

## Income/Franchise:

### New York: Appellate Court Affirms Inclusion of Royalty Payments from Foreign Affiliates in Tax Base

*Case No. 532479*, N.Y. App. Div., 3d Dep't (10/20/22). The New York Supreme Court, Appellate Division, Third Department (Court) unanimously affirmed the New York Tax Appeals Tribunal's (Tribunal) ruling from 2020 [see Decision DTA No. 828304, N.Y. Tax App. Trib. (8/6/20) for more details on this earlier ruling], which held that while certain payments received by a taxpayer from its foreign affiliates (as "related members" under the statute) constituted royalties, such intercompany royalty payments could not be excluded under a former statutory royalty exclusion in effect for the tax years at issue (ending in 2008 through 2010) in computing the taxpayer's Article 9-A corporation franchise tax combined return "entire net income" (ENI). In doing so, the Court agreed with the Tribunal that based on the overall statutory scheme of Tax Law former § 208 (9)(o), the royalty income exclusion provision of one related member is conditioned on the application of the royalty add back by another related member. Accordingly, because the foreign affiliate related members as non-New York taxpayers, "would not be required to – and simply could not – add back royalty payments on their nonexistent tax returns, [the taxpayer] is statutorily precluded from deducting the royalty payments from its income." The Court also rejected the taxpayer's argument that the former statutory royalty exclusion (*i.e.*, under Tax Law former § 208 (9)(o)(3)) violated the dormant Commerce Clause, holding that the taxpayer failed to show differential treatment between in-state and out-of-state economic interests that rose to the level of unconstitutional discrimination. Please contact us with any questions.

[URL: https://www.nycourts.gov/reporter/3dseries/2022/2022\\_05898.htm](https://www.nycourts.gov/reporter/3dseries/2022/2022_05898.htm)

[URL: https://www.dta.ny.gov/pdf/decisions/828304.dec.pdf](https://www.dta.ny.gov/pdf/decisions/828304.dec.pdf)

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