

Income/Franchise:

New Mexico: Court Says Foreign Subs Not Engaged in US Trade or Business Must be Excluded from Unitary Group

Case No. A-1-CA-39961, N.M. Ct. App. (6/17/24). In a “matter of first impression” involving a multinational oil and gas company and whether its foreign subsidiaries may be deemed a “unitary corporation” as defined in N.M. Stat. Ann. section 7-2A-2(Q), the New Mexico Court of Appeals (Court) reversed a 2022 New Mexico Administrative Hearings Office (AHO) ruling [see *State Tax Matters*, Issue 2022-15, for details on this AHO ruling] to hold that the statutory definition excludes foreign subsidiaries not engaged in trade or business in the United States as a matter of law. In doing so, the Court looked to the plain language of the statute’s third requirement and reasoned that “the most natural interpretation of this simple and straightforward language is that foreign subsidiaries of corporations subject to taxation in New Mexico are not to be included in the unitary corporate group for purposes of apportionment of income,” even if they meet the statute’s first two requirements (*i.e.*, the greater than 50% ownership/control test and “three unities test”), as was the case here.

URL: <https://coa.nmcourts.gov/wp-content/uploads/sites/43/2024/06/June-17-2024-Apache-Corporation-and-Subsidiaries-v.-New-Mexico-Taxation-and-Revenue-Department-No.-A-1-CA-39961.pdf>

URL: https://dhub.deloitte.com/Newsletters/Tax/2022/STM/220415_9.html

During the tax year 2015 at issue, the taxpayer’s foreign subsidiaries paid dividends, generated Subpart F income, or otherwise generated “check-the-box” income attributed to and partially reported by the taxpayer on its 2015 federal tax return, and this dispute focused on the income attributed to these foreign subsidiaries – with the Court concluding that because the foreign subsidiaries did *not* engage in trade or business in the United States during the taxable period at issue, they should *not* have been included in the taxpayer’s “unitary corporation” and thus New Mexico could *not* impose state corporate income tax on underlying foreign dividend income at issue. The Court also commented that “whether inadvertent or not, the Legislature’s language achieved a solution to the *Kraft* problem: if foreign subsidiaries are excluded from the definition of ‘unitary corporation’ the dividends they pay to domestic parents cannot be included as taxable income.” Please contact us with any questions.

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