No. 24-333

IN THE

Supreme Court of the United States

THE WALT DISNEY COMPANY,
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 discriminated against companies with non–New York affiliates during the years it was in effect (2003 to 2013), in violation of the dormant Commerce Clause, 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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STATEMENT OF THE CASE

Petitioner, the Walt Disney Company and its consolidated subsidiaries, challenges as unconstitutional a former provision of New York's corporate franchise tax that the State repealed more than a decade ago.[1]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. 128-131), 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, which were often located in low-tax jurisdictions, while 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] International Business Machines Corp. (IBM) brought a parallel challenge to the same law, which was also resolved by the decision below. IBM has filed a petition for review of that decision that overlaps with the present petition in some respects. *See International Business Machines Corp. v. New York State Tax Appeals Tribunal*, No. 24-332.

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 2008 through 2010 (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[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 herein, 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-

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

back and 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 other state decisions. And as explained below, this case is a poor vehicle for examining the issues that petitioner now advances, among other things because petitioner failed to preserve its new arguments on the standard of review for as-applied challenges. 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. N.Y. 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. 3-4, 88-89.)

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

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

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 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 L. 2003, ch. 686 at 9 (internet). (*See also* Pet. App. 4, 11, 23, 46, 88-89, 118.)

Entitled "[r]oyalty expense add backs," N.Y. Tax Law former § 208(9)(o)(2)(A) 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." "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*

[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).

> *payments would not be required to be added back* under subparagraph two of 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. [5]

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 into 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.

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[5] The Council on State Taxation's amicus brief in support of petitioner thus mischaracterizes the add-back and deduction by describing the deduction as a "tax incentive[]" and the add-back as an attempt to fix a "facially discriminatory corporate income tax scheme" (Amicus Br. at 8-9.) The add-back was enacted to foil tax-avoidance schemes involving related-party royalties, while the deduction ensured that the add-back did not result in double taxation.

B. Petitioner Seeks a Windfall Deduction

Petitioner is a multinational, diversified entertainment conglomerate organized under the laws of Delaware. (Pet. App. 6, 42-43, 52-54.) Part of petitioner's business is the development, ownership, and exploitation of intellectual property through licensing to subsidiaries, both domestically and internationally. (Pet. App. 6, 53-54.) Within the United States, during the years at issue petitioner and its domestic affiliates filed a combined tax return in New York, 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 . . . ."). (Pet. App. 6.)

Internationally, petitioner entered into licensing agreements with its foreign subsidiaries under which the subsidiaries were permitted to exploit petitioner's intellectual property within their respective territories in exchange for royalty payments. (Pet. App. 6, 62.) The record contains no evidence that any foreign jurisdiction taxed those outbound royalty payments. (Pet. App. 6-7.)

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 between 5% and 6% of petitioner's total taxable income. (Pet. App. 7.) In those years, petitioner received royalty payments totaling $5,440,787,188 from its foreign subsidiaries. (Pet. App. 7.) For 2009 and 2010, petitioner deducted from its taxable income the royalty payments it received from foreign subsidiaries. (Pet. App. 7.) For 2008, petitioner filed an amended return seeking a refund on the ground that its foreign royalty payments should have been deducted. (Pet. App. 7.)

Petitioner was audited by the New York State Department of Taxation and Finance ("Tax Department"). (Pet. App. 7.) The Tax Department denied petitioner's refund request for 2008 and issued a notice of deficiency for 2009 and 2010 in the amount of $3,995,551. (Pet. App. 7.)

C. Proceedings Below

Petitioner challenged the notice of deficiency and the denial of its refund request in the New York State Division of Tax Appeals. (Pet. App. 8.) Following an evidentiary hearing, an ALJ ruled in favor of the Tax Department and sustained the notice of deficiency. (Pet. App. 8-9; *see* Pet. App. 95-124.) Petitioner appealed to the Tribunal, which unanimously affirmed the ALJ's determination. (Pet. App. 9; *see* Pet. App. 51-94.)

Petitioner challenged the Tribunal's decision in an original proceeding commenced in the New York Appellate Division, Third Department. (Pet. App. 9.) The Appellate Division unanimously confirmed the Tribunal's determination and dismissed the proceeding on the ground that N.Y. Tax Law former § 208(9)(o) did not treat in-state commerce and out-of-state commerce differently. (Pet. App. 9; *see* Pet. App. 42-50.) Petitioner then appealed to the New York Court of Appeals. (Pet. App. 1.)

The Court of Appeals affirmed the Appellate Division. (*See* Pet. App. 1-41.) 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. 14.)

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. 14.) 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. 14.) 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. 15.) 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. 15.)

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. 15 [quoting Pet. App. 21 (Wilson, C.J., concurring)].) In that respect, former § 208(9)(o) differed from statutes that this Court has found to involve unconstitutional discrimination against interstate or foreign commerce, such the Iowa statute at issue in *Kraft General Foods v. Iowa Department of Revenue and Finance,* 505 U.S. 71 (1992). (Pet. App. 15-16.) 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. 16.)

The Court of Appeals went on to consider whether former § 208(9)(o) passed the "internal consistency test" (Pet. App. 16-20), 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). Although petitioner made no argument in the lower courts based on the internal consistency test, the test was advanced as a ground for reversal by IBM in a separate proceeding that the court resolved in the decision below. The court concluded that the former tax provision passed the internal consistency test. (Pet. App. 17-18.)

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. 21-41.) The concurring judges reasoned that the availability of a deduction under former § 208(9)(o)(3) turned entirely on the royalty payor's status as a New York tax-filer. (Pet. App. 24.) 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. 21, 28-30.) 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. 21, 29.) Similarly, a transaction between a New York taxpayer and a non–New York taxpayer could involve two Delaware entities.[6] (Pet. App. 21-22, 29.) 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. 22.) 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. 22; *see also* Pet. App. 39-40.)

REASONS FOR DENYING THE PETITION

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

As the concurring judges below observed, N.Y. Tax Law former § 208(9)(o) was "short-lived." (Pet. App. 38.) First effective in 2003, the statute was amended to eliminate the deduction at issue beginning in 2013. (Pet. App. 67.) The deduction was eliminated not because it was discriminatory, as petitioner suggests (Pet. 31), but rather because corporations were interpreting the deduction aggressively in ways the Legislature had not intended (*see* Pet. App. 46-47, 119-120). There is no reason for this Court to review the constitutionality of a tax law that has not been in effect for more than a decade.

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[6] The petition distorts the concurring opinion by claiming that it "emphasized" that "geography is dispositive." (Pet. 30). To the contrary, the concurring judges argued that the deduction in former § 208(9)(o)(3) turned "solely on tax filing status" and did not discriminate against interstate commerce "merely because it speaks in geographic terms." (Pet. App. 40.)

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. 60, 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.

II. 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. 14) 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).

The statute challenged here did no such thing. The dependence of the deduction on the presence 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. 14-15.) A company with foreign subsidiaries would gain nothing by rechartering those companies in New York to obtain a deduction under N.Y. Tax Law former § 208(9)(o)(3). Once the subsidiaries were moved to New York, the receiving affiliate could take a deduction, but then the corporate group would not gain because the payor affiliate would become subject to the add-back in former § 208(9)(o)(2).

The add-back distinguishes this case from cases like *Kraft*, where Iowa gave a tax deduction for dividends from subsidiaries incorporated in Iowa but not those incorporated elsewhere. (*See* Pet. App. 15 [citing *Kraft,* 505 U.S. at 77].) Iowa imposed no add-back on dividends paid by its corporations. Because Iowa corporations obtained a deduction without being subjected to an add-back, they gained an economic advantage under the law struck down in *Kraft*. In contrast, corporations that filed tax returns in New York gained no such advantage here, because they were required to add back their related-company royalty payments.

While petitioner brushes away the add-back as not having "constitutional significance" (Pet. 21), the add-back is critical. The deduction in N.Y. Tax Law former § 208(9)(o)(3) did not distinguish between in-state and out-of-state economic interests, but instead differentiated between companies that were subject to the add-back and those that were not.

To be sure, 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. 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 intrastate, interstate, or international. (Pet. App. 28-30, 34.) Indeed, depending on a company's BAP, the challenged statute could have benefited rather than burdened international transactions. (Pet. App. 34-36.) Thus, N.Y. Tax Law former § 208(9)(o) did not create an incentive to move business into New York as petitioner contends. (Pet. 22.)

Further, the New York Court of Appeals correctly applied the so-called "*Salerno* standard." (*See* Pet. App. 12.) In *United States v. Salerno*, this Court held that, to prevail on a facial challenge to a statute, a party must "establish that no set of circumstances exists under which the Act would be valid." 481 U.S. 739, 745 (1987). The *Salerno* standard reflects the basic principle that facial challenges to duly enacted statutes are disfavored. *See Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 449-51 (2008).

Contrary to petitioner's suggestion (Pet. 23-26), the *Salerno* standard remains viable. In 2024, this Court applied *Salerno* to facial constitutional challenges under the Second Amendment in *United States v. Rahimi,* 602 U.S. 680, 693 (2024). And in *Moody v. NetChoice, LLC,* the Court observed that the *Salerno* standard does not govern First Amendment cases but does govern "other cases," 603 U.S. 707, 723 (2024), which presumably include facial constitutional challenges under the Commerce Clause.

This Court did not reject the *Salerno* standard in *Kraft*, as petitioner argues (Pet. 20). Although the two dissenting Justices in *Kraft* cited *Salerno* in support of their position, the majority said nothing, one way or another, on that score. And the majority had no reason to cite *Salerno* because it concluded that the Iowa statute in *Kraft* facially discriminated against foreign subsidiaries and in favor of domestic subsidiaries. Regardless of whether the discrimination benefited a particular company, the statute was inherently discriminatory. *See Kraft,* 505 U.S. at 75 ("It is indisputable that the Iowa statute treats dividends received from foreign subsidiaries less favorably than dividends received from domestic subsidiaries."). Consequently, the *Salerno* standard was irrelevant to the result in *Kraft*. In contrast, as shown above, N.Y. Tax Law former § 208(9)(o) was facially *non*-discriminatory because companies received a deduction for related-party royalties only when those royalties were subjected to the add-back. The statute therefore survived scrutiny because it did not violate the law in every application. (*See* Pet. App. 19, 38-39.)

Nor is review warranted here because a state decision cited with approval by the majority opinion below, *General Electric Co. v. Commissioner*, 154 N.H. 457, 914 A.2d 246 (2006), *cert denied*, 552 U.S. 989 (2007), supposedly misapplied *Salerno* in rejecting a dormant Commerce Clause challenge to a dividend taxation law. (Pet. 27.) It is of no moment here whether that court erred by upholding a New Hampshire law that was allegedly discriminatory on its face, on the ground that the statute did not have a discriminatory effect on interstate commerce in some circumstances. As discussed above, the New York Court of Appeals properly concluded that New York's former tax law was *not* discriminatory on its face. And to the extent petitioner attempts to identify a court split over the proper standards for evaluating "as applied" challenges under the Commerce Clause, petitioner failed to preserve that argument, as discussed below.

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 the related corporation that received the royalties. Indeed, at oral argument in the New York Court of Appeals, petitioner's counsel observed that N.Y. Tax Law former § 208(9)(o) differed from the tax statutes in "every other state" (Tr. of Oral Argument at 14 in N.Y. Ct. of Appeals [Mar. 13, 2024][7]).

To support its contention that a substantive conflict exists, petitioner cites five cases decided between 1995 and 2003 (Pet. 24-26), not one of which was cited in the proceedings in the New York Court of Appeals. Those cases all involved statutes that taxed dividends paid by a corporation to its affiliate. Unlike royalties, dividends that a company pays to shareholders are not recorded as expenses on the company's income statement because they are paid to shareholders as a return on investment.[8] Because they are not expenses, dividends cannot be deducted from federal taxable income by the paying corporation,[9] and therefore would not be subject to an

[7] The parties' briefs, record, and oral argument transcript in the New York Court of Appeals are available on the Court's website: https://courtpass.nycourts.gov/Public_search (enter Party Names: Disney Tax).

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

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

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.

Petitioner's cases are distinguishable because they 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:

- The Ohio statute at issue in *Emerson Electric Co. v. Tracy* permitted the parent company to deduct dividends received from domestic companies in full, while restricting the deduction for foreign-company dividends to 85% of their value. 90 Ohio St. 3d 157, 161, 735 N.E.2d 445, 449 (2000).
- The Rhode Island statute challenged in *Dart Industries, Inc. v. Clark* afforded a credit for dividends received from domestic corporations but not for dividends received from foreign corporations. 657 A.2d 1062, 1063-64, 1066 (R.I. 1995).
- The New Mexico statute in *Conoco, Inc. v. Taxation & Revenue Department* included dividend income from foreign subsidiaries in the tax base of the parent corporation but excluded dividend income from domestic subsidiaries. 122 N.M. 736, 737, 931 P.2d 730, 731 (1996), *cert. denied,* 521 U.S. 1112 (1997).

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

III. THIS CASE IS A POOR VEHICLE FOR REVIEWING THE ISSUES THAT PETITIONER SEEKS TO RAISE.

This case presents a poor vehicle for ruling on geographic discrimination under the Commerce Clause (*see* Pet. i, 13-16), the standard of review for as-applied challenges (*see* Pet. 9, 11-13, 17-18), and/or the internal consistency test (*see* Pet. 10-11 n.4).

Geographic discrimination. Even if this Court were to grant certiorari, it would not need to reach petitioner's claim of geographic discrimination because the case would be resolved on other dispositive grounds.

First, petitioner did not meet a prerequisite for applying the internal consistency test because it failed 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. Disney's affiliates did not compete against one another; rather, each operated in its own designated territory. (*See* Pet. App. 63, 64.)

Second, petitioner did not prove—or even argue—that it was double-taxed. Under standard tax accounting principles, royalty payments are deducted as business expenses when computing federal taxable income—the starting tax base for New York's corporate franchise tax.[10] Petitioner offered no evidence that any foreign taxing jurisdiction deviated from that standard by requiring one of petitioner's foreign affiliates to add back its royalty payments after having deducted them as business expenses. (Pet. App. 6-7.) Rather, petitioner

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[10] *See* PwC, Worldwide Tax Summaries, *United States: Corporate – Deductions* (Aug. 13, 2024) (internet).

seeks an enormous windfall by taking a deduction on the receipt of income that was not added back, and therefore was never taxed.

Moreover, because the foreign affiliates used petitioner's intellectual property in their home countries, the royalty income earned by petitioner on account of that foreign activity lowered petitioner's BAP by adding non–New York receipts to the denominator, and thereby reduced the amount of business income that petitioner allocated to New York (Pet. App. 17-18.) The taxation of which petitioner complains resulted from New York's denial of petitioner's request for a windfall deduction to which it was not entitled—not from a defect in the apportionment formula. *See Amerada Hess Corp. v. Director, Div. of Tax'n,* 490 U.S. 66, 73 (1989) (New Jersey's apportionment formula was not invalid as to appellant corporations "simply because New Jersey denies a deduction" for certain federal tax payments).

Third, even if a foreign country required a royalty add-back (and the record contains zero evidence that one did) petitioner still would not have been double-taxed when New York denied a deduction. Payment and receipt are two different taxable events in the stream of commerce. "[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. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.,* 514 U.S. 175, 187-88 (1995).

Standard of review. Petitioner failed to preserve any challenge to the standard of review applicable to "as applied" challenges under the dormant Commerce Clause. In the Court of Appeals, petitioner did not challenge application of the *Salerno* standard to its case. Respondent cited that standard in the Court of Appeals, as incorporated into New York law by *Matter of Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448, 787 N.E.2d 624, 627 (2003). (*See* Respondent's Br. in N.Y. Court. of Appeals at 27-28 [June 26, 2023].) In its reply brief, petitioner did not dispute the standard of review as set forth by respondent. (*See generally* Disney Reply Br. in N.Y. Ct. of Appeals [July 25, 2023].) Despite respondent's citation to *Moran Towing* for its adoption of the *Salerno* standard, petitioner's reply brief did not discuss either *Moran Towing* or *Salerno*. And petitioner's opening brief cited *Moran Towing* approvingly when it recognized that statutes carry a strong presumption of constitutionality and a taxpayer challenging the constitutionality of a New York statute must carry the "high burden" of "establishing unconstitutionality beyond a reasonable doubt." (Disney Br. in N.Y. Ct. of Appeals at 13 [April 10, 2023] [citing *Moran Towing*, 787 N.E.2d at 627 (quotation marks omitted)].)

Because both sides cited *Moran Towing* as governing law and neither side called for a change in the *Salerno* standard as incorporated in that case, the Court of Appeals quite reasonably applied the standard of review set forth in *Moran Towing*. (*See* Pet. App. 12.) Any challenge to application of the *Salerno* standard is unpreserved.

Petitioner's argument that the *Salerno* standard should not govern as-applied challenges (*e.g.*, Pet. 11) similarly departs from the course it charted below. In the Court of Appeals, petitioner advanced only a facial challenge to § 208(9)(o). (Pet. App. 14; *see* Disney Br. in N.Y. Ct. of Appeals at 5, 23-34; Disney Reply Brief in N.Y. Ct. of Appeals at 11-12, 15, 16, 17.) Limiting its Court of Appeals brief to a facial challenge was petitioner's strategic choice. In the Appellate Division, petitioner had advanced both a facial and an as-applied challenge. (*See* Record in N.Y. Ct. of Appeals at 4090 ¶ 97; Disney Brief in N.Y. App. Div. at 1-2 [July 15, 2021].) But once the case reached the Court of Appeals, petitioner dropped the as-applied challenge.

Petitioner's rationalization that, by contending that former § 208(9)(o) discriminated against interstate commerce "on its face," petitioner was not really mounting a "facial" challenge (Pet. 11-12, 18), is not based on any decision of this Court. Rather, petitioner cites a footnote to a Fifth Circuit decision. (Pet. 11-12, 18.) *See NextEra Energy Cap. Holdings, Inc. v. Lake,* 48 F.4th 306, 321 n.6 (5th Cir. 2022), *cert. denied,* 144 S. Ct. 485 (2023). *NextEra* has not been cited for that proposition by any court. Moreover, the Fifth Circuit's dicta in *NextEra* indicated that the two types of challenge differ because a "facial challenge" would seek to "hold[] the entire law unconstitutional." *Id.* That, of course, is what petitioner sought to do in the Court of Appeals. (*See* Disney Brief to N.Y. Ct. of Appeals at 57 [asking court to "strike the Appellate Division's facially discriminatory construction" of N.Y. Tax Law former § 208(9)(o)(3)].)

Because petitioner did not raise an as-applied challenge in the Court of Appeals, this Court should not grant review to address the point. *See Holly Farms Corp. v. N.L.R.B.*, 517 U.S. 392, 400 n.7 (1996) ("we generally do not address arguments that were not the basis for the decision below" [quotation marks omitted]); *see, e.g., United States v. United Foods, Inc.,* 533 U.S. 405, 416-17 (2001); *Bryan v. United States*, 524 U.S. 184, 199 (1998). Indeed, by failing to brief an as-applied challenge in the Court of Appeals, petitioner abandoned or waived the issue as a matter of state law. *See Matter of Garner v. New York State Dep't of Corr. Servs.*, 10 N.Y.3d 358, 361, 889 N.E.2d 467, 469 (2008) (abandonment); *Bartlett v. Hoppock,* 34 N.Y. 118, 121 (1865) (waiver).

Internal consistency test. To the extent petitioner seeks this Court's review based on application of the internal consistency test by cross-referencing IBM's petition (*see* Pet. 10-11 n.4), petitioner's case does not present a proper vehicle for considering that doctrine.

Although petitioner argued the internal consistency test in the Court of Appeals, it failed to preserve that point for the Court of Appeals' consideration. (*See* Respondent's Br. in N.Y. Ct. of Appeals at 40-41.) In the Appellate Division, prior to its appeal to the Court of Appeals, petitioner did not advance the internal consistency test as an argument for reversal. (*See generally* Disney Br. in N.Y. App. Div.; Disney Reply Br. in N.Y. App. Div. [May 13, 2022].) Indeed, in IBM's case, the Appellate Division pointed out that IBM's arguments differed from petitioner's because IBM relied on the internal and external consistency tests. *Matter of International Bus. Machs. Corp. v. Tax Appeals Tribunal,* 214 A.D.3d 1125, 1126 (3d Dep't 2023), *aff'd sub nom. Matter of Walt Disney Co. v. Tax Appeals Tribunal*, 2024 N.Y. Slip Op. 02127, 2024 WL 1724639 (N.Y. Apr. 23, 2024).

Under New York law, therefore, petitioner failed to preserve any argument based on the internal consistency test. *See Cibro Petroleum Prods., Inc. v. Chu*, 67 N.Y.2d 806, 809, 492 N.E.2d 394, 395-96 (1986) (theory that tax was unconstitutional was not preserved for review where plaintiff failed to argue it in the Appellate Division).

IV. 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. 33 n.7). *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 Phila.,* 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, Ltd. v. Los Angeles County*, 441 U.S. 434, 447-48 (1979) (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).

Moreover, the petitioner in *Zilka* claims that the Pennsylvania Supreme Court misapplied the internal consistency test and identifies a split among the state courts over the application of that test as interpreted by *Wynne*. *See Zilka* Pet. for Cert. at 18-20. As shown above (at 23-24), petitioner failed to preserve a challenge under the internal consistency test.

Petitioner notes that this Court requested the views of the Solicitor General in *Zilka.* (Pet. 33 n.7.) 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).

CONCLUSION

The petition for a writ of certiorari should be denied.

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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 "manufacturer" shall mean a taxpayer which during the taxable year is principally engaged in the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture or commercial fishing. However, the generation and distribution of electricity, the distribution of natural gas, and the production of steam associated with the generation of electricity shall not be qualifying activities for a manufacturer under this subparagraph. Moreover, the combined group shall be considered a "manufacturer" for purposes of this subparagraph only if the combined group during the taxable year is principally engaged in the activities set forth in this paragraph, or any combination thereof. A taxpayer or a combined group shall be "principally engaged" in activities described above if, during the taxable year, more than fifty percent of the gross receipts of the taxpayer or combined group, respectively, are derived from receipts from the sale of goods produced by such activities. In computing a combined group's gross receipts, intercorporate receipts shall be eliminated. A "qualified New York manufacturer" is a manufacturer which has property in New York which is described in clause (A) of subparagraph (i) of paragraph (b) of subdivision twelve of this section and either (I) the adjusted basis of such property for federal income tax purposes at the close of the taxable year is at least one million dollars or (II) all of its real and personal property is located in New York. 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, making 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 services 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.