No. 24-332

IN THE

Supreme Court of the United States

INTERNATIONAL BUSINESS MACHINES CORPORATION & COMBINED AFFILIATES,

Petitioner,

v.

NEW YORK TAX APPEALS TRIBUNAL, and NEW YORK STATE COMMISSIONER OF TAXATION AND FINANCE

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF IN OPPOSITION FOR COMMISSIONER OF TAXATION AND FINANCE

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether New York's former statute for taxing royalties paid by one corporate affiliate to another violated the dormant Commerce Clause during the years it was in effect (2003 to 2013) by affording a tax deduction to the receiving affiliate only when the payor affiliate was required by New York law to add back those same royalty payments for purposes of computing its corporate franchise tax.

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§ 210(3)(a) 3

Miscellaneous Authorities*

Charles F. Barnwell, Jr., *Addback: It's Payback Time*, State Tax Notes (Nov. 17, 2008), http://barnwellco.com/media/article3.pdf 4

James A. Amdur, *State Income Tax Treatment of Intangible Holding Companies*, 11 A.L.R. 6th 543 (2006) 4

Senate Introducer's Mem. in Support, in Bill Jacket for Ch. 686, 2003 N.Y. Laws, https://digitalcollections.archives.nysed.gov/index.php/Detail/objects/30133 5

Tim Vipond, CFI Educ., *Understanding Dividends: A Comprehensive Guide to Dividend Types, Yield, and Valuation Impact* (n.d.), https://corporatefinanceinstitute.com/resources/accounting/dividend/ 18

U.S. Internal Revenue Serv., *Forming a Corporation* (last updated Sept. 30, 2024), https://www.irs.gov/businesses/small-businesses-self-employed/forming-a-corporation .. 18

Uniform Division of Income for Tax Purposes Act § 8(a)(1) (1957) 23

*All websites last visited December 15, 2024.

STATEMENT OF THE CASE

Petitioner, International Business Machines Corporation and its combined affiliates, challenges as unconstitutional a former provision of New York's corporate franchise tax that the State repealed more than a decade ago.[1]

The statute at issue, New York Tax Law former § 208(9)(o) (reproduced at Pet. App. 112a-115a), was enacted in 2003 to combat tax avoidance schemes in which corporations paid royalties to their own affiliates for the use of intellectual property and then deducted those royalties when computing their taxable income. Such devices shifted income to the royalty-paying company's affiliates, often located in low-tax jurisdictions, while also creating a tax deduction for the royalty-paying company when it moved funds from one corporate pocket to another.

Until its repeal in 2013, the challenged statute required corporations that *paid* royalties to affiliates to add back those payments when computing their taxable income. The royalties still flowed from one affiliate to the other, however. Therefore, to avoid taxing two affiliates within the same corporate group on the intragroup transfer of royalties, the statute allowed corporations that *received* royalty payments from affiliates to deduct those payments from taxable income if the paying affiliate was required to add back the royalties.

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[1] The Walt Disney Company (Disney) brought a parallel challenge to the same law, which was also resolved by the decision below. Disney has filed a petition for review of that decision that overlaps with the present petition in some respects. *See Walt Disney Co. v. Tax Appeals Tribunal*, No. 24-333.

The statute thus ensured that royalties paid within a corporate family were included once—and only once—when computing entire net income for the purpose of determining New York franchise tax. If the payor was required to add back the royalties, the recipient could deduct them. But if the royalty payments were not required to be added back, they could not be deducted.

If a recipient affiliate had been permitted to deduct royalties that the paying affiliate had *not* added back, the multinational corporate group would have received a windfall. The instant case arose because, for tax years 2007 through 2012 (the years at issue), petitioner tried to obtain such a windfall by deducting royalty payments received from its affiliates in foreign countries. Those affiliates were not subject to New York taxes and therefore had not added back their royalty payments.

Petitioner challenged New York's assessment of tax on the royalties received from its foreign subsidiaries. An administrative law judge (ALJ) ruled against petitioner. On petitioner's administrative appeal, the New York State Tax Appeals Tribunal (the Tribunal)[2] affirmed the ALJ's determination. Petitioner then commenced an original proceeding challenging the Tribunal's decision in the New York Appellate Division, Third Department. The Appellate Division rejected petitioner's challenge and confirmed the Tribunal's determination. On petitioner's appeal, the New York Court of Appeals affirmed the Appellate Division.

As shown below, there is no reason for this Court to review the New York Court of Appeals' decision concerning a long-superseded tax law. New York's add-back and

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[2] Under N.Y. Tax Law § 2016(4), the Tribunal is a nominal party and does not participate in this proceeding.

deduction arrangements for related-party royalties were in effect only between 2003 and 2013. While various States have imposed add-backs for related-party royalties or placed other limitations on their deductibility, to our knowledge no other State has replicated New York's former arrangement of an add-back plus a deduction.

This case does not warrant review for the additional reason that the decision below does not conflict with any precedent of this Court or the courts of other States. And as explained below, this case is a poor vehicle for examining the issues that petitioner now advances. Finally, this petition should not be held pending a decision on the petition in *Zilka v. City of Philadelphia,* No. 23-914.

A. Statutory and Regulatory Background

Corporations that do business in the State of New York must pay an annual franchise tax for that privilege. Tax Law § 209(1). During the years at issue, the amount of franchise tax that a corporation was required to pay was a percentage of the portion of its "entire net income" allocated to New York. *See* N.Y. Tax Law former § 210(1)(a) (reproduced at Resp. App. 2a-8a).

"Entire net income" referred to the corporation's total net income from all sources, which was based on its federal taxable income with certain adjustments. *Id.* former § 208(9) (reproduced in part at Resp. App. 1a). In the years at issue, the portion of entire net income attributable to business income was allocated to New York using a "business allocation percentage" (BAP). N.Y. Tax Law former § 210(3)(a) (reproduced at Resp. App. 8a-23a). The BAP was determined by comparing a company's business receipts earned in New York to its total business receipts from all sources. *See* N.Y. Tax

Law former § 210(3)(a)(2). The allocated business income was added to other types of income (such as allocated investment income) to arrive at an entire net income base, which was subject to tax at the applicable rate. *See* N.Y. Tax Law former § 210(1)(a).

Royalty receipts ordinarily were included in a corporation's entire net income. But prior to 2003, some corporations sought to reduce their tax burden by (1) transferring their intellectual property to a wholly owned holding company in a jurisdiction that did not tax income from intangibles; (2) obtaining from the holding company a license to exploit the intellectual property in return for royalty payments; and (3) deducting the royalty payments as business expenses, thereby reducing their entire net income. *See* Charles F. Barnwell, Jr., *Addback: It's Payback Time*, State Tax Notes 2 (Nov. 17, 2008) (internet);[3] James A. Amdur, *State Income Tax Treatment of Intangible Holding Companies*, 11 A.L.R. 6th 543 (2006). In that manner, corporations avoided state taxes on related-company royalty income derived from intellectual property by creating "'nowhere' income that escape[d] all state income taxation." *Geoffrey, Inc. v. South Carolina Tax Comm'n*, 313 S.C. 15, 17 n.1, 437 S.E.2d 13, 15 n.1, *cert. denied,* 510 U.S. 992 (1993). (*See also* Pet. App. 4a-5a, 77a.)

Against that backdrop, in 2003, New York enacted N.Y. Tax Law former § 208(9)(o), which required royalty-paying affiliates to add back royalties paid to related companies and allowed the royalty-receiving affiliates to deduct the royalties that had been added back. Ch. 62, sec. 1, pt. U3, § 1, 2003 N.Y. Laws 2062, 2525, *amended by* Ch. 686, sec. 1, pt. M, § 1, 2003 N.Y. Laws

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[3] For authorities available on the internet, URLs are included in the Table of Authorities.

3426, 3448, *amended by* Ch. 60, sec. 1, pt. J, § 4, 2007 N.Y. Laws 2705, 2730. The provision was enacted to "eliminate tax loopholes concerning royalty payments." Senate Introducer's Mem. in Support at 5 (discussing amendments clarifying the provision), in Bill Jacket for Ch. 686, 2003 N.Y. Laws at 9 (internet). (*See also* Pet. App. 5a, 12a, 77a.)

Entitled "[r]oyalty expense add backs," N.Y. Tax Law former § 208(9)(o)(2) provided that when computing entire net income, "a taxpayer must add back royalty payments to a related member during the taxable year to the extent deductible in calculating federal taxable income." N.Y. Tax Law former § 208(9)(o)(2)(A). "Related members" were entities that directly or indirectly owned or controlled, or were owned or controlled by, the taxpaying entity. *Id.*, former § 208(9)(o)(1)(A).

N.Y. Tax Law former § 208(9)(o)(3) granted franchise taxpayers a deduction[4] for royalties when computing entire net income. It stated:

> For the purpose of computing entire net income or other taxable basis, a taxpayer shall be allowed to deduct royalty payments directly or indirectly received from a related member during the taxable year to the extent included in the taxpayer's federal taxable income *unless such royalty payments would not be required to be added back* under subparagraph two of

[4] Although the subsection was titled "Royalty income exclusions," its text made clear that the income at issue would be "deduct[ed]." *See* N.Y. Tax Law former § 208(9)(o)(3).

> this paragraph or other similar provision in this chapter.

N.Y. Tax Law former § 208(9)(o)(3) (emphasis added). In the italicized clause, "added back" meant added back when computing the entire net income of the related member that had made the royalty payments; "subparagraph two of this paragraph" referred to N.Y. Tax Law former § 208(9)(o)(2); and "other similar provision" referred to conforming provisions that were located in other articles of the New York Tax Law.

The add-back in N.Y. Tax Law former § 208(9)(o)(2) was for tax-accounting purposes only. The add-back rendered the paying affiliate unable to deduct the royalties as a business expense, but the royalties themselves were still paid from one affiliate to the other. Absent a deduction, the royalties would have been reflected in entire net income twice: both by the paying affiliate (which added them back when computing entire net income), and by the receiving affiliate (whose income included royalties). The royalty deduction allowed the corporate group to reflect the royalty payments in entire net income once, without double-counting them.

The net effect was to shift the incidence of tax from the payee of the royalty to the payor. Ordinarily, when calculating entire net income, a company paying royalties deducts those payments as a business expense. Conversely, the company that receives the royalty payments treats those payments as income. The add-back and deduction simply changed the company to which the income was attributed. The company that paid the royalties was required to include those royalties when computing its entire net income, while the company that received the royalties was permitted to deduct them. As a result, when the corporate group computed its

entire net income, the royalty payments were reflected only once.

When the royalty-paying affiliate did not add back the royalties, the receiving affiliate could not take a corresponding deduction. The add-back and deduction operated the same way regardless of whether the payor or recipient was in a higher-tax or lower-tax jurisdiction; where the payor and recipient were incorporated; where the payor's and recipient's business operations were located; and whether the royalties flowed in or out of New York.

The burden of the add-back was expressly limited to New York taxpayers, and the benefit of the deduction was subject to a parallel limitation. *Compare* N.Y. Tax Law former § 208(9)(o)(2)(A) ("a taxpayer must add back royalty payments"), *with* N.Y. Tax Law former § 208(9)(o)(3) ("a taxpayer shall be allowed to deduct royalty payments").

The royalty deduction in N.Y. Tax Law former § 208(9)(o)(3) was eliminated in 2013. *See* Ch. 59, sec. 1, pt. E, § 2, 2013 N.Y. Laws 2686, 2702.

B. Petitioner Seeks a Windfall Deduction

Petitioner is a multinational technology and consulting company organized under the laws of New York. (Pet. App. 8a, 44a.) Petitioner operates in more than 170 countries worldwide, primarily through locally incorporated subsidiary companies. (Pet. App. 8a, 54a.) Within the United States, for the years at issue, petitioner and its domestic affiliates filed a combined tax return in New York (Pet. App. 9a, 54a), thus falling within an exception to the New York Tax Law's former add-back requirement. *See* N.Y. Tax Law former § 208(9)(o)(2)(A)

("Except where a taxpayer is included in a combined report . . . .").

Through a wholly owned U.S. subsidiary, petitioner granted its foreign affiliates the right to exploit petitioner's intellectual property relating to computer software, hardware, and services in designated regions in exchange for royalty payments. (Pet. App. 8a-9a, 44a-45a, 56a-62a.)

For the years at issue, petitioner paid New York franchise tax on its portion of the income allocated to New York business activity, which represented around 5% of petitioner's total taxable income. (Pet. App. 9a.) In those years, petitioner received royalty payments totaling $50,682,369,689 from its foreign subsidiaries. (Pet. App. 9a.) The record contains no evidence that any foreign jurisdiction taxed those outbound royalty payments. (Pet. App. 9a.)

For 2011 and 2012, petitioner deducted from its taxable income the royalty payments it received from its foreign subsidiaries. (Pet. App. 9a, 65a.) Petitioner subsequently filed amended returns and requested refunds for New York taxes paid on that income for the years 2007 through 2010. (Pet. App. 9a, 63a, 65a.) The New York State Department of Taxation and Finance (the "Tax Department") audited petitioner, denied its refund requests for 2007 to 2010, issued a notice of deficiency for 2010 to 2012, and assessed interest and penalties. (Pet. App. 9a, 45a, 66a-67a.)

C. Proceedings Below

Petitioner challenged the denial of its refund requests and the notice of deficiency in the New York State Division of Tax Appeals. (Pet. App. 9a, 45a.) Following an evidentiary hearing, an ALJ ruled in favor of the Tax Department and sustained the notice of deficiency. (Pet. App. 9a-10a, 45a; *see* Pet. App. 83a-111a.) Petitioner appealed to the Tribunal, which affirmed the ALJ's determination. (Pet. App. 10a, 45a; *see* Pet. App. 52a-82a.)

Petitioner challenged the Tribunal's determination in an original proceeding commenced in the New York Appellate Division, Third Department. (Pet. App. 10a.) The Appellate Division unanimously confirmed the Tribunal's determination and dismissed the proceeding. (Pet. App. 10a; *see* Pet. App. 43a-51a.) Petitioner then appealed to the New York Court of Appeals. (Pet. App. 10a.)

The Court of Appeals affirmed the Appellate Division. (*See* Pet. App. 1a-42a.) The court held that petitioner failed to show that former § 208(9)(o) facially discriminated against out-of-state commerce, mandated economic protectionism, or benefited in-state economic interests by burdening out-of-state competitors. (Pet. App. 15a.) The court explained that, at the corporate group level, former § 208(9)(o) treated groups with related members that did not pay taxes in New York the same as groups with related members that were New York taxpayers. (Pet. App. 15a.) The statute required corporations to add back royalty payments made to related corporate members, but allowed royalty recipients to deduct royalty payments from related companies if the royalty payor was required to add back the payments. (Pet. App. 15a.) Thus, when there was an

add-back, the recipient received a deduction. When a non–New York taxpayer, which was not required to add back royalty payments, made such payments to a related New York taxpayer, the royalty recipient was not entitled to take a deduction. (Pet. App. 15a.) In each case, the income had to be included on a New York tax return only once, resulting in a neutral economic impact on the corporate group as a whole. (Pet. App. 15a.)

The Court of Appeals concluded that former § 208(9)(o) was not facially discriminatory because it did not "'impose[ ] benefits or burdens depending on where a business is located, where goods are produced, or where payments are made.'" (Pet. App. 15a-16a [quoting Pet. App. 22a (Wilson, C.J., concurring)].) In that respect, the court stated, former § 208(9)(o) differed from statutes that this Court has found to involve unconstitutional discrimination against interstate or foreign commerce. (Pet. App. 16a.) Because N.Y. Tax Law former § 208(9)(o) did not result in differential treatment at the corporate group level between corporate groups with foreign affiliates and those with affiliates that did business in New York, the statute did not discriminate on its face. (Pet. App. 17a.)

The Court of Appeals went on to consider whether former § 208(9)(o) passed the "internal consistency test" (Pet. App. 17a-20a), which examines the structure of the tax at issue "to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Comptroller of the Treasury of Md. v. Wynne,* 575 U.S. 542, 562 (2015) (quotation marks omitted).

The court concluded that the former tax provision was internally consistent. Even if every other jurisdiction applied the same tax scheme found in N.Y. Tax Law

former § 208(9)(o), the court explained, "there would be no impermissible burden" on interstate commerce. (Pet. App. 18a.) Rather, New York's tax structure "create[s] disparate incentives." (Pet. App. 17a [quoting *Wynne*, 575 U.S. at 562].) Because New York determined taxable income by reducing federal taxable income according to a business allocation percentage (New York receipts / all receipts), relocating affiliates' business to New York might increase, decrease, or have no effect on a company's total taxable income "depending on factors entirely independent of the add back scheme," such as the amount of foreign royalties and the percentage of total income attributable to such receipts. (Pet. App. 19a; *see also* Pet. App. 35a-39a.)

Chief Judge Wilson, joined by Judge Halligan, filed a concurring opinion that provided additional reasons why N.Y. Tax Law former § 208(9)(o) did not discriminate against interstate or foreign commerce in violation of the Commerce Clause. (Pet. App. 22a-41a.) The concurring judges reasoned that the availability of a deduction under former § 208(9)(o)(3) turned on the royalty payor's status as a New York tax-filer. (Pet. App. 25a, 29a.) And status as a New York tax-filer was unrelated to whether the royalty payment or the corporate group's business crossed jurisdictional lines. (Pet. App. 22a-23a, 29a-31a.) A transaction between two New York taxpayers could involve a French corporation and a Chinese subsidiary, so long as both filed tax returns in New York. (Pet. App. 22a, 30a.) Similarly, a transaction between a New York taxpayer and a non–New York taxpayer could involve two Delaware entities. (Pet. App. 22a-23a, 30a.)

The concurring judges therefore observed that, rather than discriminating based on New York activity or geography, N.Y. Tax Law former § 208(9)(o) created

"complex second-order incentives that sometimes favor and sometimes disfavor interstate business operations." (Pet. App. 23a.) By conflating the filing of a tax return in New York with incorporation in or making payments to New York, petitioner failed to account for those incentives and thus did not show that the former statute violated the Commerce Clause. (Pet. App. 23a; *see also* Pet. App. 41a.)

REASONS FOR DENYING THE PETITION

I. THE CHALLENGED STATUTE WAS REPEALED MORE THAN A DECADE AGO.

As the concurring judges observed below, N.Y. Tax Law former § 208(9)(o) was "short-lived." (Pet. App. 39a) First effective in 2003 (Pet. App. 3a, 112a), the statute was amended to eliminate the deduction at issue beginning in 2013 (Pet. App. 3a, 69a, 106a). There is no reason for this Court to review the constitutionality of a tax law that has been superseded for more than a decade.

Further, a pronouncement by this Court on former § 208(9)(o) would require the Court to analyze not only that provision, but several other obsolete tax provisions. That is because the proper analysis of state tax laws under the Commerce Clause "must take the whole scheme of taxation into account." *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. 64, 69-70 (1963) (quotation marks omitted). And the operation of former § 208(9)(o) depended on other tax provisions, which were discarded or substantially amended in 2014 when New York overhauled its Franchise Tax. For example, "entire net income," previously the basis for franchise tax, was changed to "business income," a different measure. *See* Ch. 59, pt. A, 2014 N.Y. Laws 2577, 2579, *amended by* Ch. 59, pt. T, 2015 N.Y. Laws 2568, 2595,

amended by Ch. 69, pt. P, 2016 N.Y. Laws 2625, 2641. This Court should decline petitioner's invitation to consider a comprehensive tax structure that is now obsolete. And if this repealed structure is truly likely to "reemerge" (Pet. 29) and "proliferate" (Pet. 28) as petitioner contends, this Court should wait to review a case arising from such later developments.

II. THE FORMER NEW YORK STATUTE DID NOT DISCRIMINATE AGAINST INTERSTATE OR FOREIGN COMMERCE.

This case does not warrant review because, despite petitioner's repeated assertion to the contrary (Pet. i, 1-3, 10, 15-16, 23, 27, 28), N.Y. Tax Law former § 208(9)(o) did not create a "heads I win, tails you lose" outcome, impose an "either/or" mandate, provide for double taxation, or embody any other scheme to discriminate against interstate or foreign commerce.

Like at least 19 other States, New York enacted an add-back statute applicable to payments from one corporate affiliate to another. *See* Barnwell, *supra*, at 8-9. To *avoid* double taxation, New York's add-back statute allowed the receiving company to deduct any royalties the paying company had added back. To our knowledge, New York is the only State to have employed an add-back and a deduction together. The dependence of New York's deduction on the operation of an add-back ensured that, at the corporate group level, New York taxpayers were treated the same as non–New York taxpayers. (Pet. App. 15a-16a.) A corporation with royalty-paying foreign subsidiaries would have gained nothing by rechartering those companies in New York. Once the subsidiaries were moved to New York, the receiving affiliate could have taken the deduction under former § 208(9)(o)(3), but only because the payor affiliate, after

relocating, would have become subject to the add-back in former § 208(9)(o)(2).

Petitioner's argument that former § 208(9)(o) was an "either/or scheme" because it taxed "either the payor or the recipient, whichever side was subject to New York taxation" (Pet. 15-16) ignores that the corporate group level is the one that matters: The dormant Commerce Clause is concerned with "economic interests" rather than the individual components of a corporate group. *See Tennessee Wine & Spirits Retailers Ass'n v. Thomas,* 588 U.S. 504, 534 (2019) (quotation marks omitted). Were the law otherwise, companies could skew the results by creating more subsidiaries. And from the corporate-group perspective, the burdens and benefits of former § 208(9)(o) on payor and recipient offset one another.

Petitioner's discrimination argument reduces to the truism that, even though New York taxed related-company royalties only once, more than one State or country may tax a transaction that crosses state lines or international borders. (Pet. 2, 15, 22, 24.) That argument does not warrant certiorari—this Court has acknowledged that such outcomes are inevitable. "[T]he Commerce Clause does not forbid the actual assessment of a succession of taxes by different States on distinct events as the same tangible object flows along" the stream of commerce. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.,* 514 U.S. 175, 187-88 (1995). As this Court observed in *Wynne*, any consequent burden on interstate or foreign commerce is permissible because it "results only from the interaction of two different but nondiscriminatory tax schemes." *Wynne,* 575 U.S. at 566; *see also id.* at 562. *See, e.g., American Trucking Ass'n v. Michigan Pub. Serv.*, 545 U.S. 429, 438 (2005) (Michigan could assess fee on trucks traveling in that

State, even though such fees would burden interstate commerce more than local commerce if other States imposed an identical fee).

In any event, IBM does not contend that *it* was subject to double taxation: It filed combined tax returns with its domestic affiliates (Pet. App. 9a, 54a), which is an exception to the add-back, *see* N.Y. Tax Law former § 208(9)(o)(2)(A). And IBM did not show that any of the many foreign jurisdictions in which its affiliates operated required any of them to add back outbound royalty payments to New York affiliates.

III. THE DECISION BELOW DOES NOT CONFLICT WITH PRECEDENTS OF THIS COURT OR OTHER STATES.

Petitioner errs in contending that the decision below conflicts with precedents of this Court or other state courts.

1. The decision below does not conflict with this Court's precedents. As the New York Court of Appeals recognized (Pet. App. 15a) and this Court recently reiterated, the dormant Commerce Clause forbids discriminatory measures that "benefit in-state economic interests by burdening out-of-state competitors." *National Pork Producers Council v. Ross,* 598 U.S. 356, 369 (2023) (quotation marks omitted). As shown above (at 6-7 and 13-14), the statute challenged here did no such thing. (*See* Pet. App. 6a, 15a-16a.) It did not impose benefits or burdens depending upon where a business was located, where goods were produced, or where payments were made. (Pet. App. 15a-16a, 22a.) The limitation of the statute's effect to companies that did business in New York (*see* Pet. 9) is unsurprising, since the Due Process Clause permits taxation only when there is a nexus to

the taxing State. *See Container Corp. v. Franchise Tax Bd.,* 463 U.S. 159, 165-66 (1983).

Non–New York taxpayers had no occasion to add back royalties on their (nonexistent) New York tax returns. But being a New York taxpayer is not a proxy for geographic location, place of incorporation, or any other factor material to a Commerce Clause analysis.[5] Foreign companies can be New York taxpayers. N.Y. Tax Law § 209(1)(a). And as Chief Judge Wilson's concurrence pointed out, the ministerial act of filing a New York tax return says nothing about whether a company's business is generally intrastate, interstate, or international. (Pet. App. 29a-31a, 35a.)

Because New York's former statute was not discriminatory, the decision below is consistent with *Armco Inc. v. Hardesty,* 467 U.S. 638 (1984) and *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue,* 483 U.S. 232 (1987), decisions on which petitioner and the amicus rely. *Armco Inc.* and *Tyler Pipe* both involved statutes that, on their face, discriminated against interstate and foreign commerce. In *Armco Inc.*, West Virginia imposed a gross receipts tax on foreign manufacturers but not local ones. 467 U.S. at 639, 640-41. In *Tyler Pipe*, Washington imposed a tax on manufacturers that sold their products to out-of-state purchasers. *Tyler Pipe*, 483 U.S. at 234. In contrast, as shown above (at 6-7 and 13-14), the add-back and deduction in N.Y. Tax Law former § 208(9)(o) treated corporate groups that did business internationally the same as those that did not.

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[5] For that reason, the amicus misdescribes the statute when it states that taxpayers were allowed to deduct royalties received from "New York related members" (Amicus Br. at 4) and provided an advantage to "New York businesses" (Amicus Br. at 8).

Nor does this case run afoul of *Wynne*, as petitioner contends (Pet. 19, 22-23). The Maryland tax scheme challenged in *Wynne* failed the internal consistency test because it did not afford a credit against county income tax for taxes paid in other States. *Wynne*, 575 U.S. at 545-46. Here, petitioner did not show that any foreign country, anywhere in the world, required that its affiliates' outbound royalty payments be added back to taxable income. *Wynne* approved placing the taxation of receipts from interstate commerce "on an equal footing" with taxation of local receipts, *see id.,* 575 U.S. at 552, and former § 208(9)(o) did that. *Wynne* did not mandate the windfall that petitioner would have obtained if it had received a deduction for royalties that were never added back.

Moreover, as shown above (at 14-15), this case falls within *Wynne*'s express exception for consequences that result from "the interaction of two different but nondiscriminatory and internally consistent schemes." *Wynne*, 575 U.S. at 562; *see also id.* at 566.

2. The decision below does not conflict with state-court precedents. Although many States have adopted add-back statutes, *see* Barnwell, *supra,* at 8-9, no other State to our knowledge has replicated New York's structure of an add-back for royalties paid by a corporate affiliate, coupled with a deduction for those same royalties when received by a related corporation.

To support its contention that a conflict exists, petitioner cites four cases (Pet. 12-15), three of which were decided more than 20 years ago and none of which was cited by either party in the New York Court of Appeals. Those cases did not involve "similar regimes" as petitioner contends (Pet. 3). Rather, those cases involved statutes that—unlike N.Y. Tax Law former

§ 208(9)(o)—facially discriminated against interstate and foreign commerce through the selective treatment of *dividends* paid by a corporation to its affiliate. Unlike royalties, dividends are paid to shareholders as a return on investment and thus are not recorded as expenses on the company's income statement.[6] Because they are not business expenses, dividends cannot be deducted from federal taxable income by the paying corporation[7] and therefore would not be subject to an add-back. Royalties, in contrast, are an expense of doing business and thus are usually deductible by the payor—unless, as here, an add-back is imposed.

In *Mississippi Department of Revenue v. AT&T Corp.,* the challenged Mississippi statute allowed an income tax exemption for dividends received from Mississippi subsidiaries while denying an exemption to similarly situated non-Mississippi subsidiaries. 202 So. 3d 1207, 1209, 1210 (Miss. 2016). Stating the question as whether Mississippi could tax differently "two categories of business income that are completely identical except for the geographic footprint of the distributing corporation," the Mississippi Supreme Court found the scheme unconstitutional because it imposed an "additional burden" on out-of-state subsidiaries from which in-state subsidiaries were exempt. *Id.* at 1226. Here, in contrast, the availability of a deduction depended not on geography, but on whether the payor affiliate was subjected to New York's add-back. Either a domestic or a foreign corporation could have been

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[6] Tim Vipond, CFI Educ., *Understanding Dividends: A Comprehensive Guide to Dividend Types, Yield, and Valuation Impact* (n.d.) (internet).

[7] U.S. Internal Revenue Serv., *Forming a Corporation* (last updated Sept. 30, 2024) (internet).

subjected to the add-back. While the add-back affected only New York tax filers, status as a tax filer was unrelated to geography. (Pet. App. 15a-16a, 22a-23a.) See *supra* at 16.[8]

In *D.D.I., Inc. v. State ex rel. Clayburgh*, a North Dakota statute authorized dividend recipients to deduct dividends from income to the extent the divided-paying company was subject to North Dakota corporate income tax, while denying a deduction if the dividend-paying company was not subject to North Dakota corporate income tax. 657 N.W.2d 228, 233 (N.D. 2003). The State agreed that the deduction facially discriminated against interstate commerce but unsuccessfully defended the dividend deduction as a valid "compensatory tax." *Id.* at 231. A compensatory tax is one that "make[s] interstate commerce bear a burden already borne by intrastate commerce." *Fulton Corp. v. Faulkner,* 516 U.S. 325, 331 (1996) (quotation marks omitted). This case, in contrast, does not involve compensating for a discriminatory tax, because N.Y. Tax Law former § 208(9)(o) was itself nondiscriminatory. Consequently, the New York Court of Appeals did not consider whether former § 208(9)(o) constituted a valid compensatory tax, and thus its ruling does not conflict with the North Dakota court's ruling in *D.D.I.*

Petitioner's two remaining state cases were decided by intermediate appellate courts in California. In

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[8] The New York franchise tax is imposed on a company for "the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity, or of maintaining an office in this state, or of deriving receipts from activity in this state." N.Y. Tax Law § 209(1)(a).

Ceridian Corp. v. Franchise Tax Board, the First District Court of Appeal held that a statute which limited a deduction for insurance company dividends to corporations that were domiciled in California and restricted another deduction to dividends paid from California-sourced income violated the Commerce Clause. 85 Cal. App. 4th 875, 883, 102 Cal. Rptr. 2d 611, 616-17 (2000). In *Farmer Brothers Co. v. Franchise Tax Board*, the Second District Court of Appeal followed *Ceridian Corp.* and held another California tax statute unconstitutional, this time because it afforded companies a deduction for dividends that increased as the dividend-paying corporation had a larger share of its sales, property, and/or payroll in California. 108 Cal. App. 4th 976, 980-81, 983, 134 Cal. Rptr. 2d 390, 393-94, 396 (2003), *cert. denied,* 540 U.S. 1178 (2004)

Both *Ceridian Corp.* and *Farmer Brothers* involved facially discriminatory statutes concerning dividends. Those cases are therefore distinguishable from New York's nondiscriminatory add-back and deduction. *Ceridian Corp.* is also distinguishable because the deductions at issue applied to dividends received by corporations "commercially domiciled in California" as opposed to all California taxpayers. 85 Cal. App. 4th at 881, 102 Cal. Rptr. 2d at 615 (quoting statute).

Moreover, in a later California appellate case, *Fujitsu IT Holdings, Inc. v. Franchise Tax Board*, the First District Court of Appeal upheld, against a Commerce Clause challenge, a limitation on the deductibility of dividends received from foreign subsidiaries. 120 Cal. App. 4th 459, 15 Cal. Rptr. 3d 473 (2004). The court found no discrimination against foreign commerce because the foreign subsidiaries' income was not included in the "unitary business" that California taxed.

Id. at 482-84, 15 Cal. Rptr. 3d at 488-90. The apparent inconsistency among the holdings of California's intermediate courts on related-company dividends is best resolved by the California Supreme Court in the first instance.

Finally, even if the decision of the New Hampshire Supreme Court in *General Electric Co. v. Commissioner, New Hampshire Department of Revenue,* 154 N.H. 457, 914 A.2d 246 (2006), *cert. denied,* 552 U.S. 989 (2007), conflicts with other state-court decisions cited by petitioner, that conflict is not implicated here. Like the other cases cited by petitioner, *General Electric* concerned a dividend taxation statute. Because the present case concerns a royalty add-back rather than dividend income, it does not fall within the conflict between *General Electric* and the other state cases cited by petitioner.[9]

IV. THIS CASE IS A POOR VEHICLE FOR REVIEWING THE INTERNAL CONSISTENCY TEST.

This case presents a poor vehicle for ruling on the application of the internal consistency test.

No market was burdened. Petitioner did not meet a prerequisite for applying the internal consistency test by failing to identify an interstate or foreign market in which the New York statute burdened competition, as required by *General Motors Corp. v. Tracy,* 519 U.S. 278, 300 (1997). Rather, petitioner's case involves transactions between its own wholly controlled affiliated entities. Petitioner's corporate group members did not

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[9] When the New York Court of Appeals compared New Hampshire's taxing scheme to New York's (Pet. App. 16a-17a), it did not consider that distinction.

compete against one another; rather, each affiliate was restricted to its own designated region. (Pet. App. 55a, 61a.)

Interstate Commerce Clause. Contrary to petitioner's arguments (*e.g.,* Pet. 1-3, 10), this case is a poor vehicle for examining the operation of the interstate Commerce Clause. Rather, as petitioner acknowledges in a footnote (Pet. 11 n.5), this case arises solely under the foreign Commerce Clause.[10] Petitioner included its U.S. domestic affiliates on combined returns in New York. (Pet. App. 9a, 54a.) Companies included on combined returns were excepted from the add-back. *See* N.Y. Tax Law former § 208(9)(o)(2)(A). Thus, petitioner's U.S. domestic affiliates were not required to add back royalty payments and, conversely, the receiving affiliates were not authorized to deduct them. The same result—no add-back and no deduction—would occur if every State in the United States adopted New York's former Tax Law, including the former combination requirement and the former combined-reporting exception.

Foreign Commerce Clause. This case does not present a cert-worthy issue under the foreign Commerce Clause, either.

First, the former New York statute easily passes the internal consistency test under the foreign Commerce Clause. New York required that companies paying royalties to their affiliates add back the royalties *only* "to the extent" the royalties were "deductible in calculating federal taxable income." N.Y. Tax Law former § 208(9)(o)(2)(A). Similarly, the deduction for related-company royalties was available only "to the extent [the

[10] For the same reason, the amicus errs in treating this as an interstate commerce case (*see* Amicus Br. at 10).

royalties were] included in the taxpayer's federal taxable income." N.Y. Tax Law former § 208(9)(o)(3). Consistent with traditional allocation rules for income derived from intellectual property,[11] the federal government taxes only royalties from intellectual property located or used "in the United States." 26 U.S.C. § 861(a)(4). Here, each foreign affiliate used petitioner's intellectual property only in its "designated region," *i.e.,* the foreign country in which it operated. (Pet. App. 55a.) Applying the internal consistency test, if every taxing jurisdiction adopted New York's tax scheme, petitioner's foreign affiliates would not be double-taxed because they had no federal taxable income to begin with.

Second, when the foreign Commerce Clause is implicated, this Court has required consideration of two additional factors: (1) whether the challenged tax "creates a substantial risk of international multiple taxation"; and (2) whether the tax "prevents the Federal Government from speaking with one voice when regulating commercial relations with foreign governments." *Japan Line, Ltd. v. Los Angeles County,* 441 U.S. 434, 451 (1979) (quotation marks omitted). Petitioner did not make a record on either factor below. Petitioner did not prove—or even argue—that its foreign affiliates' outbound royalty payments were being taxed by foreign countries. (Pet. App. 9a.) Nor was there any showing that the Federal Government has spoken on related-party royalties in the international context. And because the deduction at issue was repealed more than a decade ago, there is no risk that it will constrain U.S. foreign policy in the future. The absence of a record, or even a

[11] *See, e.g.,* Uniform Division of Income for Tax Purposes Act § 8(a)(1) (1957) (patents and copyrights are allocable to State where they are used).

dispute, relating to factors that are necessary to a foreign Commerce Clause analysis make this case a poor one for considering the operation of that clause.

IBM's train hypothetical. For some of the reasons discussed, IBM's "train ride" hypothetical (Pet. 1-2) does not accurately replicate New York's former system. Rather, if every tax jurisdiction had followed New York, there would have been no double-taxation. That is because train rides originating in another State would *not* be taxed at origin, because the train holding company would be allowed to file a combined return. And a foreign train company that ran train lines into a U.S. State like New York, would be doing business in that State, thereby making that company a tax-filer in New York. This example once again illustrates Chief Judge Wilson's point in his concurrence that foreign companies can be New York tax-filers. As a New York tax-filer, the foreign train company *would* be required to pay the origin tax on its outbound trains (i.e., the add back). But if the hypothetical is to mirror reality, the foreign company's New York affiliate would then be spared the destination tax because it would receive a deduction. To the extent the train company does business in more than one State, it may permissibly be taxed based on its local activity. See *supra* at 14-15.

V. THIS CASE SHOULD NOT BE HELD PENDING A DECISION ON THE PETITION IN *ZILKA V. CITY OF PHILADELPHIA*.

There is no reason for this Court to hold this petition pending a decision on the petition in *Zilka v. City of Philadelphia,* No. 23-914, as petitioner requests (Pet. 4, 29-30). *Zilka* was not cited by any party during the proceedings below. *Zilka* involves interstate commerce, not foreign commerce. *See Zilka v. Tax Review Bd., City of Philadelphia,* 304 A.3d 1153, 1155 (Pa. 2023). The petition for certiorari in *Zilka* asks a question that is far afield from those here: whether the Commerce Clause requires States to consider a taxpayer's burden in light of the state tax scheme as a whole when crediting a taxpayer's out-of-state tax liability, or whether States are permitted to credit out-of-state and local tax liabilities as discrete tax burdens. *Zilka* Pet. for Cert. at i (Feb. 20, 2024). That question is not present in the international context. *See Japan Line*, 441 U.S. at 447-48 (noting the "absence of an authoritative tribunal capable of ensuring that the aggregation of taxes is computed on no more than one full value" in the international context).

Petitioner notes that this Court requested the views of the Solicitor General in *Zilka.* (Pet. 4, 29.) The Solicitor General has since filed an amicus brief in *Zilka* concluding that "[n]o further review is warranted." Br. for the United States as Amicus Curiae at 8, *Zilka*, No. 23-914 (filed Dec. 9, 2024). The Solicitor General observed that "double taxation resulting from taxes imposed by multiple States that yields higher taxation for interstate transactions is *not* in itself unconstitutional." *Id.* at 16 (emphasis retained).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Excerpts from N.Y. Tax Law § 208(9) (in effect from May 7, 2009 to March 27, 2013)

9. The term "entire net income" means total net income from all sources, which shall be presumably the same as the entire taxable income (but not alternative minimum taxable income),

(i) which the taxpayer is required to report to the United States treasury department, or

(ii) which the taxpayer would have been required to report to the United States treasury department if it had not made an election under subchapter s of chapter one of the internal revenue code, or

(iii) which the taxpayer, in the case of a corporation which is exempt from federal income tax (other than the tax on unrelated business taxable income imposed under section 511 of the internal revenue code) but which is subject to tax under this article, would have been required to report to the United States treasury department but for such exemption,

except as hereinafter provided, and subject to any modification required by paragraphs (d) and (e) of subdivision three of section two hundred ten of this article.

N.Y. Tax Law § 210(1)(a) (in effect from April 9, 2007 through December 8, 2011)

§ 210. Computation of tax

1. The tax imposed by subdivision one of section two hundred nine of this chapter shall be: (A) in the case of each taxpayer other than a New York S corporation or a qualified homeowners association, the sum of (1) the highest of the amounts prescribed in paragraphs (a), (b), (c) and (d) of this subdivision and (2) the amount prescribed in paragraph (e) of this subdivision, (B) in the case of each New York S corporation, the amount prescribed in paragraph (g) of this subdivision, and (C) in the case of a qualified homeowners association, the sum of (1) the highest of the amounts prescribed in paragraphs (a), (b) and (c) of this subdivision and (2) the amount prescribed in paragraph (e) of this subdivision. For purposes of this paragraph, the term "qualified homeowners association" means a homeowners association, as such term is defined in subsection (c) of section five hundred twenty-eight of the internal revenue code without regard to subparagraph (E) of paragraph one of such subsection (relating to elections to be taxed pursuant to such section), which has no homeowners association taxable income, as such term is defined in subsection (d) of such section. Provided, however, that in the case of a small business taxpayer (other than a New York S corporation) as defined in paragraph (f) of this subdivision, if the amount prescribed in such paragraph (b) is higher than the amount prescribed in such paragraph (a) solely by reason of the application of the rate applicable to small business taxpayers, then with respect to such taxpayer the tax referred to in the previous sentence shall be the sum of (1) the highest of the amounts prescribed in paragraphs (a), (c) and (d) of this subdivi-

sion and (2) the amount prescribed in paragraph (e) of this subdivision.

(a) Entire net income base. For taxable years beginning before July first, nineteen hundred ninety-nine, the amount prescribed by this paragraph shall be computed at the rate of nine percent of the taxpayer's entire net income base. For taxable years beginning after June thirtieth, nineteen hundred ninety-nine and before July first, two thousand, the amount prescribed by this paragraph shall be computed at the rate of eight and one-half percent of the taxpayer's entire net income base. For taxable years beginning after June thirtieth, two thousand and before July first, two thousand one, the amount prescribed by this paragraph shall be computed at the rate of eight percent of the taxpayer's entire net income base. For taxable years beginning after June thirtieth, two thousand one and before January first, two thousand seven, the amount prescribed by this paragraph shall be computed at the rate of seven and one-half percent of the taxpayer's entire net income base. For taxable years beginning on or after January first, two thousand seven, the amount prescribed by this paragraph shall be computed at the rate of seven and one-tenth percent of the taxpayer's entire net income base. The taxpayer's entire net income base shall mean the portion of the taxpayer's entire net income allocated within the state as hereinafter provided, subject to any modification required by paragraphs (d) and (e) of subdivision three of this section. However, in the case of a small business taxpayer, as defined in paragraph (f) of this subdivision, the amount prescribed by this paragraph shall be computed pursuant to subparagraph (iv) of this paragraph and in the case of a manufacturer, as defined in subparagraph (vi) of this

paragraph, the amount prescribed by this paragraph shall be computed pursuant to subparagraph (vi) of this paragraph.

(i) if the entire net income base is not more than two hundred thousand dollars, (1) for taxable years beginning before July first, nineteen hundred ninety-nine, the amount shall be eight percent of the entire net income base; (2) for taxable years beginning after June thirtieth, nineteen hundred ninety-nine and before July first, two thousand three, the amount shall be seven and one-half percent of the entire net income base; and (3) for taxable years beginning after June thirtieth, two thousand three and before January first, two thousand five, the amount shall be 6.85 percent of the entire net income base;

(ii) if the entire net income base is more than two hundred thousand dollars but not over two hundred ninety thousand dollars, (1) for taxable years beginning before July first, nineteen hundred ninety-nine, the amount shall be the sum of (a) sixteen thousand dollars, (b) nine percent of the excess of the entire net income base over two hundred thousand dollars and (c) five percent of the excess of the entire net income base over two hundred fifty thousand dollars; (2) for taxable years beginning after June thirtieth, nineteen hundred ninety-nine and before July first, two thousand, the amount shall be the sum of (a) fifteen thousand dollars, (b) eight and one-half percent of the excess of the entire net income base over two hundred thousand dollars and (c) five percent of the excess of the entire net income base over two hundred fifty thousand dollars; (3) for taxable years beginning after June thirtieth, two thousand and before July first, two thousand one, the amount shall be the sum of (a) fifteen thousand dollars, (b) eight percent of the

excess of the entire net income base over two hundred thousand dollars and (c) two and one-half percent of the excess of the entire net income base over two hundred fifty thousand dollars; (4) for taxable years beginning after June thirtieth, two thousand one and before July first, two thousand three, the amount shall be seven and one-half percent of the entire net income base; and (5) for taxable years beginning after June thirtieth, two thousand three and before January first, two thousand five, the amount shall be the sum of (a) thirteen thousand seven hundred dollars, (b) 7.5 percent of the excess of the entire net income base over two hundred thousand dollars and (c) 3.25 percent of the excess of the entire net income base over two hundred fifty thousand dollars;

(iii) for taxable years beginning on or after January first, two thousand five and ending before January first, two thousand seven, if the entire net income base is not more than two hundred ninety thousand dollars the amount shall be six and one-half percent of the entire net income base; if the entire net income base is more than two hundred ninety thousand dollars but not over three hundred ninety thousand dollars the amount shall be the sum of (1) eighteen thousand eight hundred fifty dollars, (2) seven and one-half percent of the excess of the entire net income base over two hundred ninety thousand dollars but not over three hundred ninety thousand dollars and (3) seven and one-quarter percent of the excess of the entire net income base over three hundred fifty thousand dollars but not over three hundred ninety thousand dollars;

(iv) for taxable years beginning on or after January first, two thousand seven, if the entire net income base is not more than two hundred ninety thousand

dollars the amount shall be six and one-half percent of the entire net income base; if the entire net income base is more than two hundred ninety thousand dollars but not over three hundred ninety thousand dollars the amount shall be the sum of (1) eighteen thousand eight hundred fifty dollars, (2) seven and one-tenth percent of the excess of the entire net income base over two hundred ninety thousand dollars but not over three hundred ninety thousand dollars and (3) four and thirty-five hundredths percent of the excess of the entire net income base over three hundred fifty thousand dollars but not over three hundred ninety thousand dollars;

(v) if the taxable period to which subparagraphs (i), (ii), (iii), and (iv) of this paragraph apply is less than twelve months, the amount prescribed by this paragraph shall be computed as follows:

(A) Multiply the entire net income base for such taxpayer by twelve;

(B) Divide the result obtained in (A) by the number of months in the taxable year;

(C) Compute an amount pursuant to subparagraphs (i) and (ii) as if the result obtained in (B) were the taxpayer's entire net income base;

(D) Multiply the result obtained in (C) by the number of months in the taxpayer's taxable year;

(E) Divide the result obtained in (D) by twelve.

(vi) 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. The term "manu-

facturer" 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. 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 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).

N.Y. Tax Law § 210(3)(a) (in effect from April 9, 2007 through December 31, 2012)

3. The portion of the entire net income of a taxpayer to be allocated within the state shall be determined as follows:

(a) multiply its business income by a business allocation percentage to be determined by

(1) ascertaining the percentage which the average value of the taxpayer's real and tangible personal property, whether owned or rented to it, within the state during the period covered by its report bears to the average value of all the taxpayer's real and tangible personal property, whether owned or rented to it, wherever situated during such period. For the purpose of this subparagraph the term "value of the taxpayer's real and tangible personal property" shall mean the adjusted bases of such properties for federal income tax purposes (except that in the case of rented property such value shall mean the product of (i) eight and (ii) the gross rents payable for the rental of such property during the taxable year); provided, however, that the taxpayer may make a one-time, revocable election, pursuant to regulations promulgated by the commissioner to use fair market value as the value of all of its real and tangible personal property, provided that such election is made on or before the due date for filing a report under section two hundred eleven for the taxpayer's first taxable year commencing on or after January first, nineteen hundred eighty-seven and provided that such election shall not apply to any

taxable year with respect to which the taxpayer is included on a combined report unless each of the taxpayers included on such report has made such an election which remains in effect for such year;

(2) ascertaining the percentage which the receipts of the taxpayer, computed on the cash or accrual basis according to the method of accounting used in the computation of its entire net income, arising during such period from

(A) sales of its tangible personal property where shipments are made to points within this state,

(B) services performed within the state, provided, however, that (i) in the case of a taxpayer engaged in the business of publishing newspapers or periodicals, receipts arising from sales of advertising contained in such newspapers and periodicals shall be deemed to arise from services performed within the state to the extent that such newspapers and periodicals are delivered to points within the state, (ii) receipts from an investment company arising from the sale of management, administration or distribution services to such investment company shall be deemed to arise from services performed within the state to the extent set forth in subparagraph six of this paragraph, (iii) in the case of taxpayers principally engaged in the activity of air freight forwarding acting as principal and like indirect air carriage receipts arising from such activity shall arise from services performed within the state as follows: one hundred percent of such receipts if both the pickup and delivery associated with such receipts are made in this state and fifty percent of such receipts if either the pickup or delivery associated with such receipts is made in

this state and (iv) in the case of a taxpayer which is a registered securities or commodities broker or dealer, the receipts specified in subparagraph nine of this paragraph shall be deemed to arise from services performed within the state to the extent set forth in such subparagraph nine, and (iv) in the case of receipts arising from the transportation or transmission of gas through pipes, the portion of such receipts which constitute receipts from services performed within the state shall be the product of (I) the total of such receipts and (II) a fraction, the numerator of which is the taxpayer's transportation units within the state and the denominator of which is the taxpayer's transportation units within and without the state. A transportation unit is the transportation of one cubic foot of gas over a distance of one mile,

(C) rentals from property situated, and royalties from the use of patents or copyrights, within the state, and receipts from the sales of rights for closed-circuit and cable television transmissions of an event (other than events occurring on a regularly scheduled basis) taking place within the state as a result of the rendition of services by employees of the corporation, as athletes, entertainers or performing artists, but only to the extent that such receipts are attributable to such transmissions received or exhibited within the state and

(D) all other business receipts earned within the state, bear to the total amount of the taxpayer's receipts, similarly computed, arising during such period from all sales of its tangible personal property, services, rentals, royalties, receipts from the sales of rights for closed-circuit and cable television

transmissions and all other business transactions, whether within or without the state;

(3) ascertaining the percentage of the total wages, salaries and other personal service compensation, similarly computed, during such period of employees within the state, except general executive officers, to the total wages, salaries and other personal service compensation, similarly computed, during such period of all the taxpayer's employees within and without the state, except general executive officers; and

(4) adding together the percentages so determined and dividing the result by the number of percentages; provided, however, except (i) in the case of a New York S corporation, (ii) for purposes of computing minimum taxable income for taxable years beginning before nineteen hundred ninety-four, and (iii) for purposes of computing pre-nineteen hundred ninety minimum taxable income, for taxable years beginning on or after the first day of January, nineteen hundred seventy-six, the business allocation percentage shall be determined by adding the percentages so determined and an additional percentage equal to the percentage determined under subparagraph two of this paragraph together, and dividing the result by the number of percentages so added together; provided, however, that for taxable years beginning before January first, nineteen hundred seventy-eight, if the taxpayer does not have a regular place of business outside the state other than a statutory office, the business allocation percentage shall be one hundred percent;

(5) Provided, however, that any taxpayer required to adjust its receipts, expenses, assets and liabilities by adding an attributable portion of the receipts,

expenses, assets and liabilities of any DISC, as provided by paragraph (i) of subdivision nine of section two hundred eight of this article, shall substitute such adjusted figures in computing the percentages required in subparagraphs one, two and three of this paragraph.

(6) Rules for receipts from certain services to investment companies.

(A) For purposes of subclause (ii) of clause (B) of subparagraph two of this paragraph, the portion of receipts received from an investment company arising from the sale of management, administration or distribution services to such investment company determined in accordance with clause (B) of this subparagraph shall be deemed to arise from services performed within the state (such portion referred to herein as the New York portion).

(B) The New York portion shall be the product of (a) the total of such receipts from the sale of such services and (b) a fraction. The numerator of that fraction is the sum of the monthly percentages (as defined hereinafter) determined for each month of the investment company's taxable year for federal income tax purposes which taxable year ends within the taxable year of the taxpayer (but excluding any month during which the investment company had no outstanding shares). The monthly percentage for each such month is determined by dividing (a) the number of shares in the investment company which are owned on the last day of the month by shareholders which are domiciled in the state by (b) the total number of shares in the investment company outstanding on that date. The denominator of the fraction is the number of such monthly percentages.

(C) (i) For purposes of this subparagraph, the term "domicile", in the case of an individual, shall have the meaning ascribed to it under article twenty-two of this chapter; an estate or trust is domiciled in the state if it is a resident estate or trust as defined in paragraph three of subsection (b) of section six hundred five of this chapter; a business entity is domiciled in the state if the location of the actual seat of management or control is in the state. It shall be presumed that the domicile of a shareholder, with respect to any month, is his, her or its mailing address on the records of the investment company as of the last day of such month.

(ii) For purposes of this subparagraph, the term "investment company" means a regulated investment company, as defined in section 851 of the internal revenue code, and a partnership to which section 7704(a) of the internal revenue code applies (by virtue of section 7704(c)(3) of such code) and that meets the requirements of section 851(b) of such code. The preceding sentence shall be applied to the taxable year for federal income tax purposes of the business entity that is asserted to constitute an investment company that ends within the taxable year of the taxpayer.

(iii) For purposes of this subparagraph, the term "receipts from an investment company" includes amounts received directly from an investment company as well as amounts received from the shareholders in such investment company, in their capacity as such.

(iv) For purposes of this subparagraph, the term "management services" means the rendering of investment advice to an investment company, mak-

ing determinations as to when sales and purchases of securities are to be made on behalf of an investment company, or the selling or purchasing of securities constituting assets of an investment company, and related activities, but only where such activity or activities are performed pursuant to a contract with the investment company entered into pursuant to section 15(a) of the federal investment company act of nineteen hundred forty, as amended.

(v) For purposes of this subparagraph, the term "distribution services" means the services of advertising, servicing investor accounts (including redemptions), marketing shares or selling shares of an investment company, but, in the case of advertising, servicing investor accounts (including redemptions) or marketing shares, only where such service is performed by a person who is (or was, in the case of a closed end company) also engaged in the service of selling such shares. In the case of an open end company, such service of selling shares must be performed pursuant to a contract entered into pursuant to section 15(b) of the federal investment company act of nineteen hundred forty, as amended.

(vi) For purposes of this subparagraph, the term "administration services" includes (1) clerical, accounting, bookkeeping, data processing, internal auditing, legal and tax services performed for an investment company but only (2) if the provider of such service or services during the taxable year in which such service or services are sold also sells management or distribution services, as defined hereinabove, to such investment company.

(7) (A) Provided, further, however, that a taxpayer principally engaged in the conduct of aviation (other than air freight forwarders acting as principal and like indirect air carriers and other than as provided in clause (D) of this subparagraph) shall, notwithstanding the foregoing provisions of this paragraph, determine the portion of entire net income to be allocated within the state by multiplying its business income by a business allocation percentage which is equal to the arithmetic average of the following three percentages:

(i) the percentage determined by dividing sixty percent of the aircraft arrivals and departures within this state by the taxpayer during the period covered by its report by the total aircraft arrivals and departures within and without this state during such period; provided, however, arrivals and departures solely for maintenance or repair, refueling (where no debarkation or embarkation of traffic occurs), arrivals and departures of ferry and personnel training flights or arrivals and departures in the event of emergency situations shall not be included in computing such arrival and departure percentage; provided, further, the commissioner may also exempt from such percentage aircraft arrivals and departures of all non-revenue flights including flights involving the transportation of officers or employees receiving air transportation to perform maintenance or repair services or where such officers or employees are transported in conjunction with an emergency situation or the investigation of an air disaster (other than on a scheduled flight); provided, however, that arrivals and departures of flights transporting officers and employees receiving air transportation for purposes

other than specified above (without regard to remuneration) shall be included in computing such arrival and departure percentage;

(ii) the percentage determined by dividing sixty percent of the revenue tons handled by the taxpayer at airports within this state during such period by the total revenue tons handled by it at airports within and without this state during such period; and

(iii) the percentage determined by dividing sixty percent of the taxpayer's originating revenue within this state for such period by its total originating revenue within and without this state for such period.

(B) As used herein the term "aircraft arrivals and departures" means the number of landings and take-offs of the aircraft of the taxpayer and the number of air pickups and deliveries by the aircraft of such taxpayer; the term "originating revenue" means revenue to the taxpayer from the transportation of revenue passengers and revenue property first received by the taxpayer either as originating or connecting traffic at airports; and the term "revenue tons handled" by the taxpayer at airports means the weight in tons of revenue passengers (at two hundred pounds per passenger) and revenue cargo first received either as originating or connecting traffic or finally discharged by the taxpayer at airports;

(C) Taxpayers principally engaged as air freight forwarders acting as principal and like indirect air carriers shall allocate business income in accordance with subparagraphs (1) through (4) of this paragraph, including the special provision relating to the allocation of receipts from the activity of air

freight forwarding acting as principal contained in clause (B) of subparagraph (2) of this paragraph.

(D) A foreign air carrier described in the first sentence of subparagraph one of paragraph (c-1) of subdivision nine of section two hundred eight of this article shall determine its business allocation percentage pursuant to the provisions of subparagraphs one through four of this paragraph, except that the numerators and denominators involved in such computation shall exclude property to the extent employed in generating income excluded from entire net income pursuant to the provisions of paragraph (c-1) of subdivision nine of section two hundred eight of this article, exclude such receipts as are excluded from entire net income for the taxable year pursuant to the provisions of paragraph (c-1) of subdivision nine of section two hundred eight of this article, and exclude wages, salaries or other personal service compensation which are directly attributable to the generation of income excluded from entire net income for the taxable year pursuant to the provisions of paragraph (c-1) of subdivision nine of section two hundred eight of this article.

(8) Provided, further, however that the business allocation percentage of a taxpayer principally engaged in the conduct of a railroad business (including surface railroad, whether or not operated by steam, subway railroad, elevated railroad, palace car or sleeping car business) or a trucking business, shall, notwithstanding the foregoing provisions of this paragraph, be computed by dividing the taxpayer's mileage within this state during the period covered by its report by the taxpayer's mileage within and without this state during such period.

(9) (A) In the case of a taxpayer which is a registered securities or commodities broker or dealer, the receipts specified in subclauses (i) through (vii) of this clause shall be deemed to arise from services performed within the state to the extent set forth in each of such subclauses.

(i) Receipts constituting brokerage commissions derived from the execution of securities or commodities purchase or sales orders for the accounts of customers shall be deemed to arise from services performed at the mailing address in the records of the taxpayer of the customer who is responsible for paying such commissions.

(ii) Receipts constituting margin interest earned on behalf of brokerage accounts shall be deemed to arise from services performed at the mailing address in the records of the taxpayer of the customer who is responsible for paying such margin interest.

(iii) Gross income, including any accrued interest or dividends, from principal transactions for the purchase or sale of stocks, bonds, foreign exchange and other securities or commodities (including futures and forward contracts, options and other types of securities or commodities derivatives contracts) shall be deemed to arise from services performed within the state either (I) to the extent that production credits are awarded to branches, offices or employees of the taxpayer within the state as a result of such principal transactions or (II) if the taxpayer so elects, to the extent that the gross proceeds from such principal transactions (determined without deduction for any cost incurred by the taxpayer to acquire the securities

or commodities) are generated from sales of securities or commodities to customers within the state based upon the mailing addresses of such customers in the records of the taxpayer. For purposes of item (II) of the preceding sentence, the taxpayer shall separately calculate such gross income from principal transactions by type of security or commodity. For purposes of this subclause, gross income from principal transactions shall be determined after the deduction of any cost incurred by the taxpayer to acquire the securities or commodities. For purposes of this subparagraph, the term "production credits" means credits granted pursuant to the internal accounting system used by the taxpayer to measure the amount of revenue that should be awarded to a particular branch or office or employee of the taxpayer which is based, at least in part, on the branch's, the office's or the employee's particular activities. Upon request, the taxpayer shall be required to furnish a detailed explanation of such internal accounting system to the department.

(iv) (I) Receipts constituting fees earned by the taxpayer for advisory services to a customer in connection with the underwriting of securities for such customer (such customer being the entity which is contemplating issuing or is issuing securities) or fees earned by the taxpayer for managing an underwriting shall be deemed to arise from services performed at the mailing address in the records of the taxpayer of such customer who is responsible for paying such fees. (II) Receipts constituting the primary spread or selling concession from underwritten securities shall be deemed to arise from services performed within the state to the extent that production credits are awarded to branches,

offices or employees of the taxpayer within the state as a result of the sale of the underwritten securities. (III) The term "primary spread" means the difference between the price paid by the taxpayer to the issuer of the securities being marketed and the price received from the subsequent sale of the underwritten securities at the initial public offering price, less any selling concession and any fees paid to the taxpayer for advisory services or any manager's fees, if such fees are not paid by the customer to the taxpayer separately. The term "public offering price" means the price agreed upon by the taxpayer and the issuer at which the securities are to be offered to the public. The term "selling concession" means the amount paid to the taxpayer for participating in the underwriting of a security where the taxpayer is not the lead underwriter. The term "production credits" shall have the same meaning as in subclause (iii) of this clause.

(v) Receipts constituting interest earned by the taxpayer on loans and advances made by the taxpayer to a corporation affiliated with the taxpayer but with which the taxpayer is not permitted or required to file a combined report pursuant to section two hundred eleven of this article shall be deemed to arise from services performed at the principal place of business of such affiliated corporation.

(vi) Receipts constituting account maintenance fees shall be deemed to arise from services performed at the mailing address in the records of the taxpayer of the customer who is responsible for paying such account maintenance fees.

(vii) Receipts constituting fees for management or advisory services, including fees for advisory ser-

vices in relation to merger or acquisition activities but excluding fees paid for services described in subclause (ii) of clause (B) of subparagraph two of this paragraph, shall be deemed to arise from services performed at the mailing address in the records of the taxpayer of the customer who is responsible for paying such fees.

(B) For purposes of this subparagraph, the term "securities" shall have the same meaning as in section 475(c)(2) of the internal revenue code and the term "commodities" shall have the same meaning as in section 475(e)(2) of the internal revenue code. The term "registered securities or commodities broker or dealer" means a broker or dealer registered as such by the securities and exchange commission or the commodities futures trading commission, and shall include an OTC derivatives dealer as defined under regulations of the securities and exchange commission at title 17, part 240, section 3b-12 of the code of federal regulations (17 CFR 240.3b-12).

(C) If the taxpayer receives any of the receipts enumerated in clause (A) of this subparagraph as a result of a securities correspondent relationship such taxpayer has with another registered securities or commodities broker or dealer with the taxpayer acting in this relationship as the clearing firm, such receipts shall be deemed to arise from services performed within the state to the extent set forth in each of such subclauses. The amount of such receipts shall exclude the amount the taxpayer is required to pay to the correspondent firm for such correspondent relationship. If the taxpayer receives any of the receipts enumerated in clause (A) of this subparagraph as a result of a securities correspondent relationship such taxpayer has with another registered

securities or commodities broker or dealer with the taxpayer acting in this relationship as the introducing firm, such receipts shall be deemed to arise from services performed within the state to the extent set forth in each of such subclauses.

(D) If, for purposes of subclause (i), (ii), (iv)(I), (vi), or (vii) of clause (A) of this subparagraph, the taxpayer is unable from its records to determine the mailing address of the customer, the receipts enumerated in any of such subclauses shall be deemed to arise from services performed at the branch or office of the taxpayer that generates the transaction for the customer that generated such receipts.

(10) (A) Notwithstanding the foregoing provisions of this paragraph, other than subparagraphs seven and eight of this paragraph, the business allocation percentage shall be computed in the manner set forth in this subparagraph.

(i) For taxable years beginning on or after January first, two thousand six and before January first, two thousand seven, the business allocation percentage shall be determined by adding together the following percentages:

(I) the product of twenty percent and the percentage determined under subparagraph one of this paragraph,

(II) the product of sixty percent and the percentage determined under subparagraph two of this paragraph, and

(III) the product of twenty percent and the percentage determined under subparagraph three of this paragraph.

(ii) For taxable years beginning on or after January first, two thousand seven, the business allocation percentage shall be the percentage provided for in subparagraph two of this paragraph.