of $82,723. These adjustments are in accordance with N.J.S.A. 54:10A-4(k)(6)(E) that

[3] The charts of the NOL carryover methodology in plaintiff's refund claim, in the auditor's decision, and the CAB's conference report are reproduced at the end of this opinion.

> extend portions of NOLs as a result of NOL suspension periods, privilege periods beginning during calendar year 2002 through 2005.
> . . .
> The refund is being adjusted to reflect the NOL extension due to the suspension years, however, the extension of four periods is denied.

**ANALYSIS**

(A) APPROPRIATENESS OF SUMMARY JUDGMENT

Summary judgment will be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). The only issue here is the disagreement on Subparagraph E's interpretation which does not involve materially disputed facts. Therefore, summary judgment is appropriate.

(B) INTERPRETATION OF SUBPARAGRAPH E

In interpreting any statute, the court must first examine its plain language to effectuate the legislative intent. Cowley v. Virtua Health System, 242 N.J. 1, 15 (2020) (citation and internal quotation marks omitted). The court's "review is not limited to the words in a challenged provision." State v. Twiggs, 233 N.J. 513, 532 (2018). It can "also draw inferences based on the statute's overall structure and composition" and can review "the entire legislative scheme of which [the statute] is a part." Ibid. (citations and internal quotations marks omitted). The court should ensure that its interpretation of a statute should not "render[] any part of the statute superfluous." Id. at 532-33 (citation omitted). Statutory "words and phrases" should not be considered "in isolation but rather in their proper context and in relationship to other parts of [the] statute, so that meaning can be given to the whole of [the] enactment." Id. at 533 (citation omitted).

Plaintiff argues that the term "allowed" and "disallowed" are terms of art in taxing statutes (resorting to the interpretation under the federal Internal Revenue Code). The term "allowed" per plaintiff, is used in N.J.S.A. 54:10A-4(k)(6)(A), which grants a deduction for NOL carryover without any qualification, condition or limitation, which means that the deduction is granted even in tax years when there is no income to absorb the NOL carryover. Therefore, Subparagraph E's disallowance is what is allowed under N.J.S.A. 54:10A-4(k)(6)(A), which is the entire NOL carryover amount, regardless of whether there was any income or loss during the suspension period, and therefore, any NOL carried over to 2002-2005 (the suspension years) gets an extension of its carryover life. Taxation's "income-testing" pre-qualification for deeming whether an NOL carryover is "allowed" plaintiff argues, is improper. In addition, plaintiff contends, the Legislature took four years away from the normal seven-year NOL carryover period, therefore, it simply gave back that four-year period, which means that the extension period is also four years.

Taxation contends that the limiting phrase "[i]f and only to the extent" in Subparagraph E, militates against the broad construction plaintiff seeks. What is disallowed in Subparagraph E, per Taxation, is only that amount which could have otherwise been used to offset income (i.e., used but for Subparagraph E), which then presupposes existence of income. If there was no income to absorb an NOL carryover, then that carried over NOL cannot benefit additional carryover period/s by virtue of Subparagraph E. In addition, Taxation argues, as ruled in the 2015 bench opinion of the Tax Court, there can never be a four-year extension period.

(1) Disallowed NOL Carryover under Subparagraph E

It is undisputed that Subparagraph E was enacted, and amended, for raising revenue. It is equally clear that the Legislature returned to taxpayers, the benefits lost during the suspension period (2002-2005), by extending the carryover period. No less clear is the Legislature's intent to

limit the benefit because it explicitly stated in Subparagraph E as follows: "If and only to the extent that any [NOL] carryover deduction is disallowed by reason of this subparagraph (E), the date on which the amount of the disallowed [NOL] carryover deduction would otherwise expire shall be extended" by a commensurate period.

The court finds that the language in Subparagraph E requires an examination of the entire scheme of the NOL carryover deduction in determining how much of an NOL carryover can be used in the extension period. Even without Subparagraph E, the court is unpersuaded by plaintiff's argument that since N.J.S.A. 54:10A-4(k)(6)(A) grants an unconditional deduction for an NOL carryover, the entire amount is deemed "allowed" and when suspended is deemed "disallowed." This is because N.J.S.A. 54:10A-4(k)(6)(B) conditions the deductibility on (a) availability of income to absorb an NOL carryover; and (b) availability of the seven-year period. And when there is no income to absorb an NOL carryover, such amount is only carried over to the next tax year. It is not "disallowed" in the year there is no income.

In addition, the grant of a deduction for an NOL carryover under N.J.S.A. 54:10A-4(k)(6)(A) is not unconditional since it incorporates by reference the income restriction under N.J.S.A. 54:10A-4(k)(6)(B): Subparagraph A states "there shall be allowed as a deduction for the privilege period the net operating loss carryover to that period," while the term "net operating loss carryover" is defined in Subparagraph B and limits its deductibility to the extent of income.[4]

---

[4] N.J.S.A. 54:10A-4(k)(6)(B) provides as follows:

> "Net operating loss carryover. A net operating loss for any privilege period ending after June 30, 1984 shall be a net operating loss carryover to each of the seven privilege periods following the period of the loss and a net operating loss for any privilege period ending after June 30, 2009 shall be a net operating loss carryover to each of the twenty privilege periods following the period of the loss. The entire amount of the net operating loss for any privilege period (the "loss period") shall be carried to the earliest of the privilege periods to which the loss may be carried. The portion of the loss which shall be carried to each of the other privilege periods

However, if there was income which could have been reduced by an NOL carryover, and Subparagraph E prevented this ability for the specific tax years, then that NOL carryover is effectively disallowed. Therefore, the court agrees with Taxation that when in 2002, a year of suspension, plaintiff had no income, regardless of Subparagraph E, no NOL carryover amount could have been used. This is not a "disallowance" for purposes of Subparagraph E so that the NOL carried over to 2002 gets an extension period. Rather, it is carried over to the next tax year. If in 2003 there was income, then, that NOL carried over will benefit from an extension. However, as here for plaintiff's 1995 NOL carryover: it expires at the end of the 2002 tax year and there was no income to absorb it; therefore, it is not extended into 2003.

This construction finds support in the language of the limiting portion of Subparagraph E: "If and only to the extent that any [NOL] carryover deduction is disallowed by reason of this subparagraph (E), the date on which the amount of the disallowed net operating loss carryover deduction would otherwise expire shall be extended . . . ." (emphasis added). The underscored phrases when read together with the term "deduction," implicates N.J.S.A. 54:10A-4(k)(6)(B), which defines an NOL carryover and which dictates how, and how much of an NOL can offset income. Thus, Subparagraph E has a "built in" income testing restriction by referencing "net operating loss carryover" which is defined in N.J.S.A. 54:10A-4(k)(6)(B) and which is limited to the extent of income.

The legislative history also aids in this regard. The Legislature stated that Subparagraph E suspended "application of [NOL] . . . deductions." See also Assembly Budget Comm. Statement

---

> shall be the excess, if any, of the amount of the loss over the sum of the entire net income, computed without the exclusions permitted in paragraphs (4) and (5) of this subsection or the net operating loss deduction provided by subparagraph (A) of this paragraph, for each of the prior privilege periods to which the loss may be carried." (emphasis added).

to A. 2501 (emphasis added). The Legislature also noted that a NOL which is generated or incurred in a particular tax year "can be deducted in later years from taxable income to reduce tax liability," that the enactment of Subparagraph E "provided for a suspension of the application of" the NOL carryovers in 2002, while the 2004 amendment was to "allow[] the use of available NOLs for 2004 and 2005 for reducing taxable income." Assembly Budget Comm. Statement to A. 3110 (emphasis added). The word "application" means how an NOL carryover is used, i.e., deducted. This again implicates N.J.S.A. 54:10A-4(k)(6)(B). Cf. also N.J.A.C. 18:7-5.13(a) ("In no event may a [NOL] carryover be used for a net operating loss deduction on the eighth return succeeding the loss year") (emphasis added).

The court also notes that Taxation's position when promulgating N.J.A.C. 18:7-5.17 in 2003 (renumbered as N.J.A.C. 18:7-5.17(a) in 2007), and N.J.A.C. 18:7-5.17(b) in 2007 was that only such amount of NOL carryovers which could have absorbed income during the suspension periods gets the benefit of the extension period. See 35 N.J.R. 1573(a) ("a taxpayer may obtain relief in the extended year of expiration based upon the tax significance of the NOL's lost in 2002 and 2003"); 39 N.J.R. 3780(b) (an NOL is "disallowed if its force and validity are denied and its effect as a tax attribute is nullified in the suspension year. This occurs only if the attribute could have been used or applied against income during that suspension period" which promotes "the legislative goals of the [CBT] statute of meeting the State's revenue needs and at the same time enabling those taxpayers that would have lost NOLs . . . that they could have used to have possible use of those NOLs preserved"). This reasoning/construction is within the fair contemplation of Subparagraph E.

Since raising revenue was reason for the enactment and amendment of Subparagraph E, the court finds that the Legislature presupposed the existence of income in 2002-2005, and that

such income would be taxed since it would not be absorbed by an NOL carryover. This means that the Legislature intended to disallow only such amount of an NOL carryover that would otherwise have been allowed to offset the existing ENI in 2002-2005. This construction gives effect to the overall language and intent of the NOL carryover statute and will avoid rendering the limiting phrase in Subsection E superfluous. Additionally, all entities which had income in any tax year 2002-2005, which income would have been reduced/absorbed by NOL carryover amounts but for Subparagraph E, benefit by getting an extension of the NOL's carryover period, whereas entities which did not have any ENI are also treated equally in that none benefit by getting additional carryover period(s). Thus, the court is unpersuaded by plaintiff's contention that the limiting phrase in Subparagraph E applies only to a specific disallowance of an NOL carryover, here, N.J.S.A. 54:10A-4(k)(6)(D) (which bars deduction of a predecessor's NOL carryover, or where the acquisition of an entity is for the "primary purpose" of using its NOL carryover).

(2) Extension Period

When enacted, Subparagraph E specified the extension period as two years. This is because the suspension period was for 2002 and 2003. See Assembly Budget Comm. Statement to A. 2501 (the BTRA "suspends the application of . . . (NOL) deductions for tax years 2002 and 2003. The usual seven year carryforward . . . is extended for two years"). This extension, taking into consideration that preceding analysis of the amount of the disallowed NOL carryover, means that if an entity has ENI in 2002, that NOL carryover which would have offset that income has another year of life. If the entity still exists and had income in 2003, and this same NOL carryover could not be used to offset the 2003 income, it gets one more year of life.

However, and since the Legislature continued the disallowance (partially) for 2004 and 2005, it amended the extension period to provide that "the date on which the amount of the

disallowed [NOL] carryover deduction would otherwise expire" is extended by "a period equal to the period for which application of the [NOL] was disallowed by" Subparagraph E. See also Assembly Budget Comm. Statement to A. 3110 ("the usual seven year carryforward" is extended "for the period of suspension").

Plaintiff is correct that the extension period is tied to the suspension period. However, its further reciprocal argument that the Legislature took away four years of an NOL carryover's life during 2002-2005, therefore, it gave (or must have given) back those four years via an extension period is unpersuasive. Rather, the extension period(s) commensurate with the year the NOL carryover could have been used to offset income in the suspension year, but Subparagraph E prevented its use. This means that an NOL carryover gets an additional year for each suspended tax year in which it could not be used to offset income. This is so whether the suspension year was 2002 or 2004. However, if the entity had income to absorb a particular NOL carryover (or more than one NOL carryover) in 2002 and 2003, it stands to reason that the extension period would have to be two years because the Legislature barred use of any amount of NOL carryover as a deduction for each of those two tax years (unlike for tax years 2004 and 2005).

In this connection, the CAB's computation of the disallowed NOL carryover (based on the bench opinion) indicates that if a first-in-time, first-in-line NOL carryover was extended into a tax year because of Subparagraph E, and as a result, absorbs the ENI for that year, then the next-in-line NOL carryover is also deemed as a disallowed deduction. In other words, but for Subparagraph E, the first-in-time, first-in-line NOL carryover would not have been "pushed down" into an extension year, and therefore would not have usurped the next-in-line NOL carryover. Therefore, the next-in-line NOL carryover is deemed to be equally disallowed due to Subparagraph E, meriting it an extension. This logic comports with the conclusion that Subparagraph E should

not be interpreted in a vacuum, thus, should also consider its impact on the first-in-time, first-in-line sequence of use in N.J.S.A. 54:10A-4(k)(6)(B).

(3) Computation of Plaintiff's Disallowed NOL Carryover and Extension Periods

As explained earlier, a disallowed NOL carryover deduction is one that could have offset the reported ENI for a suspension year. While the Legislature effectively taxed 100% of an entity's ENI in 2002 and 2003 by disallowing use of any amount of NOL carryover, it taxed 50% of ENI in 2004 and 2005 by limiting the amount of usable NOL carryover. In either scenario, an NOL carryover that could have offset income in a suspension year gets an extension. Thus, for tax years 2002 and 2003, any NOL carryover which could have offset the suspension year(s) ENI, is pushed down to an extension year after its seventh year of life. Similarly, any NOL carryover that could have offset the balance 50% income in 2004 and 2005, merits an extension to its normal seven-year carry over life. The balance 50% of income was taxed only because it was not allowed to be used up by an NOL carryover by Subparagraph E, thereby raising revenue for the State. Thus, if any NOL carryover in excess of 0% of ENI is usable in an extension period(s), then any NOL carryover in excess of 50% of ENI is also usable in an extension period(s). Regardless of the zero deduction in 2002 and 2003, or partial deduction in 2004 and 2005, all four years were suspension periods and the Legislature extended the normal NOL carryover period(s) commensurate with the suspension periods. Therefore, the court rejects a position that only so much of the balance of an NOL carryover that was available but could not be used against the taxed 50% income (either because the NOL carryover amount was greater than the 50% taxed income, or the 50% taxed income was absorbed by a first-in-line, first-in-time NOL carryover), merits an extension.

Plaintiff points out, that if the court accepts Taxation's "change in policy" position (the "push down" of the first-in-time, first-in-line NOL carryover into an extension period due to

Subparagraph E), then the correct amounts would be by comparing how the carryover would be computed without Subparagrah E and how it would be under the new methodology. It provided the court two charts in this regard (also reproduced at the end of this opinion). Per these charts, plaintiff argues, its total used and expired NOLs would be the same: $1,510,152,532. Whereas, the CAB's calculation of this amount is inexplicably much higher ($1,860,992,054).

Plaintiff's logic of comparing what NOL carryovers would have been used without and with Subparagraph E is persuasive. The court cannot understand Taxation's logic of the 2007 ENI being absorbed by the 1999 NOL carryover of up to $121,563,438 and $39,544,180 by the 2000 NOL carryover, when all of the 2007 ENI could be absorbed by the 1999 NOL carryover.

The court therefore accepts plaintiff's computation of the NOL carryover/use with Subparagraph E under Taxation's policy change which this court has ruled above is a reasonable construction of that statute. The only disagreement the court has with plaintiff's computation under the new methodology is of the extension period for the 1999 NOL carryover. It should be three years, not four because the 1999 NOL carryover could not be used in 2004, 2005 and 2006. Tax year 2002, a suspension year, did not impact the 1999 NOL carryover even without Subparagraph E since it was a non-income year.[5] While 2003, another suspension year, did have income, the 1999 NOL carryover could not have been used to offset any portion of the income because it was next in line to both the 1996 and 1997 NOL carryovers even without Subparagraph E, or even under Subparagraph E's "pushed down" effect. However, it could have been used in 2004 and 2005, and also in 2006 (where, due to the impact of Subparagraph E, the first-in-time,

[5] As 2002, a year of suspension, was a loss year, the 1995 NOL carryover could not be used regardless of Subparagraph E. And since 2002 was its seventh year, it expires. This lack of income in 2002 is also why the subsequent tax year/s NOL carryovers do not merit an additional extension period to their normal seven-years.

first-in-line NOL carryover of 1998 was pushed down into 2006, which then absorbed a portion of the 2006 ENI, whereas without Subparagraph E, all of the 2006 income could have been absorbed by a portion of the 1999 NOL carryover amount). Therefore, the 1999 NOL carryover is extended to 2009. This means, plaintiff cannot use $70,501,320, a portion of the 2010 income to be offset by the 1999 NOL carryover.

The 2000 NOL carryover would normally expire in 2007 when there was income of only $161,107,618. Thus, even without Subparagraph E, this is what could be used in 2007. However, due to the first-in-time, first-in-line sequence, the 1999 NOL carryover bars use until tax year 2010. The similar logic applies to the 2001 and 2002 NOL carryover.

The court requires the parties to compute the ensuing refund claim pursuant to plaintiff's computation of NOL carryovers under the new methodology but without extension of the 1999 NOL carryover into tax year 2010 in the amount of $70,501,320.

(4) Taxation's Regulations

The plain language of the regulations, N.J.A.C. 18:7-5.17 (re-numbered as N.J.A.C. 18:7-5.17(a) in 2007), and N.J.A.C. 18:7-5.17(b) reiterate Subparagraph E's language. Additionally, when these regulations were promulgated/amended, Taxation made it clear that existence of income was a necessary criterion because an NOL carryover has tax significance (or is a tax attribute) only when it can offset income, thus, this significance is lost when it is not allowed to be used to deduct income. See 35 N.J.R. 1573(a); 39 N.J.R. 3780(b) (an NOL carryover "is disallowed if its force and validity are denied and its effect as a tax attribute is nullified in the suspension year"). To this extent, and as explained earlier, the court agrees with Taxation's interpretation of Subparagraph E: when there was income in a suspension year, but an NOL carryover could not be used to offset the same because of Subparagraph E, the NOL carryover's

tax attribute or significance is then lost, which renders that NOL carryover as disallowed by, and for purposes of, Subparagraph E. However, as explained below, it appears that Taxation's application of these two regulatory subsections superimposes a second condition explicated in N.J.A.C. 18:7-5.17(c), which second condition the court finds suspect.

N.J.A.C. 18:7-5.17(c), reproduced above, specifies the suspension years and the extension years, but includes as a condition for extension that the NOL carryover "would have expired" in the suspension years 2002-2005. This regulatory subsection was promulgated to "provide[] guidance on the application of suspension periods" enunciated in Subparagraph E. See 39 N.J.R. 844(a). However, the court finds that such condition is unwarranted.

Subparagraph E extends "the date on which the amount of the disallowed [NOL] carryover deduction would otherwise expire." (emphasis added). Although the time when an NOL carryover would normally expire is after its seventh year, above-quoted statutory language simply means that the normal seven-year carryover period is extended by additional period/s. See also Assembly Budget Comm. Statement to A. 2501 (the BTRA "suspends the application of net operating loss (NOL) deductions for tax years 2002 and 2003. The usual seven year carryforward . . . is extended for two years"); Assembly Budget Comm. Statement to A. 3110 (the 2004 proposed amendment extends the usual seven year carryforward . . . for the period of suspension"). Therefore, Taxation's requirement that a disallowed NOL carryover merits an extension only if it its seventh year of life falls in a suspension year is wrong. As plaintiff correctly points out, the second sentence in Subparagraph E which addresses the extension period, allows an extension to any NOL carryover which could not be used to offset income in 2002, 2003, 2004, or 2005.

It appears that Taxation considered this second requirement as being a natural consequence of what constitutes a disallowed NOL carryover deduction for purposes of Subparagraph E. See

35 N.J.R. 1573(a) ("[i]f" a NOL carryover "would otherwise expire during the suspension period, a taxpayer may obtain relief in the extended year of expiration based upon the tax significance of the NOL's lost in 2002 and 2003") (emphasis added); 39 N.J.R. 3780(b) (an NOL carryover's significance as a "tax attribute is nullified in the suspension year" which "occurs only if the attribute could have been used or applied against income during that suspension period and would otherwise have been lost" and this interpretation "enable[es] those taxpayers that would have lost NOLs through expiration that they could have used to have possible use of those NOLs preserved") (emphasis added).

However, this reasoning defeats the language and intent of Subparagraph E which is that if an NOL carryover was available for use to offset income in a suspension year, and was not permitted to be so used, its carryover period is extended. It does not have to be in its seventh year of life when it is disallowed. Taxation's justification for the second condition, a necessary consequence of what is a disallowed NOL carryover deduction, is suspect. Plaintiff therefore properly contends that the additional requirement in N.J.A.C. 18:7-5.17(c) is contrary to the language and intent of Subparagraph E, and the court finds such requirement to be invalid.

Problematic is also Taxation's extension of its "necessary consequence" premise of N.J.A.C. 18:7-5.17(c), into the interpretation of the other two subsection, N.J.A.C. 18:7-5.17(a) and 18:7-5.17(b). Taxation stated, "it must be noted that the words that begin N.J.A.C. 18:7-5.17(a) ('Except as provided below') incorporate by reference the meaning of N.J.A.C. 18:7-5.17(c) into that section." See 39 N.J.R. 3780(b). Similarly, it noted that when N.J.A.C. 18:7-5.17(b) provides that "[i]f and only to the extent that any [NOL] carryover deduction is disallowed by reason of this section," those underscored words mean that this regulation "incorporates by reference the meaning of disallowance set forth later in N.J.A.C. 18:7-5.17, namely in N.J.A.C.

18:7-5.17(c), and thus incorporates into N.J.A.C. 18:7-5.17(b) the need for expiration as a precondition for time shifting the NOL." 39 N.J.R. 3780(b). None of these interpretations are found in the plain language of either N.J.A.C. 18:7-5.17(a) or 18:7-5.17(b). Application of these regulations as further support of the second condition in N.J.A.C. 18:7-5.17(c) will also be invalid, including the phrase "[e]xcept as provided below" in N.J.A.C. 18:7-5.17(a).[6]

In sum, N.J.A.C. 18:7-5.17(a) and 18:7-5.17(b) validly interpret Subparagraph E in connection with the determination of what constitutes as disallowed amount of an NOL carryover deduction. The phrase "and would have expired" in N.J.A.C. 18:7-5.17(c) is invalid. Any implied incorporation of this requirement in N.J.A.C. 18:7-5.17(a) and 18:7-5.17(b) is also invalid.

Taxation contends that this court cannot decide the validity of its regulations because "[r]ather than follow N.J.A.C. 18:7-5.17(c), [it] . . . properly followed the Tax Court's decision in Amtopp," and therefore, "plaintiff's attack of that regulation's validity is moot." Taxation contends that for the court to nonetheless address plaintiff's arguments in this connection is to render an impermissible advisory opinion.

The court disagrees. By choosing not to address plaintiff's arguments in this regard, Taxation has waived any objection to the same, which equates to conceding that plaintiff's position is correct. More importantly, an agency "ordinarily must enforce and adhere to, and may not disregard, the regulations it has promulgated." County of Hudson v. Dep't of Corr., 152 N.J. 60, 70 (1997) (citation omitted). While an agency "may change its regulations, so long as they are in force the agency is bound by them." Ibid. (citations omitted). Similarly, "an agency generally

[6] But see supra n.2. If the "[e]xcept as provided below" phrase in N.J.A.C. 18:7-5.17(a) was meant to address the third sentence in N.J.A.C. 18:7-5.17(a) as to inapplicability of Subparagraph E to CBT benefit certificates, it can survive.

should not waive its own duly-enacted regulations by disregarding them," unless there is specific statutory or regulatory authority to do so. Id. at 71 (citations omitted).

Here, Taxation did not, delete or amend N.J.A.C. 18:7-5.17(c) to reflect the 2015 unpublished opinion. Therefore, it cannot "waive" or disregard this regulation unless it has formally acted. Thus, its decision to follow the 2015 unpublished opinion, but only at the CAB level,[7] does not prevent this court from deciding plaintiff's arguments that the additional requirement of "and would have expired" is invalid.

It is troubling to this court that Taxation's decision to disregard portions of its regulations is without any public announcement or formal amendment. That such a decision was only because Taxation felt compelled to follow an unpublished court opinion does not mitigate the unjust lack of notice to taxpayers and entities subject to the CBT, that Taxation has informally waived application of N.J.A.C. 18:7-5.17(c). Nor is it an excuse that plaintiff's attorney was aware of the bench opinion due to an unrelated litigation involving the same issue. The attorney's knowledge of the unpublished opinion and Taxation's policy change is not a notice to the public. Like plaintiff, perhaps there are taxpayers which did not use an NOL carryover into an extended tax year because they relied on N.J.A.C. 18:7-5.17(c).[8]

If the public is beholden to the application of a regulation due to its presumptive correctness, Taxation is also beholden to notify the public that the regulation will no longer be applied. A government needs to turn square corners "particularly" in tax matters since taxpayers

---

[7] Taxation's auditor had no knowledge of this "change in position" when in 2016 and 2017, she (1) denied plaintiff's refund claims because there were no NOL carryovers to offset the 2010, 2011, or 2012 income "in accordance with New Jersey statutes and regulations;" and (2) asserted that "[o]nly NOL's that were disallowed by the prohibition and would have expired are extended."

[8] Plaintiff became aware that its refund claim would be guided by the Tax Court's bench opinion and not the regulations, only after it commenced the instant litigation, and then only during discovery when it obtained the conference report which referenced that opinion.

"and others must be able to reliably engage in tax planning and, to do so, they must know what the rules are." Residuary Trust v. Dir., Div. of Taxation, 28 N.J. Tax 541, 545, 548 (App. Div. 2015) (citations omitted). Thus, it is "fundamentally unfair" when Taxation publishes certain guidance, "and then retroactively apply a different standard years later." Ibid.

Normally, the lack of notice would suffice for this court to reverse Taxation's final determination especially when it is to the detriment of the taxpayer. However, the court will not void Taxation's final determination here because it has found that (1) interpretation of the limiting sentence in Subparagraph E must account for the methodology of using NOL carryovers set forth in N.J.S.A. 54:10A-4(k)(6)(B), including the first-in-time, first-in-line sequence; (2) Taxation's regulations, specifically N.J.A.C. 18:7-5.17(a) and 18:7-5.17(b), without the implicit incorporation of N.J.A.C. 18:7-5.17(c), properly interpret Subparagraph E's limitation,[9] and (3) only the phrase "and would have expired" in N.J.A.C. 18:7-5.17(c) is invalid.[10]

(D) AMA TAX CREDITS

The court rejects plaintiff's claim for refund of the AMA tax credits. It was never raised in the refund claim but only during protest. Further, as Taxation pointed out, one of the tax years was also time barred in this regard (for refund claims). Plaintiff is not harmed since those credits are available for offset of future CBT liabilities.

[9] Plaintiff agrees that Taxation's regulations "looked to whether the taxpayer had income in the suspension period" but attacks this as an invalid pre-qualification for purposes of Subparagraph E.
[10] The court rejects Taxation's argument that since plaintiff's case is one of a partial refund denial, as opposed to one imposing an assessment, this court has no authority to grant any additional refund. A final determination denying a refund claim is no different than a final determination which affirms an audited assessment. When that determination is reversed, the consequences are the same: cancellation of an audited assessment or cancellation of the refund denial. This means no additional tax can be imposed, or the refund as claimed should be paid.

**CONCLUSION**

As to the NOL carryover issue under Subparagraph E: the court finds that plaintiff cannot use tax year 2002, a loss year, to obtain the benefit of extending its NOL carryovers' seven-year life. The extension of the carryover period is not always four years. While the court finds N.J.A.C. 18:7-5.17(c) invalid, it agrees with Taxation that the next-in-line NOL carryover should benefit from the extension period(s) because Subparagraph E pushed down a first-in-time, first-in-line NOL carryover into an extension period. The court accepts, in part, plaintiff's computations under the new methodology of its NOL carryovers extension and use, therefore, requires parties to provide a computation of plaintiff's refund as a result under R. 8:9-3 within 30 days of this opinion. Plaintiff's refund claim pertaining to the AMA tax credit was properly denied. Each party's summary judgment motion is therefore granted in part and denied in part.

## NOL CARRYOVER METHODOLOGY CHARTS

## PLAINTIFF'S METHOD USED FOR ITS REFUND CLAIM

| | | | NOL GENERATED AND USED | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | *1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | |
| **TY | ENI | (35,571,578) | (52,347,268) | (91,838,280) | (251,881,194) | (640,992,474) | (770,274,274) | (626,454,352) | (286,111,748) | ENI after NOL |
| 2003 | $98,610,272 | | | | | | | | | $98,610,272 |
| 2004 | $343,113,684 | 35,571,578 | 52,347,268 | 83,637,996 | | | | | | $171,556,842 |
| 2005 | $243,126,876 | | | 8,200,284 | 113,363,154 | | | | | $121,563,438 |
| 2006 | $239,238,672 | | | | 138,518,040 | 100,720,632 | | | | $0 |
| 2007 | $161,107,618 | | | | | 161,107,618 | | | | $0 |
| 2008 | $119,230,684 | | | | | 119,230,684 | | | | $0 |
| 2009 | $40,890,930 | | | | | 40,890,930 | | | | $0 |
| 2010 | $283,643,255 | | | | | 219,042,610 | 64,600,645 | | | $0 |
| 2011 | $220,978,908 | | | | | | 220,978,908 | | | $0 |
| 2012 | $115,480,899 | | | | | | | 115,480,899 | | $0 |
| USED | | 35,571,578 | 52,347,268 | 91,838,280 | 251,881,194 | 640,992,474 | 285,579,553 | 115,480,899 | 0 | 1,473,691,246 |
| EXP'D | | 0 | 0 | 0 | 0 | 0 | (484,694,721) | (510,973,453) | (286,111,748) | (1,281,779,922) |

* Loss Periods. **Profit Periods. EXP'D = Expired. Shaded areas indicate extension years.

## AUDITOR'S BASIS FOR DENIAL OF NOL CARRYOVERS

| | | | NOL GENERATED AND USED | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | |
| TY | ENI | (35,571,578) | (52,347,268) | (91,838,280) | (251,881,194) | (640,992,474) | (770,274,274) | (626,454,352) | (286,111,748) | ENI after NOL |
| 2003 | $98,610,272 | | | | | | | | | $98,610,272 |
| 2004 | $343,113,684 | | 52,347,268 | 91,838,280 | 27,371,294 | | | | | $171,556,842 |
| 2005 | $243,126,876 | | | | 121,563,438 | | | | | $121,563,438 |
| 2006 | $239,238,672 | | | | 102,946,462 | 136,292,210 | | | | $0 |
| 2007 | $161,107,618 | | | | | | 161,107,618 | | | $0 |
| 2008 | $119,230,684 | | | | | | | 119,230,684 | | $0 |
| 2009 | $40,890,930 | | | | | | | | 40,890,930 | $0 |
| 2010 | $283,643,255 | | | | | | | | | $283,643,255 |
| 2011 | $220,978,908 | | | | | | | | | $220,978,908 |
| 2012 | $115,480,899 | | | | | | | | | $115,480,899 |
| USED | | 0 | 52,347,268 | 91,838,280 | 251,881,194 | 136,292,210 | 161,107,618 | 119,230,684 | 40,890,930 | 853,588,184 |
| EXP'D | | (35,571,578) | 0 | 0 | 0 | (504,700,264) | (609,166,656) | (507,223,668) | (245,220,818) | (1,901,882,984) |

## CAB'S MODIFICATION BASED ON POLICY CHANGE

| | | NOL GENERATED AND USED | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | |
| TY | ENI | (35,571,578) | (52,347,268) | (91,838,280) | (251,881,194) | (640,992,474) | (770,274,274) | (626,454,352) | (286,111,748) | ENI after NOL |
| 2003 | $98,610,272 | | | | | | | | | $98,610,272 |
| 2004 | $343,113,684 | | 52,347,268 | 91,838,280 | 27,371,294 | | | | | $171,556,842 |
| 2005 | $243,126,876 | | | | 121,563,438 | | | | | $121,563,438 |
| 2006 | $239,238,672 | | | | 102,946,462 | 136,292,210 | | | | $0 |
| 2007 | $161,107,618 | | | | | 121,563,438 | 39,544,180 | | | $0 |
| 2008 | $119,230,684 | | | | | | 119,230,684 | | | $0 |
| 2009 | $40,890,930 | | | | | | | 40,890,930 | | $0 |
| 2010 | $283,643,255 | | | | | | | | 40,890,930 | $242,752,325 |
| 2011 | $220,978,908 | | | | | | | | | $220,978,908 |
| 2012 | $115,480,899 | | | | | | | | | $115,480,899 |
| USED | | 0 | 52,347,268 | 91,838,280 | 251,881,194 | 257,855,648 | 158,774,864 | 40,890,930 | 40,890,930 | 894,479,114 |
| EXPD | | (35,571,578) | 0 | 0 | 0 | (383,136,826) | (611,499,410) | (585,563,422) | (245,220,818) | (1,860,992,054) |

## PLAINTIFF'S NOL CARRYOVER/USE WITHOUT SUBPARAGRAPH E PROVIDED TO THE COURT

| | | NOL GENERATED AND USED | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | |
| TY | ENI | (35,571,578) | (52,347,268) | (91,838,280) | (251,881,194) | (640,992,474) | (770,274,274) | (626,454,352) | (286,111,748) | ENI after NOL |
| 2003 | $98,610,272 | | 52,347,268 | 46,263,004 | | | | | | $0 |
| 2004 | $343,113,684 | | | 45,575,276 | 251,881,194 | 45,657,214 | | | | $0 |
| 2005 | $243,126,876 | | | | | 243,126,876 | | | | $0 |
| 2006 | $239,238,672 | | | | | 239,238,672 | | | | $0 |
| 2007 | $161,107,618 | | | | | | 161,107,618 | | | $0 |
| 2008 | $119,230,684 | | | | | | | 119,230,684 | | $0 |
| 2009 | $40,890,930 | | | | | | | | 40,890,930 | $0 |
| 2010 | $283,643,255 | | | | | | | | | $283,643,255 |
| 2011 | $220,978,908 | | | | | | | | | $220,978,908 |
| 2012 | $115,480,899 | | | | | | | | | $115,480,899 |
| USED | | 0 | 52,347,268 | 91,838,280 | 251,881,194 | 528,022,762 | $161,107,618 | 119,230,684 | 40,890,930 | 1,245,318,736 |
| EXP'D | | (35,571,578) | 0 | 0 | 0 | (112,969,712) | (609,166,656) | (507,223,668) | (245,220,818) | (1,510,152,432) |

## PLAINTIFF'S NOL CARRYOVER/USE WITH SUBPARAGRAPH E UNDER POLICY CHANGE PROVIDED TO THE COURT

| | | NOL GENERATED AND USED | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | |
| TY | ENI | (35,571,578) | (52,347,268) | (91,838,280) | (251,881,194) | (640,992,474) | (770,274,274) | (626,454,352) | (286,111,748) | ENI after NOL |
| 2003 | $98,610,272 | | | | | | | | | $98,610,272 |
| 2004 | $343,113,684 | | 52,347,268 | 91,838,280 | 27,371,294 | | | | | $171,556,842 |
| 2005 | $243,126,876 | | | | 121,563,438 | | | | | $121,563,438 |
| 2006 | $239,238,672 | | | | 102,946,462 | 136,292,210 | | | | $0 |
| 2007 | $161,107,618 | | | | | 161,107,618 | | | | $0 |
| 2008 | $119,230,684 | | | | | 119,230,684 | | | | $0 |
| 2009 | $40,890,930 | | | | | 40,890,930 | | | | $0 |
| 2010 | $283,643,255 | | | | | 70,501,320 | 161,107,618 | 52,034,317 | | $0 |
| 2011 | $220,978,908 | | | | | | | 67,196,367 | 40,890,930 | $112,891,611 |
| 2012 | $115,480,899 | | | | | | | | | $115,480,899 |
| USED | | 0 | 52,347,268 | 91,838,280 | 251,881,194 | 528,022,762 | 161,107,618 | 119,230,684 | 40,890,930 | 1,245,318,736 |
| EXP'D | | (35,571,578) | 0 | 0 | 0 | (112,969,712) | (609,166,656) | (507,223,668) | (245,220,818) | (1,510,152,432) |