ORIGINAL

In the
Supreme Court of Ohio

INTERNATIONAL PAPER COMPANY,	:	
	:	Case No. 2014-1614
Appellee,	:	
v.	:	Appeal from Ohio Board of Tax Appeals
JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO	:	BTA Case No. 2010-2230
Appellant.	:	

APPENDIX TO APPELLANT TAX COMMISSIONER'S MERIT BRIEF

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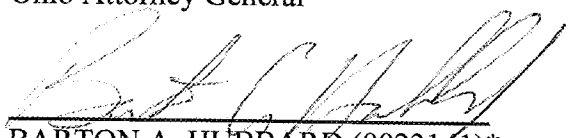
Respectfully submitted,

Michael DeWine
Ohio Attorney General



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Appendix to Appellant Tax Commissioner's Merit Brief was served upon the following by U.S. regular mail on this 29th day of December, 2014:

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In the
Supreme Court of Ohio

INTERNATIONAL PAPER COMPANY,	:	
Appellee,	:	Case No. 14-1614
v.	:	
	:	Appeal from Ohio Board of Tax Appeals
JOSEPH W. TESTA [RICHARD A. LEVIN], TAX COMMISSIONER OF OHIO	:	
	:	Case No. 2010-2230
Appellant.	:	

NOTICE OF APPEAL

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BOARD OF TAX APPEALS
COLUMBUS, OHIO

INTERNATIONAL PAPER COMPANY,	:	
Appellee,	:	Case No. _____
v.	:	
	:	Appeal from Ohio Board of Tax Appeals
JOSEPH W. TESTA [RICHARD A. LEVIN], TAX COMMISSIONER OF OHIO	:	Case No. 2010-2230
Appellant.	:	

NOTICE OF APPEAL

Appellant, Joseph W. Testa, Tax Commissioner of Ohio ("Commissioner"), hereby gives notice of his appeal to the Supreme Court of Ohio from a Decision and Order of the Ohio Board of Tax Appeals ("BTA") journalized in Case No. 2010-2230 on August 19, 2014. A true copy of the Decision and Order of the BTA being appealed is attached hereto as Exhibit A and incorporated herein by reference. This appeal is taken as a matter of right pursuant to Ohio Revised Code ("R.C.") 5717.04.

This appeal involves an Ohio commercial activity tax ("CAT") credit claim made by the appellee, International Paper Company ("International Paper"), pursuant to R.C. 5751.53. Under that statute, the amount of the credit is referred to as the "amortizable amount" and, accordingly, will often be referred to as such in this Notice of Appeal. Further, in the Decision and Order of the BTA, the credit is referred to as "the CAT net operating loss credit."

Pursuant to R.C. 5751.53(D), the Commissioner, through his tax personnel, audited the "amortizable amount" that International Paper had claimed in its "amortizable amount report" as filed with the Commissioner and, based on that audit, adjusted the amount of the claimed credit

from $16,957,077 to $927,513. The Commissioner's personnel notified International Paper's designated tax contact person, Amy Nowlin Childers, of the audit results (adjusting the amortizable amount to $927,513) via email correspondence on May 17, 2010, detailing the various facts and law substantiating the adjusted amortizable amount.

By response email on May 27, 2010, Ms. Childers acknowledged and accepted the Commissioner's adjusted "amortizable amount" of $ 927,513 and requested the Commissioner's personnel to send her a final audit letter. Accordingly the Commissioner's personnel sent via email transmission a final audit letter on June 2, 2010 setting forth an amortizable amount of $927,513. Ms. Childers then requested the Commissioner to delay any issuance of a final determination in the matter until after June 30, 2010.

On June 8, 2010, the Commissioner, through his authorized personnel dated, signed and placed in his public journal, a "final determination" setting forth International Paper's amortizable amount as $927,513. In this way and on that date, the Commissioner thereby made International Paper's final determination available to all members of the public, including International Paper's own tax personnel. The Commissioner's personnel then mailed the final determination to International Paper via certified mail on July 12, 2010.

On timely appeal to the BTA of the Commissioner's final determination pursuant to R.C. 5717.02, following its receipt of the certified mailing of the final determination, International Paper asserted that because the Commissioner's final determination was mailed to International Paper after June 30, 2010, it assertedly was "void ab initio," and that, accordingly, the BTA assertedly should order the Commissioner to grant International Paper an amortizable amount of $16, 957,077, rather than the adjusted amount that the Commissioner had determined on audit of $927,513. In this way, International Paper sought to effectively invalidate the Commissioner's

audit and adjustment, without any showing or evidence by International Paper that the Commissioner's audit determination reducing the amortizable amount to $927,513 from $16,957,077 was substantively erroneous in whole or in part.

The BTA issued its decision and order determining that the Commissioner's final determination was not "properly issued" because the Commissioner's mailing of the final determination occurred after June 30, 2010, in alleged violation of R.C. 5751.53(D). Further, the BTA's decision and order directed the Commissioner to vacate his final determination. Finally, without any analysis or reasoning, the BTA's decision and order, opined that the "practical effect" of the Commissioner's vacating of his final determination would be that the amortizable amount shall be $16,957,077. See the last paragraph of unnumbered page 3 of the BTA's Decision and Order.

Under the facts and circumstances of this case, as established by probative evidence adduced in the proceedings below, including the facts set forth above, the appellant Commissioner complains of the following errors in the Decision and Order of the Board:

1. The BTA erred, as a matter of fact and law, in determining that the Commissioner's final determination was not "properly issued." The BTA should have determined that the Commissioner's final determination was properly and validly issued under R.C. 5751.53(D) and, accordingly, upheld the Commissioner's final determination setting forth an amortizable amount of $927,513 as reasonable and lawful.
2. The BTA erred, as a matter of fact and law, in determining that the Commissioner's final determination should be vacated. The Board should have determined that the Commissioner's final determination was properly and validly issued under R.C. 5751.53(D) and, accordingly, upheld the Commissioner's final determination setting

forth an amortizable amount of $927,513 as reasonable and lawful, rather than ordering the Commissioner to vacate his final determination.

3. Assuming arguendo that the BTA did not err in determining that the Commissioner's final determination was not "properly issued," and that the BTA did not err in ordering the Commissioner to vacate that final determination, the BTA erred, as a matter of fact and law, in stating, without any analysis or reasoning, that the "practical effect" of the Commissioner's vacating of his final determination would be that the amortizable amount shall be $16,957,077, rather than the amortizable amount of $927,513 as determined by the Commissioner pursuant to his audit.

The BTA's statement regarding the "practical effect" of vacating the Commissioner's final determination is unreasonable and unlawful because it directly conflicts with the express language and intent of R.C. 5751.53(D), which provides the Commissioner with the express authority to "audit **and adjust**" the amortizable amount, so long as such audit and adjustment occur on or prior to June 30, 2010, as occurred in this case. R.C. 5751.53(D) provides, in pertinent part, as follows:

> Unless extended by mutual consent, the tax commissioner may, until June 30, 2010, audit the accuracy of the amortizable amount available to each taxpayer that will claim the credit, **and adjust the amortizable amount <u>or</u>**, if appropriate, issue any assessment or final determination, as applicable, necessary to correct any errors found upon audit.

(Emphasis added.)

The BTA's statement regarding the "practical effect" of vacating the Commissioner's final determination effectively would render meaningless the General Assembly's authorization in R.C. 5751.53(D) for the Commissioner to "audit and adjust" the amortizable amount claimed by a taxpayer by June 30, 2010. Under

the BTA's misreading of R.C. 5751.53(D), in order for the Commissioner to reduce the amount of the amortizable amount claimed by a taxpayer on the taxpayer's amortizable amount report, the Commissioner necessarily would be required to "properly issue" a final determination by June 30, 2010, whether or not the Commissioner "audited and adjusted" a taxpayer's claimed amortizable amount prior to June 30, 2010.

Thus, under the BTA's misreading of R.C. 5751.53(D), words "and adjust the amortizable amount" would be unlawfully and unreasonably deleted from the statute. Further, the word "or," thereafter would be unlawfully and unreasonably changed to "and," thereby contravening the General Assembly's express legislative will under which the Commissioner's issuance of final determinations regarding the amount of a CAT claimant's amortizable amount is a statutory option, which the Commissioner may exercise in his discretion, rather than a statutorily mandated one.

Further, the BTA's bare, unexplained and unsubstantiated statement concerning the "practical effect" of vacating the Commissioner's final determination not only contravenes the General Assembly's legislative will by directly conflicting with the express language of R.C. 5751.53(D), it violates the General Assembly's express legislative will in a second fundamental way, by contravening the substantive statutory provisions in R.C. 5751.53 setting forth how the amortizable amount shall be computed. Increasing International Paper's R.C. 5751.53 credit to $16,957,077, would be in complete disregard as to whether International Paper's credit claim accords with the substantive law for computing the credit set forth in R.C. 5751.53.

It is axiomatic that tax reduction statutes, such as the R.C. 5751.53 credit, are a matter of legislative grace and must be strictly construed against the claimed tax reduction. *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904; *Ares, Inc. v. Limbach* (1990), 51 Ohio St.3d 102, 104; *Lakefront Lines, Inc. v. Tracy* (1996), 75 Ohio St.3d 627, 629; *H.R. Options, Inc. v. Wilkins*, 102 Ohio St.3d 1214, 2004-Ohio-2085, ¶ 2; *In re Estate of Roberts* (2002), 94 Ohio St.3d 311, 314.

In sum, assuming arguendo that the BTA did not err in determining that the Commissioner's final determination was not "properly issued," and that the BTA did not err in ordering the Commissioner to vacate that final determination, the "practical effect" of the Commissioner's vacating of his final determination would be that the reasonableness and lawfulness of the Commissioner's audit and adjustment of International Paper's amortizable amount would be determined through the statutory procedures generally applicable under the CAT chapter of the Revised Code, R.C. Chapter 5751.

Specifically, to the extent that International Paper's filed CAT returns claim an amortizable amount higher than the amortizable amount of $927,513, the Commissioner may issue assessments based on reducing the amortizable amount to $927,513, which International Paper may then timely challenge by the filing of petitions for reassessment. Conversely, to the extent that International Paper, in reporting is CAT liability has utilized the $927,513 amortizable amount as audited and adjusted by the Commissioner, International Paper may timely file refund claims with the Commissioner, in the event that International Paper believes that the

Commissioner's computation of the amortizable amount is substantively erroneous under the computation provisions of R.C. 5751.53.

Respectfully submitted,

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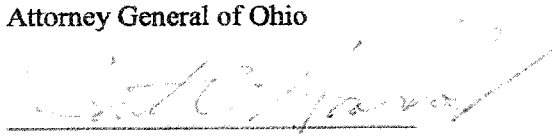

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OHIO BOARD OF TAX APPEALS

INTERNATIONAL PAPER COMPANY, (et. al.),)	CASE NO(S). 2010-2230
Appellant(s),)	(COMMERCIAL ACTIVITY TAX)
vs.)	DECISION AND ORDER
RICHARD A. LEVIN, TAX COMMISSIONER OF OHIO, (et. al.),)	
Appellee(s).)	

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COLUMBUS, OH 43215

Entered Tuesday, August 19, 2014

Mr. Williamson, Mr. Johrendt, and Mr. Harbarger concur.

Appellant filed the present appeal to challenge a final determination issued by the Tax Commissioner in which he rejected appellant's claimed credit against its commercial activity tax ("CAT") liability beginning in tax year 2010. We now consider this matter upon appellant's notice of appeal, the transcript certified by the commissioner pursuant to R.C. 5717.02 ("S.T."), the record of the hearing convened before this board ("H.R."), and the written argument submitted on behalf of the parties.

For many businesses, the CAT served to replace tax imposed on personal property located and used in business in Ohio, see, generally, R.C. Chapter 5719, and tax imposed on the privilege of exercising a corporate franchise within the state. See, generally, R.C. 5733.01(G)(1) and (2). As for the corporate franchise tax, businesses not having positive net income accumulated net operating losses ("NOLs") which could be carried forward and deducted against future corporate franchise tax liability, recorded as a deferred tax asset on their financial statements. In recognizing that Ohio's transition to the CAT would result in loss of the financial value of the allowed NOL carry-forward, the General Assembly established a one-time CAT credit that allowed a percentage conversion of this corporate franchise NOL tax credit to serve as a credit against future CAT liability. In order to claim this conversion credit, a qualifying taxpayer, i.e., one with $50 million in unused franchise NOL carryforward, was required to file a report "[n]ot later

than June 30, 2006," R.C. 5751.53(D), disclosing the value of its deferred tax assets as of its taxable year ending in 2004 which, with certain specific adjustments, was referred to as the "amortizable amount." See, generally, R.C. 5751.53(A)(9). R.C. 5751.53(D) further provided that "[u]nless extended by mutual consent, the tax commissioner may, until June 30, 2010, audit the accuracy of the amortizable amount available to each taxpayer that will claim the credit, and adjust the amortizable amount or, if appropriate, issue any assessment or final determination, as applicable, necessary to correct any errors found upon audit." Once approved, use of the credit is then spread out over a period extending from calendar years 2010 through 2030.

In the present case, appellant filed its amortizable amount report claiming a total amortizable amount of $16,957,077. Appellant was notified by the Ohio Department of Taxation ("ODT") of its intent to conduct a corporation franchise tax audit, indicating that "[t]he focus of the examination would be the Ohio Franchise Tax Net Operating Loss ("NOL") reported on the return and used for the Commercial Activity Tax Amortizable Amount Report," and through this letter a variety of information was requested. Ex. D. By letter dated March 18, 2010, ODT noticed appellant of its final proposed audit results which indicated that the claimed credit was being denied in full, based upon the adjustments ODT made to appellant's calculation of the "other net deferred tax items apportioned to Ohio," i.e., part of the formula for calculating the CAT credit for unused franchise tax net operating losses. Ex. A. Based upon additional information provided in further discussions between ODT and appellant, the final proposed audit results were adjusted, as reflected in a letter dated June 2, 2010, indicating a final credit of $927,513. Ex. B. Thereafter, such results were set forth in a final determination from the Tax Commissioner, dated June 8, 2010, but mailed on July 12, 2010 and received by appellant on July 14, 2010. Ex. 2; H.R. at 15; S.T. at 59.

The findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. It is incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut the presumption and establish a right to the relief requested. *Belgrade Gardens, Inc. v. Kosydar* (1974), 38 Ohio St.2d 135; *Ohio Fast Freight v. Porterfield* (1972), 29 Ohio St.2d 69; *National Tube v. Glander* (1952), 157 Ohio St. 407. The taxpayer is assigned the burden of showing in what manner and to what extent the Tax Commissioner's determination is in error. *Federated Department Stores v. Lindley* (1983), 5 Ohio St.3d 213. See *Nusseibeh v. Zaino*, 98 Ohio St.3d 292, 2003-Ohio-855.

Appellant contends that the commissioner was prohibited from issuing the subject final determination because he did not act within the period prescribed by R.C. 5751.53(D), i.e., that he did not "issue" the final determination by June 30, 2010, and the parties had not agreed to extend such deadline. We agree.

"'In construing a statute, a court's paramount concern is the legislative intent in enacting the statute. *** In determining legislative intent, the court first looks to the language in the statute and the purpose to be accomplished.' *State v. S.R.* (1992), 63 Ohio St.3d 590, 594-595 ***. Words used in a statute must be taken in their usual, normal or customary meaning. R.C. 1.42; *Indep. Ins. Agents of Ohio, Inc. v. Fabe* (1992), 63 Ohio St.3d 310, 314 ***. In construing a statute, it is the duty of the court to give effect to the words used and not to insert words not used. *S.R.*, supra, 63 Ohio St.3d at 595 ***. 'Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to apply rules of statutory interpretation. *** However, where a statute is found to be subject to various interpretations, a court called upon to interpret its provisions may invoke rules of statutory construction in order to arrive at legislative intent.' *Cline v. Ohio Bur. of Motor Vehicles* (1991), 61 Ohio St.3d 93, 96 ***." *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.* (1994), 69 Ohio St.3d 217, 220. (Parallel citations omitted.)

A plain reading of the statute under consideration, R.C. 5751.53(D), indicates that the commissioner, in considering the amortizable amount claimed by a CAT taxpayer, had until June 30, 2010, to audit and adjust the amortizable amount, or, if necessary, issue an assessment or final determination to correct any errors found through the audit. Thus, the application of the statute to the facts herein turns on what constitutes the date of "issuance" of the final determination. The commissioner contends that the subject

final determination was issued on June 8, 2010, the date upon which it was journalized. However, the record establishes that the final determination was deposited in the mail on July 12, 2010, which the appellant contends is the date of issuance.

This board previously acknowledged the statutory deadline for the commissioner to act under R.C. 5751.53(D) in *Navistar, Inc. v. Levin* (Dec. 31, 2013), BTA No. 2010-575, unreported, recognizing that "[b]oth the appellant and the commissioner *were required to adhere to certain statutory deadlines*, i.e., the former to file the requisite report prior to July 1, 2006, and the latter to audit the accuracy of the amount of the credit claimed, absent agreed extension, and issue any assessment or final determination by June 30, 2010." (Emphasis added.) The Supreme Court, in *Carstab Corp. v. Limbach* (1988), 40 Ohio St.3d 89, in considering whether the commissioner had issued a sales tax assessment in a timely fashion, analyzed the commissioner's statutory duties, concluding that pursuant to R.C. 5703.05, "[d]ivision (H) empowers her to make all assessments authorized by law, and division (L) requires her to maintain a public journal in which she must keep a record of all actions taken by her relating to assessments and the reasons therefor. Accordingly, she "makes" an assessment when she journalizes it because this is the act that concludes her audit activity and by which she places the assessment on the public record." Id. at 90. The court continued, "under R.C. 5739.13 and 5741.13, the commissioner must give written notice of the assessment to the assessee. She may serve it on the assessee personally or by registered or certified mail. This giving of notice is the 'issuing' of the assessment contemplated in R.C. 5739.16 and 5741.16; that is, the commissioner 'issues' notice of the assessment when she 'gives' notice to the assesse." Id. at 90. Indeed, to "issue" contemplates "[t]o be put forth officially" or "[t]o send out or distribute officially." Black's Law Dictionary (8th Ed.2004) at 850.

The final determination in question was not sent out officially until after the June 30, 2010 statutory deadline, and, as such, was barred pursuant to the provisions of R.C. 5751.53(D). Accordingly, this matter is hereby remanded to the commissioner with instructions to vacate the previously issued final determination under consideration herein; the practical effect of such order is that appellant's amortizable amount for the CAT net operating loss credit shall be $16,957,077, as originally claimed by appellant, since the commissioner's final determination, concluding otherwise, was never properly issued.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Williamson		
Mr. Johrendt		
Mr. Harbarger		

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.

A.J. Groeber, Board Secretary

BEFORE THE BOARD OF TAX APPEALS
STATE OF OHIO

INTERNATIONAL PAPER COMPANY,	:	
Appellee,	:	Case No. _____
v.	:	Appeal from Ohio Board of Tax Appeals
JOSEPH W. TESTA [RICHARD A. LEVIN], TAX COMMISSIONER OF OHIO	:	Case No. 2010-2230
Appellant	:	

PRAECIPE

TO THE OHIO BOARD OF TAX APPEALS

Demand is hereby made that the Ohio Board of Tax Appeals ("Board") prepare, transmit and file with the Supreme Court of Ohio a certified transcript of the records and proceedings of the Board pertaining to its Order in the above-styled matter; including in said certified transcript, the Board's Order, the original papers in the case or a transcript thereof, and all evidence with originals or copies of all exhibits as adduced in said proceeding considered by the Board in making its Order.

Respectfully submitted,

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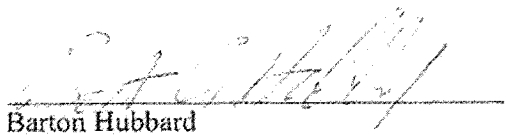
FILED
SEP 18 2014
BOARD OF TAX APPEALS
COLUMBUS, OHIO

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Notice of Appeal and Praecipe were filed by hand-delivery with the Ohio Supreme Court, 65 South Front St., Columbus, Ohio 43215, and the Ohio Board of Tax Appeals, 30 E. Broad St., 24th Floor, Columbus, Ohio 43215, and were served upon Richard C. Farrin, Zaino, Hall & Farrin LLC, 41 S. High Street, Suite 3600, Columbus, Ohio 43215, by certified mail return receipt requested this 18th day of September, 2014.



Barton Hubbard

5705.03 Authorization to levy taxes - collection.

(A) The taxing authority of each subdivision may levy taxes annually, subject to the limitations of sections 5705.01 to 5705.47 of the Revised Code, on the real and personal property within the subdivision for the purpose of paying the current operating expenses of the subdivision and acquiring or constructing permanent improvements. The taxing authority of each subdivision and taxing unit shall, subject to the limitations of such sections, levy such taxes annually as are necessary to pay the interest and sinking fund on and retire at maturity the bonds, notes, and certificates of indebtedness of such subdivision and taxing unit, including levies in anticipation of which the subdivision or taxing unit has incurred indebtedness.

(B)

(1) When a taxing authority determines that it is necessary to levy a tax outside the ten-mill limitation for any purpose authorized by the Revised Code, the taxing authority shall certify to the county auditor a resolution or ordinance requesting that the county auditor certify to the taxing authority the total current tax valuation of the subdivision, and the number of mills required to generate a specified amount of revenue, or the dollar amount of revenue that would be generated by a specified number of mills. The resolution or ordinance shall state the purpose of the tax, whether the tax is an additional levy or a renewal or a replacement of an existing tax, and the section of the Revised Code authorizing submission of the question of the tax. If a subdivision is located in more than one county, the county auditor shall obtain from the county auditor of each other county in which the subdivision is located the current tax valuation for the portion of the subdivision in that county. The county auditor shall issue the certification to the taxing authority within ten days after receiving the taxing authority's resolution or ordinance requesting it.

(2) When considering the tangible personal property component of the tax valuation of the subdivision, the county auditor shall take into account the assessment percentages prescribed in section 5711.22 of the Revised Code. The tax commissioner may issue rules, orders, or instructions directing how the assessment percentages must be utilized.

(3) If, upon receiving the certification from the county auditor, the taxing authority proceeds with the submission of the question of the tax to electors, the taxing authority shall certify its resolution or ordinance, accompanied by a copy of the county auditor's certification, to the proper county board of elections in the manner and within the time prescribed by the section of the Revised Code governing submission of the question, and shall include with its certification the rate of the tax levy, expressed in mills for each one dollar in tax valuation as estimated by the county auditor. The county board of elections shall not submit the question of the tax to electors unless a copy of the county auditor's certification accompanies the resolution or ordinance the taxing authority certifies to the board. Before requesting a taxing authority to submit a tax levy, any agency or authority authorized to make that request shall first request the certification from the county auditor provided under this section.

(4) This division is supplemental to, and not in derogation of, any similar requirement governing the certification by the county auditor of the tax valuation of a subdivision or necessary tax rates for the purposes of the submission of the question of a tax in excess of the ten-mill limitation, including sections 133.18 and 5705.195 of the Revised Code.

(C) All taxes levied on property shall be extended on the tax duplicate by the county auditor of the county in which the property is located, and shall be collected by the county treasurer of such county in the same manner and under the same laws and rules as are prescribed for the assessment and collection of county taxes. The proceeds of any tax levied by or for any subdivision when received by its fiscal officer shall be

deposited in its treasury to the credit of the appropriate fund.

Effective Date: 12-21-1998; 03-30-2006

Appx. 16

5717.02 Appeal from final determination by tax commissioner or county auditor - procedure - hearing.

(A) Except as otherwise provided by law, appeals from final determinations by the tax commissioner of any preliminary, amended, or final tax assessments, reassessments, valuations, determinations, findings, computations, or orders made by the commissioner may be taken to the board of tax appeals by the taxpayer, by the person to whom notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by the commissioner is required by law to be given, by the director of budget and management if the revenues affected by that decision would accrue primarily to the state treasury, or by the county auditors of the counties to the undivided general tax funds of which the revenues affected by that decision would primarily accrue. Appeals from the redetermination by the director of development services under division (B) of section 5709.64 or division (A) of section 5709.66 of the Revised Code may be taken to the board of tax appeals by the enterprise to which notice of the redetermination is required by law to be given. Appeals from a decision of the tax commissioner or county auditor concerning an application for a property tax exemption may be taken to the board of tax appeals by the applicant or by a school district that filed a statement concerning that application under division (C) of section 5715.27 of the Revised Code. Appeals from a redetermination by the director of job and family services under section 5733.42 of the Revised Code may be taken by the person to which the notice of the redetermination is required by law to be given under that section.

(B) The appeals shall be taken by the filing of a notice of appeal with the board, and with the tax commissioner if the tax commissioner's action is the subject of the appeal, with the county auditor if the county auditor's action is the subject of the appeal, with the director of development services if that director's action is the subject of the appeal, or with the director of job and family services if that director's action is the subject of the appeal. The notice of appeal shall be filed within sixty days after service of the notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by the commissioner, property tax exemption determination by the commissioner or the county auditor, or redetermination by the director has been given as provided in section 5703.37, 5709.64, 5709.66, or 5733.42 of the Revised Code. The notice of appeal may be filed in person or by certified mail, express mail, facsimile transmission, electronic transmission or by authorized delivery service. If the notice of appeal is filed by certified mail, express mail, or authorized delivery service as provided in section 5703.056 of the Revised Code, the date of the United States postmark placed on the sender's receipt by the postal service or the date of receipt recorded by the authorized delivery service shall be treated as the date of filing. If notice of appeal is filed by facsimile transmission or electronic transmission, the date and time the notice is received by the board shall be the date and time reflected on a timestamp provided by the board's electronic system, and the appeal shall be considered filed with the board on the date reflected on that timestamp. Any timestamp provided by another computer system or electronic submission device shall not affect the time and date the notice is received by the board. The notice of appeal shall have attached to it and incorporated in it by reference a true copy of the notice sent by the commissioner, county auditor, or director to the taxpayer, enterprise, or other person of the final determination or redetermination complained of, but failure to attach a copy of that notice and to incorporate it by reference in the notice of appeal does not invalidate the appeal.

(C) A notice of appeal shall contain a short and plain statement of the claimed errors in the determination or redetermination of the tax commissioner, county auditor, or director showing that the appellant is entitled to relief and a demand for the relief to which the appellant claims to be entitled. An appellant may amend the notice of appeal once as a matter of course within sixty days after the certification of the

transcript. Otherwise, an appellant may amend the notice of appeal only after receiving leave of the board or the written consent of each adverse party. Leave of the board shall be freely given when justice so requires.

(D) Upon the filing of a notice of appeal, the tax commissioner, county auditor, or the director, as appropriate, shall certify to the board a transcript of the record of the proceedings before the commissioner, auditor, or director, together with all evidence considered by the commissioner, auditor, or director in connection with the proceedings. Those appeals or applications may be heard by the board at its office in Columbus or in the county where the appellant resides, or it may cause its examiners to conduct the hearings and to report to it their findings for affirmation or rejection.

(E) The board may order the appeal to be heard upon the record and the evidence certified to it by the commissioner, county auditor, or director, but upon the application of any interested party the board shall order the hearing of additional evidence, and it may make an investigation concerning the appeal that it considers proper. An appeal may proceed pursuant to section 5703.021 of the Revised Code on the small claims docket if the appeal qualifies under that section.

Amended by 130th General Assembly File No. 37, HB 138, §1, eff. 10/11/2013.

Amended by 129th General AssemblyFile No.64, HB 225, §1, eff. 3/22/2012.

Effective Date: 09-06-2002

Related Legislative Provision: *See 129th General AssemblyFile No.64, HB 225, §4*

5717.04 Appeal from certain decisions of board of tax appeals to supreme court; parties who may appeal; certification.

This section does not apply to any decision and order of the board made pursuant to section 5703.021 of the Revised Code. Any such decision and order shall be conclusive upon all parties and may not be appealed.

The proceeding to obtain a reversal, vacation, or modification of a decision of the board of tax appeals shall be by appeal to the supreme court or the court of appeals for the county in which the property taxed is situate or in which the taxpayer resides. If the taxpayer is a corporation, then the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the supreme court or to the court of appeals for the county in which the property taxed is situate, or the county of residence of the agent for service of process, tax notices, or demands, or the county in which the corporation has its principal place of business. In all other instances, the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the court of appeals for Franklin county.

Appeals from decisions of the board determining appeals from decisions of county boards of revision may be instituted by any of the persons who were parties to the appeal before the board of tax appeals, by the person in whose name the property involved in the appeal is listed or sought to be listed, if such person was not a party to the appeal before the board of tax appeals, or by the county auditor of the county in which the property involved in the appeal is located.

Appeals from decisions of the board of tax appeals determining appeals from final determinations by the tax commissioner of any preliminary, amended, or final tax assessments, reassessments, valuations, determinations, findings, computations, or orders made by the commissioner may be instituted by any of the persons who were parties to the appeal or application before the board, by the person in whose name the property is listed or sought to be listed, if the decision appealed from determines the valuation or liability of property for taxation and if any such person was not a party to the appeal or application before the board, by the taxpayer or any other person to whom the decision of the board appealed from was by law required to be sent, by the director of budget and management if the revenue affected by the decision of the board appealed from would accrue primarily to the state treasury, by the county auditor of the county to the undivided general tax funds of which the revenues affected by the decision of the board appealed from would primarily accrue, or by the tax commissioner.

Appeals from decisions of the board upon all other appeals or applications filed with and determined by the board may be instituted by any of the persons who were parties to such appeal or application before the board, by any persons to whom the decision of the board appealed from was by law required to be sent, or by any other person to whom the board sent the decision appealed from, as authorized by section 5717.03 of the Revised Code.

Such appeals shall be taken within thirty days after the date of the entry of the decision of the board on the journal of its proceedings, as provided by such section, by the filing by appellant of a notice of appeal with the court to which the appeal is taken and the board. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten days of the date on which the first notice of appeal was filed or within the time otherwise prescribed in this section, whichever is later. A notice of appeal shall set forth the decision of the board appealed from and the errors therein complained of. Proof of the filing of such notice with the board shall be filed with the court to which the appeal is being taken. The court in which notice of appeal is first filed shall have exclusive jurisdiction of the appeal.

In all such appeals the commissioner or all persons to whom the decision of the board appealed from is required by such section to be sent, other than the appellant, shall be made appellees. Unless waived, notice of the appeal shall be served upon all appellees by certified mail. The prosecuting attorney shall represent the county auditor in any such appeal in which the auditor is a party.

The board, upon written demand filed by an appellant, shall within thirty days after the filing of such demand file with the court to which the appeal is being taken a certified transcript of the record of the proceedings of the board pertaining to the decision complained of and the evidence considered by the board in making such decision.

If upon hearing and consideration of such record and evidence the court decides that the decision of the board appealed from is reasonable and lawful it shall affirm the same, but if the court decides that such decision of the board is unreasonable or unlawful, the court shall reverse and vacate the decision or modify it and enter final judgment in accordance with such modification.

The clerk of the court shall certify the judgment of the court to the board, which shall certify such judgment to such public officials or take such other action in connection therewith as is required to give effect to the decision. The "taxpayer" includes any person required to return any property for taxation.

Any party to the appeal shall have the right to appeal from the judgment of the court of appeals on questions of law, as in other cases.

Amended by 130th General Assembly File No. 37, HB 138, §1, eff. 10/11/2013.

Amended by 128th General AssemblyFile No.9, HB 1, §101.01, eff. 10/16/2009.

Effective Date: 10-05-1987

5733.04 Corporation franchise tax definitions.

As used in this chapter:

(A) "Issued and outstanding shares of stock" applies to nonprofit corporations, as provided in section 5733.01 of the Revised Code, and includes, but is not limited to, membership certificates and other instruments evidencing ownership of an interest in such nonprofit corporations, and with respect to a financial institution that does not have capital stock, "issued and outstanding shares of stock" includes, but is not limited to, ownership interests of depositors in the capital employed in such an institution.

(B) "Taxpayer" means a corporation subject to the tax imposed by section 5733.06 of the Revised Code.

(C) "Resident" means a corporation organized under the laws of this state.

(D) "Commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed.

(E) "Taxable year" means the period prescribed by division (A) of section 5733.031 of the Revised Code upon the net income of which the value of the taxpayer's issued and outstanding shares of stock is determined under division (B) of section 5733.05 of the Revised Code or the period prescribed by division (A) of section 5733.031 of the Revised Code that immediately precedes the date as of which the total value of the corporation is determined under division (A) or (C) of section 5733.05 of the Revised Code.

(F) "Tax year" means the calendar year in and for which the tax imposed by section 5733.06 of the Revised Code is required to be paid.

(G) "Internal Revenue Code" means the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C.A. 1 , as amended.

(H) "Federal income tax" means the income tax imposed by the Internal Revenue Code.

(I) Except as provided in section 5733.058 of the Revised Code, "net income" means the taxpayer's taxable income before operating loss deduction and special deductions, as required to be reported for the taxpayer's taxable year under the Internal Revenue Code, subject to the following adjustments:

(1)

(a) Deduct any net operating loss incurred in any taxable years ending in 1971 or thereafter, but exclusive of any net operating loss incurred in taxable years ending prior to January 1, 1971. This deduction shall not be allowed in any tax year commencing before December 31, 1973, but shall be carried over and allowed in tax years commencing after December 31, 1973, until fully utilized in the next succeeding taxable year or years in which the taxpayer has net income, but in no case for more than the designated carryover period as described in division (I)(1)(b) of this section. The amount of such net operating loss, as determined under the allocation and apportionment provisions of section 5733.051 and division (B) of section 5733.05 of the Revised Code for the year in which the net operating loss occurs, shall be deducted from net income, as determined under the allocation and apportionment provisions of section 5733.051 and division (B) of section 5733.05 of the Revised Code, to the extent necessary to reduce net income to zero with the remaining unused portion of the deduction, if any, carried forward to the remaining years of the designated carryover period as described in division (I)(1)(b) of this section, or until fully utilized, whichever occurs first.

(b) For losses incurred in taxable years ending on or before December 31, 1981, the designated carryover period shall be the five consecutive taxable years after the taxable year in which the net operating loss occurred. For losses incurred in taxable years ending on or after January 1, 1982, and beginning before August 6, 1997, the designated carryover period shall be the fifteen consecutive taxable years after the taxable year in which the net operating loss occurs. For losses incurred in taxable years beginning on or after August 6, 1997, the designated carryover period shall be the twenty consecutive taxable years after the taxable year in which the net operating loss occurs.

(c) The tax commissioner may require a taxpayer to furnish any information necessary to support a claim for deduction under division (I)(1)(a) of this section and no deduction shall be allowed unless the information is furnished.

(2) Deduct any amount included in net income by application of section 78 or 951 of the Internal Revenue Code, amounts received for royalties, technical or other services derived from sources outside the United States, and dividends received from a subsidiary, associate, or affiliated corporation that neither transacts any substantial portion of its business nor regularly maintains any substantial portion of its assets within the United States. For purposes of determining net foreign source income deductible under division (I)(2) of this section, the amount of gross income from all such sources other than dividend income and income derived by application of section 78 or 951 of the Internal Revenue Code shall be reduced by:

(a) The amount of any reimbursed expenses for personal services performed by employees of the taxpayer for the subsidiary, associate, or affiliated corporation;

(b) Ten per cent of the amount of royalty income and technical assistance fees;

(c) Fifteen per cent of the amount of all other income.

The amounts described in divisions (I)(2)(a) to (c) of this section are deemed to be the expenses attributable to the production of deductible foreign source income unless the taxpayer shows, by clear and convincing evidence, less actual expenses, or the tax commissioner shows, by clear and convincing evidence, more actual expenses.

(3) Add any loss or deduct any gain resulting from the sale, exchange, or other disposition of a capital asset, or an asset described in section 1231 of the Internal Revenue Code, to the extent that such loss or gain occurred prior to the first taxable year on which the tax provided for in section 5733.06 of the Revised Code is computed on the corporation's net income. For purposes of division (I)(3) of this section, the amount of the prior loss or gain shall be measured by the difference between the original cost or other basis of the asset and the fair market value as of the beginning of the first taxable year on which the tax provided for in section 5733.06 of the Revised Code is computed on the corporation's net income. At the option of the taxpayer, the amount of the prior loss or gain may be a percentage of the gain or loss, which percentage shall be determined by multiplying the gain or loss by a fraction, the numerator of which is the number of months from the acquisition of the asset to the beginning of the first taxable year on which the fee provided in section 5733.06 of the Revised Code is computed on the corporation's net income, and the denominator of which is the number of months from the acquisition of the asset to the sale, exchange, or other disposition of the asset. The adjustments described in this division do not apply to any gain or loss where the gain or loss is recognized by a qualifying taxpayer, as defined in section 5733.0510 of the Revised Code, with respect to a qualifying taxable event, as defined in that section.

(4) Deduct the dividend received deduction provided by section 243 of the Internal Revenue Code.

(5) Deduct any interest or interest equivalent on public obligations and purchase obligations to the extent included in federal taxable income. As used in divisions (I)(5) and (6) of this section, "public obligations," "purchase obligations," and "interest or interest equivalent" have the same meanings as in section 5709.76 of the Revised Code.

(6) Add any loss or deduct any gain resulting from the sale, exchange, or other disposition of public obligations to the extent included in federal taxable income.

(7) To the extent not otherwise allowed, deduct any dividends or distributions received by a taxpayer from a public utility, excluding an electric company and a combined company, and, for tax years 2005 and thereafter, a telephone company, if the taxpayer owns at least eighty per cent of the issued and outstanding common stock of the public utility. As used in division (I)(7) of this section, "public utility" means a public utility as defined in Chapter 5727. of the Revised Code, whether or not the public utility is doing business in the state.

(8) To the extent not otherwise allowed, deduct any dividends received by a taxpayer from an insurance company, if the taxpayer owns at least eighty per cent of the issued and outstanding common stock of the insurance company. As used in division (I)(8) of this section, "insurance company" means an insurance company that is taxable under Chapter 5725. or 5729. of the Revised Code.

(9) Deduct expenditures for modifying existing buildings or structures to meet American national standards institute standard A-117.1-1961 (R-1971), as amended; provided, that no deduction shall be allowed to the extent that such deduction is not permitted under federal law or under rules of the tax commissioner. Those deductions as are allowed may be taken over a period of five years. The tax commissioner shall adopt rules under Chapter 119. of the Revised Code establishing reasonable limitations on the extent that expenditures for modifying existing buildings or structures are attributable to the purpose of making the buildings or structures accessible to and usable by physically handicapped persons.

(10) Deduct the amount of wages and salaries, if any, not otherwise allowable as a deduction but that would have been allowable as a deduction in computing federal taxable income before operating loss deduction and special deductions for the taxable year, had the targeted jobs credit allowed and determined under sections 38, 51, and 52 of the Internal Revenue Code not been in effect.

(11) Deduct net interest income on obligations of the United States and its territories and possessions or of any authority, commission, or instrumentality of the United States to the extent the laws of the United States prohibit inclusion of the net interest for purposes of determining the value of the taxpayer's issued and outstanding shares of stock under division (B) of section 5733.05 of the Revised Code. As used in division (I)(11) of this section, "net interest" means interest net of any expenses taken on the federal income tax return that would not have been allowed under section 265 of the Internal Revenue Code if the interest were exempt from federal income tax.

(12)

(a) Except as set forth in division (I)(12)(d) of this section, to the extent not included in computing the taxpayer's federal taxable income before operating loss deduction and special deductions, add gains and deduct losses from direct or indirect sales, exchanges, or other dispositions, made by a related entity who is not a taxpayer, of the taxpayer's indirect, beneficial, or constructive investment in the stock or debt of another entity, unless the gain or loss has been included in computing the federal taxable income before operating loss deduction and special deductions of another taxpayer with a more closely related investment in the stock or debt of the other entity. The amount of gain added or loss deducted shall not

exceed the product obtained by multiplying such gain or loss by the taxpayer's proportionate share, directly, indirectly, beneficially, or constructively, of the outstanding stock of the related entity immediately prior to the direct or indirect sale, exchange, or other disposition.

(b) Except as set forth in division (I)(12)(e) of this section, to the extent not included in computing the taxpayer's federal taxable income before operating loss deduction and special deductions, add gains and deduct losses from direct or indirect sales, exchanges, or other dispositions made by a related entity who is not a taxpayer, of intangible property other than stock, securities, and debt, if such property was owned, or used in whole or in part, at any time prior to or at the time of the sale, exchange, or disposition by either the taxpayer or by a related entity that was a taxpayer at any time during the related entity's ownership or use of such property, unless the gain or loss has been included in computing the federal taxable income before operating loss deduction and special deductions of another taxpayer with a more closely related ownership or use of such intangible property. The amount of gain added or loss deducted shall not exceed the product obtained by multiplying such gain or loss by the taxpayer's proportionate share, directly, indirectly, beneficially, or constructively, of the outstanding stock of the related entity immediately prior to the direct or indirect sale, exchange, or other disposition.

(c) As used in division (I)(12) of this section, "related entity" means those entities described in divisions (I)(12)(c)(i) to (iii) of this section:

(i) An individual stockholder, or a member of the stockholder's family enumerated in section 318 of the Internal Revenue Code, if the stockholder and the members of the stockholder's family own, directly, indirectly, beneficially, or constructively, in the aggregate, at least fifty per cent of the value of the taxpayer's outstanding stock;

(ii) A stockholder, or a stockholder's partnership, estate, trust, or corporation, if the stockholder and the stockholder's partnerships, estates, trusts, and corporations own directly, indirectly, beneficially, or constructively, in the aggregate, at least fifty per cent of the value of the taxpayer's outstanding stock;

(iii) A corporation, or a party related to the corporation in a manner that would require an attribution of stock from the corporation to the party or from the party to the corporation under division (I)(12)(c)(iv) of this section, if the taxpayer owns, directly, indirectly, beneficially, or constructively, at least fifty per cent of the value of the corporation's outstanding stock.

(iv) The attribution rules of section 318 of the Internal Revenue Code apply for purposes of determining whether the ownership requirements in divisions (I)(12)(c)(i) to (iii) of this section have been met.

(d) For purposes of the adjustments required by division (I)(12)(a) of this section, the term "investment in the stock or debt of another entity" means only those investments where the taxpayer and the taxpayer's related entities directly, indirectly, beneficially, or constructively own, in the aggregate, at any time during the twenty-four month period commencing one year prior to the direct or indirect sale, exchange, or other disposition of such investment at least fifty per cent or more of the value of either the outstanding stock or such debt of such other entity.

(e) For purposes of the adjustments required by division (I)(12)(b) of this section, the term "related entity" excludes all of the following:

(i) Foreign corporations as defined in section 7701 of the Internal Revenue Code;

(ii) Foreign partnerships as defined in section 7701 of the Internal Revenue Code;

(iii) Corporations, partnerships, estates, and trusts created or organized in or under the laws of the Commonwealth of Puerto Rico or any possession of the United States;

(iv) Foreign estates and foreign trusts as defined in section 7701 of the Internal Revenue Code.

The exclusions described in divisions (I)(12)(e)(i) to (iv) of this section do not apply if the corporation, partnership, estate, or trust is described in any one of divisions (C)(1) to (5) of section 5733.042 of the Revised Code.

(f) Nothing in division (I)(12) of this section shall require or permit a taxpayer to add any gains or deduct any losses described in divisions (I)(12)(f)(i) and (ii) of this section:

(i) Gains or losses recognized for federal income tax purposes by an individual, estate, or trust without regard to the attribution rules described in division (I)(12)(c) of this section;

(ii) A related entity's gains or losses described in division (I)(12)(b) of this section if the taxpayer's ownership of or use of such intangible property was limited to a period not exceeding nine months and was attributable to a transaction or a series of transactions executed in accordance with the election or elections made by the taxpayer or a related entity pursuant to section 338 of the Internal Revenue Code.

(13) Any adjustment required by section 5733.042 of the Revised Code.

(14) Add any amount claimed as a credit under section 5733.0611 of the Revised Code to the extent that such amount satisfies either of the following:

(a) It was deducted or excluded from the computation of the corporation's taxable income before operating loss deduction and special deductions as required to be reported for the corporation's taxable year under the Internal Revenue Code;

(b) It resulted in a reduction of the corporation's taxable income before operating loss deduction and special deductions as required to be reported for any of the corporation's taxable years under the Internal Revenue Code.

(15) Deduct the amount contributed by the taxpayer to an individual development account program established by a county department of job and family services pursuant to sections 329.11 to 329.14 of the Revised Code for the purpose of matching funds deposited by program participants. On request of the tax commissioner, the taxpayer shall provide any information that, in the tax commissioner's opinion, is necessary to establish the amount deducted under division (I)(15) of this section.

(16) Any adjustment required by section 5733.0510 or 5733.0511 of the Revised Code.

(17)

(a)

(i) Add five-sixths of the amount of depreciation expense allowed under subsection (k) of section 168 of the Internal Revenue Code, including a person's proportionate or distributive share of the amount of depreciation expense allowed by that subsection to any pass-through entity in which the person has direct or indirect ownership.

(ii) Add five-sixths of the amount of qualifying section 179 depreciation expense, including a person's proportionate or distributive share of the amount of qualifying section 179 depreciation expense allowed to

any pass-through entity in which the person has a direct or indirect ownership. For the purposes of this division, "qualifying section 179 depreciation expense" means the difference between (I) the amount of depreciation expense directly or indirectly allowed to the taxpayer under section 179 of the Internal Revenue Code, and (II) the amount of depreciation expense directly or indirectly allowed to the taxpayer under section 179 of the Internal Revenue Code as that section existed on December 31, 2002.

The tax commissioner, under procedures established by the commissioner, may waive the add-backs related to a pass-through entity if the person owns, directly or indirectly, less than five per cent of the pass-through entity.

(b) Nothing in division (I)(17) of this section shall be construed to adjust or modify the adjusted basis of any asset.

(c) To the extent the add-back is attributable to property generating income or loss allocable under section 5733.051 of the Revised Code, the add-back shall be allocated to the same location as the income or loss generated by that property. Otherwise, the add-back shall be apportioned, subject to division (B)(2)(d) of section 5733.05 of the Revised Code.

(18)

(a) If a person is required to make the add-back under division (I)(17)(a) of this section for a tax year, the person shall deduct one-fifth of the amount added back for each of the succeeding five tax years.

(b) If the amount deducted under division (I)(18)(a) of this section is attributable to an add-back allocated under division (I)(17)(c) of this section, the amount deducted shall be allocated to the same location. Otherwise, the amount shall be apportioned using the apportionment factors for the taxable year in which the deduction is taken, subject to division (B)(2)(d) of section 5733.05 of the Revised Code.

(J) Except as otherwise expressly provided or clearly appearing from the context, any term used in this chapter has the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes. Any reference in this chapter to the Internal Revenue Code includes other laws of the United States relating to federal income taxes.

(K) "Financial institution" has the meaning given by section 5725.01 of the Revised Code but does not include a production credit association as described in 85 Stat. 597, 12 U.S.C.A. 2091 .

(L)

(1) A "qualifying holding company" is any corporation satisfying all of the following requirements:

(a) Subject to divisions (L)(2) and (3) of this section, the net book value of the corporation's intangible assets is greater than or equal to ninety per cent of the net book value of all of its assets and at least fifty per cent of the net book value of all of its assets represents direct or indirect investments in the equity of, loans and advances to, and accounts receivable due from related members;

(b) At least ninety per cent of the corporation's gross income for the taxable year is attributable to the following:

(i) The maintenance, management, ownership, acquisition, use, and disposition of its intangible property, its aircraft the use of which is not subject to regulation under 14 C.F.R. part 121 or part 135, and any real property described in division (L)(2)(c) of this section;

(ii) The collection and distribution of income from such property.

(c) The corporation is not a financial institution on the last day of the taxable year ending prior to the first day of the tax year;

(d) The corporation's related members make a good faith and reasonable effort to make timely and fully the adjustments required by division (D) of section 5733.05 of the Revised Code and to pay timely and fully all uncontested taxes, interest, penalties, and other fees and charges imposed under this chapter;

(e) Subject to division (L)(4) of this section, the corporation elects to be treated as a qualifying holding company for the tax year.

A corporation otherwise satisfying divisions (L)(1)(a) to (e) of this section that does not elect to be a qualifying holding company is not a qualifying holding company for the purposes of this chapter.

(2)

(a)

(i) For purposes of making the ninety per cent computation under division (L)(1)(a) of this section, the net book value of the corporation's assets shall not include the net book value of aircraft or real property described in division (L)(1)(b)(i) of this section.

(ii) For purposes of making the fifty per cent computation under division (L)(1)(a) of this section, the net book value of assets shall include the net book value of aircraft or real property described in division (L)(1)(b)(i) of this section.

(b)

(i) As used in division (L) of this section, "intangible asset" includes, but is not limited to, the corporation's direct interest in each pass-through entity only if at all times during the corporation's taxable year ending prior to the first day of the tax year the corporation's and the corporation's related members' combined direct and indirect interests in the capital or profits of such pass-through entity do not exceed fifty per cent. If the corporation's interest in the pass-through entity is an intangible asset for that taxable year, then the distributive share of any income from the pass-through entity shall be income from an intangible asset for that taxable year.

(ii) If a corporation's and the corporation's related members' combined direct and indirect interests in the capital or profits of a pass-through entity exceed fifty per cent at any time during the corporation's taxable year ending prior to the first day of the tax year, "intangible asset" does not include the corporation's direct interest in the pass-through entity, and the corporation shall include in its assets its proportionate share of the assets of any such pass-through entity and shall include in its gross income its distributive share of the gross income of such pass-through entity in the same form as was earned by the pass-through entity.

(iii) A pass-through entity's direct or indirect proportionate share of any other pass-through entity's assets shall be included for the purpose of computing the corporation's proportionate share of the pass-through entity's assets under division (L)(2)(b)(ii) of this section, and such pass-through entity's distributive share of any other pass-through entity's gross income shall be included for purposes of computing the corporation's distributive share of the pass-through entity's gross income under division (L)(2)(b)(ii) of this section.

(c) For the purposes of divisions (L)(1)(b)(i), (1)(b)(ii), (2)(a)(i), and (2)(a)(ii) of this section, real property is described in division (L)(2)(c) of this section only if all of the following conditions are present at all times during the taxable year ending prior to the first day of the tax year:

(i) The real property serves as the headquarters of the corporation's trade or business, or is the place from which the corporation's trade or business is principally managed or directed;

(ii) Not more than ten per cent of the value of the real property and not more than ten per cent of the square footage of the building or buildings that are part of the real property is used, made available, or occupied for the purpose of providing, acquiring, transferring, selling, or disposing of tangible property or services in the normal course of business to persons other than related members, the corporation's employees and their families, and such related members' employees and their families.

(d) As used in division (L) of this section, "related member" has the same meaning as in division (A)(6) of section 5733.042 of the Revised Code without regard to division (B) of that section.

(3) The percentages described in division (L)(1)(a) of this section shall be equal to the quarterly average of those percentages as calculated during the corporation's taxable year ending prior to the first day of the tax year.

(4) With respect to the election described in division (L)(1)(e) of this section:

(a) The election need not accompany a timely filed report;

(b) The election need not accompany the report; rather, the election may accompany a subsequently filed but timely application for refund and timely amended report, or a subsequently filed but timely petition for reassessment;

(c) The election is not irrevocable;

(d) The election applies only to the tax year specified by the corporation;

(e) The corporation's related members comply with division (L)(1)(d) of this section.

Nothing in division (L)(4) of this section shall be construed to extend any statute of limitations set forth in this chapter.

(M) "Qualifying controlled group" means two or more corporations that satisfy the ownership and control requirements of division (A) of section 5733.052 of the Revised Code.

(N) "Limited liability company" means any limited liability company formed under Chapter 1705. of the Revised Code or under the laws of any other state.

(O) "Pass-through entity" means a corporation that has made an election under subchapter S of Chapter 1 of Subtitle A of the Internal Revenue Code for its taxable year under that code, or a partnership, limited liability company, or any other person, other than an individual, trust, or estate, if the partnership, limited liability company, or other person is not classified for federal income tax purposes as an association taxed as a corporation.

(P) "Electric company," "combined company," and "telephone company" have the same meanings as in section 5727.01 of the Revised Code.

(Q) "Business income" means income arising from transactions, activities, and sources in the regular

course of a trade or business and includes income from real property, tangible personal property, and intangible personal property if the acquisition, rental, management, and disposition of the property constitute integral parts of the regular course of a trade or business operation. "Business income" includes income, including gain or loss, from a partial or complete liquidation of a business, including, but not limited to, gain or loss from the sale or other disposition of goodwill.

(R) "Nonbusiness income" means all income other than business income.

Amended by 128th General AssemblyFile No.9, HB 1, §101.01, eff. 10/16/2009.

Effective Date: 09-26-2003; 12-30-2004

5733.05 Determination of value of issued and outstanding stock and intangible property - determination of net income of corporation.

As used in this section, "qualified research" means laboratory research, experimental research, and other similar types of research; research in developing or improving a product; or research in developing or improving the means of producing a product. It does not include market research, consumer surveys, efficiency surveys, management studies, ordinary testing or inspection of materials or products for quality control, historical research, or literary research. "Product" as used in this paragraph does not include services or intangible property.

The annual report determines the value of the issued and outstanding shares of stock of the taxpayer, which under division (A) or divisions (B) and (C) of this section is the base or measure of the franchise tax liability. Such determination shall be made as of the date shown by the report to have been the beginning of the corporation's annual accounting period that includes the first day of January of the tax year. For the purposes of this chapter, the value of the issued and outstanding shares of stock of any corporation that is a financial institution shall be deemed to be the value as calculated in accordance with division (A) of this section. For the purposes of this chapter, the value of the issued and outstanding shares of stock of any corporation that is not a financial institution shall be deemed to be the values as calculated in accordance with divisions (B) and (C) of this section. Except as otherwise required by this section or section 5733.056 of the Revised Code, the value of a taxpayer's issued and outstanding shares of stock under division (A) or (C) of this section does not include any amount that is treated as a liability under generally accepted accounting principles.

(A) The total value, as shown by the books of the financial institution, of its capital, surplus, whether earned or unearned, undivided profits, and reserves shall be determined as prescribed by section 5733.056 of the Revised Code for tax years 1998 and thereafter.

(B) The sum of the corporation's net income during the corporation's taxable year, allocated or apportioned to this state as prescribed in divisions (B)(1) and (2) of this section, and subject to sections 5733.052 , 5733.053 , 5733.057 , 5733.058 , 5733.059 , and 5733.0510 of the Revised Code:

(1) The net nonbusiness income allocated or apportioned to this state as provided by section 5733.051 of the Revised Code.

(2) The amount of Ohio apportioned net business income, which shall be calculated by multiplying the corporation's net business income by a fraction. The numerator of the fraction is the sum of the following products: the property factor multiplied by twenty, the payroll factor multiplied by twenty, and the sales factor multiplied by sixty. The denominator of the fraction is one hundred, provided that the denominator shall be reduced by twenty if the property factor has a denominator of zero, by twenty if the payroll factor has a denominator of zero, and by sixty if the sales factor has a denominator of zero.

The property, payroll, and sales factors shall be determined as follows, but the numerator and the denominator of the factors shall not include the portion of any property, payroll, and sales otherwise includible in the factors to the extent that the portion relates to, or is used in connection with, the production of nonbusiness income allocated under section 5733.051 of the Revised Code:

(a) The property factor is a fraction computed as follows:

The numerator of the fraction is the average value of the corporation's real and tangible personal property

owned or rented, and used in the trade or business in this state during the taxable year, and the denominator of the fraction is the average value of all the corporation's real and tangible personal property owned or rented, and used in the trade or business everywhere during such year. Real and tangible personal property used in the trade or business includes, but is not limited to, real and tangible personal property that the corporation rents, subrents, leases, or subleases to others if the income or loss from such rentals, subrentals, leases, or subleases is business income. There shall be excluded from the numerator and denominator of the fraction the original cost of all of the following property within Ohio: property with respect to which a "pollution control facility" certificate has been issued pursuant to section 5709.21 of the Revised Code; property with respect to which an "industrial water pollution control certificate" has been issued pursuant to that section or former section 6111.31 of the Revised Code; and property used exclusively during the taxable year for qualified research.

(i) Property owned by the corporation is valued at its original cost. Property rented by the corporation is valued at eight times the net annual rental rate. "Net annual rental rate" means the annual rental rate paid by the corporation less any annual rental rate received by the corporation from subrentals.

(ii) The average value of property shall be determined by averaging the values at the beginning and the end of the taxable year, but the tax commissioner may require the averaging of monthly values during the taxable year, if reasonably required to reflect properly the average value of the corporation's property.

(b) The payroll factor is a fraction computed as follows:

The numerator of the fraction is the total amount paid in this state during the taxable year by the corporation for compensation, and the denominator of the fraction is the total compensation paid everywhere by the corporation during such year. There shall be excluded from the numerator and the denominator of the payroll factor the total compensation paid in this state to employees who are primarily engaged in qualified research.

(i) Compensation means any form of remuneration paid to an employee for personal services.

(ii) Compensation is paid in this state if: (I) the recipient's service is performed entirely within this state, (II) the recipient's service is performed both within and without this state, but the service performed without this state is incidental to the recipient's service within this state, (III) some of the service is performed within this state and either the base of operations, or if there is no base of operations, the place from which the service is directed or controlled is within this state, or the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the recipient's residence is in this state.

(iii) Compensation is paid in this state to any employee of a common or contract motor carrier corporation, who performs the employee's regularly assigned duties on a motor vehicle in more than one state, in the same ratio by which the mileage traveled by such employee within the state bears to the total mileage traveled by such employee everywhere during the taxable year.

(c) The sales factor is a fraction computed as follows:

Except as provided in this section, the numerator of the fraction is the total sales in this state by the corporation during the taxable year or part thereof, and the denominator of the fraction is the total sales by the corporation everywhere during such year or part thereof. In computing the numerator and denominator of the fraction, the following shall be eliminated from the fraction: receipts and any related gains or losses from the sale or other disposal of excluded assets; dividends or distributions and interest

or other similar amounts received for the use of, or for the forbearance of the use of, money. Also, in computing the numerator and denominator of the sales factor, in the case of a corporation owning at least eighty per cent of the issued and outstanding common stock of one or more insurance companies or public utilities, except an electric company and a combined company, and, for tax years 2005 and thereafter, a telephone company, or owning at least twenty-five per cent of the issued and outstanding common stock of one or more financial institutions, receipts received by the corporation from such utilities, insurance companies, and financial institutions shall be eliminated. As used in this division, "excluded assets" means property that is either: intangible property, other than trademarks, trade names, patents, copyrights, and similar intellectual property; or tangible personal property or real property where that property is a capital asset or an asset described in section 1231 of the Internal Revenue Code, without regard to the holding period specified therein.

(i) For the purpose of this section and section 5733.03 of the Revised Code, receipts not eliminated or excluded from the fraction shall be sitused as follows:

Receipts from rents and royalties from real property located in this state shall be sitused to this state.

Receipts from rents and royalties of tangible personal property, to the extent the tangible personal property is used in this state, shall be sitused to this state.

Receipts from the sale of electricity and of electric transmission and distribution services shall be sitused to this state in the manner provided under section 5733.059 of the Revised Code.

Receipts from the sale of real property located in this state shall be sitused to this state.

Receipts from the sale of tangible personal property shall be sitused to this state if such property is received in this state by the purchaser. In the case of delivery of tangible personal property by common carrier or by other means of transportation, the place at which such property is ultimately received after all transportation has been completed shall be considered as the place at which such property is received by the purchaser. Direct delivery in this state, other than for purposes of transportation, to a person or firm designated by a purchaser constitutes delivery to the purchaser in this state, and direct delivery outside this state to a person or firm designated by a purchaser does not constitute delivery to the purchaser in this state, regardless of where title passes or other conditions of sale.

(ii) Receipts from all other sales not eliminated or excluded from the fraction shall be sitused to this state as follows:

Receipts from the sale, exchange, disposition, or other grant of the right to use trademarks, trade names, patents, copyrights, and similar intellectual property shall be sitused to this state to the extent that the receipts are based on the amount of use of that property in this state. If the receipts are not based on the amount of use of that property, but rather on the right to use the property and the payor has the right to use the property in this state, then the receipts from the sale, exchange, disposition, or other grant of the right to use such property shall be sitused to this state to the extent the receipts are based on the right to use the property in this state.

Receipts from the sale of services, and receipts from any other sales not eliminated or excluded from the sales factor and not otherwise sitused under division (B)(2)(c) of this section, shall be sitused to this state in the proportion to the purchaser's benefit, with respect to the sale, in this state to the purchaser's benefit, with respect to the sale, everywhere. The physical location where the purchaser ultimately uses or receives the benefit of what was purchased shall be paramount in determining the proportion of the

benefit in this state to the benefit everywhere.

(iii) Income from receipts eliminated or excluded from the sales factor under division (B)(2)(c) of this section shall not be presumed to be nonbusiness income.

(d) If the allocation and apportionment provisions of division (B) of this section do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may request, which request must be in writing and must accompany the report, a timely filed petition for reassessment, or a timely filed amended report, or the tax commissioner may require, in respect to all or any part of the taxpayer's allocated or apportioned base, if reasonable, any one or more of the following:

(i) Separate accounting;

(ii) The exclusion of any one or more of the factors;

(iii) The inclusion of one or more additional factors that will fairly represent the taxpayer's allocated or apportioned base in this state.

An alternative method will be effective only with approval by the tax commissioner.

Nothing in this section shall be construed to extend any statute of limitations set forth in this chapter.

(e) The tax commissioner may adopt rules providing for alternative allocation and apportionment methods, and alternative calculations of a corporation's base, that apply to corporations engaged in telecommunications.

(C)

(1) The total value, as shown on the books of each corporation that is not a qualified holding company, of the net book value of the corporation's assets less the net carrying value of its liabilities, and excluding from the corporation's assets land devoted exclusively to agricultural use as of the first Monday of June in the corporation's taxable year as determined by the county auditor of the county in which the land is located pursuant to section 5713.31 of the Revised Code, and making any adjustment required by division (D) of this section. For the purposes of determining that total value, any reserves shown on the corporation's books shall be considered liabilities or contra assets, as the case may be, except for any reserves that are deemed appropriations of retained earnings under generally accepted accounting principles.

(2) The base upon which the tax is levied under division (C) of section 5733.06 of the Revised Code shall be computed by multiplying the amount determined under division (C)(1) of this section by the fraction determined under divisions (B)(2)(a) to (c) of this section and, if applicable, divisions (B)(2)(d)(ii) and (iii) of this section, and without regard to section 5733.052 of the Revised Code, but substituting "net worth" for "net income" wherever "net income" appears in division (B)(2)(c) in this section. For purposes of division (C)(2) of this section, the numerator and denominator of each of the fractions shall include the portion of any real and tangible personal property, payroll, and sales, respectively, relating to, or used in connection with the production of, net nonbusiness income allocated under section 5733.051 of the Revised Code. Nothing in this division shall allow any amount to be included in the numerator or denominator more than once.

(D)

(1) If, on the last day of the taxpayer's taxable year preceding the tax year, the taxpayer is a related

member to a corporation that elects to be a qualifying holding company for the tax year beginning after the last day of the taxpayer's taxable year, or if, on the last day of the taxpayer's taxable year preceding the tax year, a corporation that elects to be a qualifying holding company for the tax year beginning after the last day of the taxpayer's taxable year is a related member to the taxpayer, then the taxpayer's total value for the purposes of division (C) of this section shall be adjusted by the qualifying amount. Except as otherwise provided under division (D)(2) of this section, "qualifying amount" means the amount that, when added to the taxpayer's total value, and when subtracted from the net carrying value of the taxpayer's liabilities computed without regard to division (C)(2) of this section, or when subtracted from the taxpayer's total value and when added to the net carrying value of the taxpayer's liabilities computed without regard to division (D) of this section, results in the taxpayer's debt-to-equity ratio equaling the debt-to-equity ratio of the qualifying controlled group on the last day of the taxable year ending prior to the first day of the tax year computed on a consolidated basis in accordance with general accepted accounting principles. For the purposes of division (D)(1) of this section, the corporation's total value, after the adjustment required by that division, shall not exceed the net book value of the corporation's assets.

(2)

(a) The amount added to the taxpayer's total value and subtracted from the net carrying value of the taxpayer's liabilities shall not exceed the amount of the net carrying value of the taxpayer's liabilities owed to the taxpayer's related members.

(b) A liability owed to the taxpayer's related members includes, but is not limited to, any amount that the corporation owes to a person that is not a related member if the corporation's related member or related members in whole or in part guarantee any portion or all of that amount, or pledge, hypothecate, mortgage, or carry out any similar transactions to secure any portion or all of that amount.

(3) The base upon which the tax is levied under division (C) of section 5733.06 of the Revised Code shall be computed by multiplying the amount determined under divisions (C) and (D) of this section but without regard to section 5733.052 of the Revised Code.

(4) For purposes of division (D) of this section, "related member" has the same meaning as in section 5733.042 of the Revised Code.

Effective Date: 03-11-2004

5739.16 Four-year limitation for assessments - exceptions.

(A) Except as otherwise provided in this section, no assessment shall be made or issued against a vendor or consumer for any tax imposed by or pursuant to section 5739.02 , 5739.021 , 5739.023 , 5739.026 , or 5739.10 of the Revised Code more than four years after the return date for the period in which the sale or purchase was made, or more than four years after the return for such period is filed, whichever is later. A consumer who provides a fully completed exemption certificate pursuant to division (B) of section 5739.03 of the Revised Code may be assessed any tax imposed by or pursuant to section 5739.02 , 5739.021 , 5739.023 , or 5739.026 of the Revised Code that results from denial of the claimed exemption within the later of a period otherwise allowed by this section or one year after the date the certificate was provided. This division does not bar an assessment:

(1) When the tax commissioner has substantial evidence of amounts of taxes collected by a vendor from consumers on retail sales, which were not returned to the state;

(2) When the vendor assessed failed to file a return as required by section 5739.12 of the Revised Code;

(3) When the vendor or consumer and the commissioner waive in writing the time limitation.

(B) No assessment shall be made or issued against a vendor or consumer for any tax imposed by or pursuant to section 5739.02 , 5739.021 , 5739.023 , 5739.026 , or 5739.10 of the Revised Code for any period during which there was in full force and effect a rule of the tax commissioner under or by virtue of which the collection or payment of any such tax was not required. This division does not bar an assessment when the tax commissioner has substantial evidence of amounts of taxes collected by a vendor from consumers on retail sales which were not returned to the state.

(C) No assessment shall be made or issued against a person for any tax imposed pursuant to section 5739.101 of the Revised Code more than four years after the return date for the period in which the tax is imposed on the person's gross receipts, or more than four years after the return for such period is filed, whichever is later. This division does not bar an assessment when the person assessed failed to file a return as required under section 5739.102 of the Revised Code, or when the person and the commissioner waive in writing the time limitation.

Effective Date: 06-30-1993; 01-01-2006

5741.16 Four-year limitation for assessment against seller or consumer - exceptions.

(A) Except as provided in division (B) or (C) of this section, no assessment shall be made or issued against a seller or consumer for any tax imposed by or pursuant to section 5741.02 , 5741.021 , 5741.022 , or 5741.023 of the Revised Code more than four years after the return date for the period in which the sale or purchase was made, or more than four years after the return for such period was filed, whichever date is later.

(B) A consumer who provides a fully completed exemption certificate pursuant to division (B) of section 5739.03 or division (E) of section 5741.02 of the Revised Code may be assessed any tax imposed by or pursuant to section 5741.02 , 5741.021 , 5741.022 , or 5741.023 of the Revised Code that results from denial of the claimed exemption within the later of a period allowed by division (A) of this section or one year after the date the certificate was provided.

(C) This section does not bar an assessment:

(1) When the tax commissioner has substantial evidence of amounts of taxes collected by a seller from consumers on purchases, which were not returned to the state by direct remittance;

(2) When the person assessed failed to file a return as required by section 5741.12 of the Revised Code;

(3) When the seller or consumer and the commissioner waive in writing the time limitation.

Effective Date: 02-20-1986; 01-01-2006

5751.09 Assessment against person not filing return or paying tax.

(A) The tax commissioner may make an assessment, based on any information in the commissioner's possession, against any person that fails to file a return or pay any tax as required by this chapter. The commissioner shall give the person assessed written notice of the assessment as provided in section 5703.37 of the Revised Code. With the notice, the commissioner shall provide instructions on the manner in which to petition for reassessment and request a hearing with respect to the petition. The commissioner shall send any assessments against consolidated elected taxpayer and combined taxpayer groups under section 5751.011 or 5751.012 of the Revised Code to the taxpayer's "reporting person" as defined under division (R) of section 5751.01 of the Revised Code. The reporting person shall notify all members of the group of the assessment and all outstanding taxes, interest, and penalties for which the assessment is issued.

(B) Unless the person assessed, within sixty days after service of the notice of assessment, files with the tax commissioner, either personally or by certified mail, a written petition signed by the person or the person's authorized agent having knowledge of the facts, the assessment becomes final, and the amount of the assessment is due and payable from the person assessed to the treasurer of state. The petition shall indicate the objections of the person assessed, but additional objections may be raised in writing if received by the commissioner prior to the date shown on the final determination.

If a petition for reassessment has been properly filed, the commissioner shall proceed under section 5703.60 of the Revised Code.

(C)

(1) After an assessment becomes final, if any portion of the assessment, including accrued interest, remains unpaid, a certified copy of the tax commissioner's entry making the assessment final may be filed in the office of the clerk of the court of common pleas in the county in which the person resides or has its principal place of business in this state, or in the office of the clerk of court of common pleas of Franklin county.

(2) Immediately upon the filing of the entry, the clerk shall enter judgment for the state against the person assessed in the amount shown on the entry. The judgment may be filed by the clerk in a loose-leaf book entitled, "special judgments for the commercial activity tax" and shall have the same effect as other judgments. Execution shall issue upon the judgment at the request of the tax commissioner, and all laws applicable to sales on execution shall apply to sales made under the judgment.

(3) If the assessment is not paid in its entirety within sixty days after the day the assessment was issued, the portion of the assessment consisting of tax due shall bear interest at the rate per annum prescribed by section 5703.47 of the Revised Code from the day the tax commissioner issues the assessment until it is paid or until it is certified to the attorney general for collection under section 131.02 of the Revised Code, whichever comes first. If the unpaid portion of the assessment is certified to the attorney general for collection, the entire unpaid portion of the assessment shall bear interest at the rate per annum prescribed by section 5703.47 of the Revised Code from the date of certification until the date it is paid in its entirety. Interest shall be paid in the same manner as the tax and may be collected by the issuance of an assessment under this section.

(D) If the tax commissioner believes that collection of the tax will be jeopardized unless proceedings to collect or secure collection of the tax are instituted without delay, the commissioner may issue a jeopardy

assessment against the person liable for the tax. Immediately upon the issuance of the jeopardy assessment, the commissioner shall file an entry with the clerk of the court of common pleas in the manner prescribed by division (C) of this section. Notice of the jeopardy assessment shall be served on the person assessed or the person's authorized agent in the manner provided in section 5703.37 of the Revised Code within five days of the filing of the entry with the clerk. The total amount assessed is immediately due and payable, unless the person assessed files a petition for reassessment in accordance with division (B) of this section and provides security in a form satisfactory to the commissioner and in an amount sufficient to satisfy the unpaid balance of the assessment. Full or partial payment of the assessment does not prejudice the commissioner's consideration of the petition for reassessment.

(E) The tax commissioner shall immediately forward to the treasurer of state all amounts the commissioner receives under this section, and such amounts shall be considered as revenue arising from the tax imposed under this chapter.

(F) Except as otherwise provided in this division, no assessment shall be made or issued against a taxpayer for the tax imposed under this chapter more than four years after the due date for the filing of the return for the tax period for which the tax was reported, or more than four years after the return for the tax period was filed, whichever is later. The time limit may be extended if both the taxpayer and the commissioner consent in writing to the extension or enter into an agreement waiving or extending the time limit. Any such extension shall extend the four-year time limit in division (B) of section 5751.08 of the Revised Code for the same period of time. Nothing in this division bars an assessment against a taxpayer that fails to file a return required by this chapter or that files a fraudulent return.

(G) If the tax commissioner possesses information that indicates that the amount of tax a taxpayer is required to pay under this chapter exceeds the amount the taxpayer paid, the tax commissioner may audit a sample of the taxpayer's gross receipts over a representative period of time to ascertain the amount of tax due, and may issue an assessment based on the audit. The tax commissioner shall make a good faith effort to reach agreement with the taxpayer in selecting a representative sample. The tax commissioner may apply a sampling method only if the commissioner has prescribed the method by rule.

(H) If the whereabouts of a person subject to this chapter is not known to the tax commissioner, the commissioner shall follow the procedures under section 5703.37 of the Revised Code.

Amended by 130th General Assembly File No. 25, HB 59, §101.01, eff. 9/29/2013.

Amended by 128th General AssemblyFile No.47, SB 181, §1, eff. 9/13/2010.

Amended by 128th General AssemblyFile No.9, HB 1, §101.01, eff. 10/16/2009.

Effective Date: 06-30-2005

5751.53 Credit against tax for amortizable net operating losses.

(A) As used in this section:

(1) "Net income" and "taxable year" have the same meanings as in section 5733.04 of the Revised Code.

(2) "Franchise tax year" means "tax year" as defined in section 5733.04 of the Revised Code.

(3) "Deductible temporary differences" and "taxable temporary differences" have the same meanings as those terms have for purposes of paragraph 13 of the statement of financial accounting standards, number 109.

(4) "Qualifying taxpayer" means a taxpayer under this chapter that has a qualifying Ohio net operating loss carryforward equal to or greater than the qualifying amount.

(5) "Qualifying Ohio net operating loss carryforward" means an Ohio net operating loss carryforward that the taxpayer could deduct in whole or in part for franchise tax year 2006 under section 5733.04 of the Revised Code but for the application of division (H) of this section. A qualifying Ohio net operating loss carryforward shall not exceed the amount of loss carryforward from franchise tax year 2005 as reported by the taxpayer either on a franchise tax report for franchise tax year 2005 pursuant to section 5733.02 of the Revised Code or on an amended franchise tax report prepared in good faith for such year and filed before July 1, 2006.

(6) "Disallowed Ohio net operating loss carryforward" means the lesser of the amounts described in division (A)(6)(a) or (b) of this section, but the amounts described in divisions (A)(6)(a) and (b) of this section shall each be reduced by the qualifying amount.

(a) The qualifying taxpayer's qualifying Ohio net operating loss carryforward;

(b) The Ohio net operating loss carryforward amount that the qualifying taxpayer used to compute the related deferred tax asset reflected on its books and records on the last day of its taxable year ending in 2004, adjusted for return to accrual, but this amount shall be reduced by the qualifying related valuation allowance amount. For the purposes of this section, the "qualifying related valuation allowance amount" is the amount of Ohio net operating loss reflected in the qualifying taxpayer's computation of the valuation allowance account, as shown on its books and records on the last day of its taxable year ending in 2004, with respect to the deferred tax asset relating to its Ohio net operating loss carryforward amount.

(7) "Other net deferred tax items apportioned to this state" is the product of (a) the amount of other net deferred tax items and (b) the fraction described in division (B)(2) of section 5733.05 for the qualifying taxpayer's franchise tax year 2005.

(8)

(a) Subject to divisions (A)(8)(b) to (d) of this section, the "amount of other net deferred tax items" is the difference between (i) the qualifying taxpayer's deductible temporary differences, net of related valuation allowance amounts, shown on the qualifying taxpayer's books and records on the last day of its taxable year ending in 2004, and (ii) the qualifying taxpayer's taxable temporary differences as shown on those books and records on that date. The amount of other net deferred tax items may be less than zero.

(b) For the purposes of computing the amount of the qualifying taxpayer's other net deferred tax items described in division (A)(8)(a) of this section, any credit carryforward allowed under Chapter 5733. of the

Revised Code shall be excluded from the amount of deductible temporary differences to the extent such credit carryforward amount, net of any related valuation allowance amount, is otherwise included in the qualifying taxpayer's deductible temporary differences, net of related valuation allowance amounts, shown on the qualifying taxpayer's books and records on the last day of the qualifying taxpayer's taxable year ending in 2004.

(c) No portion of the disallowed Ohio net operating loss carryforward shall be included in the computation of the amount of the qualifying taxpayer's other net deferred tax items described in division (A)(8)(a) of this section.

(d) In no event shall the amount of other net deferred tax items apportioned to this state exceed twenty-five per cent of the qualifying Ohio net operating loss carryforward.

(9) "Amortizable amount" means:

(a) If the qualifying taxpayer's other net deferred tax items apportioned to this state is equal to or greater than zero, eight per cent of the sum of the qualifying taxpayer's disallowed Ohio net operating loss carryforward and the qualifying taxpayer's other net deferred tax items apportioned to this state;

(b) If the amount of the qualifying taxpayer's other net deferred tax items apportioned to this state is less than zero and if the absolute value of the amount of qualifying taxpayer's other net deferred tax items apportioned to this state is less than the qualifying taxpayer's disallowed net operating loss, eight per cent of the difference between the qualifying taxpayer's disallowed net operating loss carryforward and the absolute value of the qualifying taxpayer's other net deferred tax items apportioned to this state;

(c) If the amount of the qualifying taxpayer's other net deferred tax items apportioned to this state is less than zero and if the absolute value of the amount of qualifying taxpayer's other net deferred tax items apportioned to this state is equal to or greater than the qualifying taxpayer's disallowed net operating loss, zero.

(10) "Books and records" means the qualifying taxpayer's books, records, and all other information, all of which the qualifying taxpayer maintains and uses to prepare and issue its financial statements in accordance with generally accepted accounting principles.

(11)

(a) Except as modified by division (A)(11)(b) of this section, "qualifying amount" means fifty million dollars per person.

(b) If for franchise tax year 2005 the person was a member of a combined franchise tax report, as provided by section 5733.052 of the Revised Code, the "qualifying amount" is, in the aggregate, fifty million dollars for all members of that combined franchise tax report, and for purposes of divisions (A)(6)(a) and (b) of this section, those members shall allocate to each member any portion of the fifty million dollar amount. The total amount allocated to the members who are qualifying taxpayers shall equal fifty million dollars.

(B) For each calendar period beginning prior to January 1, 2030, there is hereby allowed a nonrefundable tax credit against the tax levied each year by this chapter on each qualifying taxpayer, on each consolidated elected taxpayer having one or more qualifying taxpayers as a member, and on each combined taxpayer having one or more qualifying taxpayers as a member. The credit shall be claimed in the order specified in section 5751.98 of the Revised Code and is allowed only to reduce the first one-half

of any tax remaining after allowance of the credits that precede it in section 5751.98 of the Revised Code. No credit under division (B) of this section shall be allowed against the second one-half of such remaining tax.

Except as otherwise limited by divisions (C) and (D) of this section, the maximum amount of the nonrefundable credit that may be used against the first one-half of the remaining tax for each calendar year is as follows:

(1) For calendar year 2010, ten per cent of the amortizable amount;

(2) For calendar year 2011, twenty per cent of the amortizable amount, less all amounts previously used;

(3) For calendar year 2012, thirty per cent of the amortizable amount, less all amounts previously used;

(4) For calendar year 2013, forty per cent of the amortizable amount, less all amounts previously used;

(5) For calendar year 2014, fifty per cent of the amortizable amount, less all amounts previously used;

(6) For calendar year 2015, sixty per cent of the amortizable amount, less all amounts previously used;

(7) For calendar year 2016, seventy per cent of the amortizable amount, less all amounts previously used;

(8) For calendar year 2017, eighty per cent of the amortizable amount, less all amounts previously used;

(9) For calendar year 2018, ninety per cent of the amortizable amount, less all amounts previously used;

(10) For each of calendar years 2019 through 2029, one hundred per cent of the amortizable amount, less all amounts used in all previous years.

In no event shall the cumulative credit used for calendar years 2010 through 2029 exceed one hundred per cent of the amortizable amount.

(C)

(1) Except as otherwise set forth in division (C)(2) of this section, a refundable credit is allowed in calendar year 2030 for any portion of the qualifying taxpayer's amortizable amount that is not used in accordance with division (B) of this section against the tax levied by this chapter on all taxpayers.

(2) Division (C)(1) of this section shall not apply and no refundable credit shall be available to any person if during any portion of the calendar year 2030 the person is not subject to the tax imposed by this chapter.

(D) Not later than June 30, 2006, each qualifying taxpayer, consolidated elected taxpayer, or combined taxpayer that will claim for any year the credit allowed in divisions (B) and (C) of this section shall file with the tax commissioner a report setting forth the amortizable amount available to such taxpayer and all other related information that the commissioner, by rule, requires. If the taxpayer does not timely file the report or fails to provide timely all information required by this division, the taxpayer is precluded from claiming any credit amounts described in divisions (B) and (C) of this section. Unless extended by mutual consent, the tax commissioner may, until June 30, 2010, audit the accuracy of the amortizable amount available to each taxpayer that will claim the credit, and adjust the amortizable amount or, if appropriate, issue any assessment or final determination, as applicable, necessary to correct any errors found upon audit.

(E) For the purpose of calculating the amortizable amount, if the tax commissioner ascertains that any portion of that amount is the result of a sham transaction as described in section 5703.56 of the Revised Code, the commissioner shall reduce the amortizable amount by two times the adjustment.

(F) If one entity transfers all or a portion of its assets and equity to another entity as part of an entity organization or reorganization or subsequent entity organization or reorganization for which no gain or loss is recognized in whole or in part for federal income tax purposes under the Internal Revenue Code, the credits allowed by this section shall be computed in a manner consistent with that used to compute the portion, if any, of federal net operating losses allowed to the respective entities under the Internal Revenue Code. The tax commissioner may prescribe forms or rules for making the computations required by this division.

(G)

(1) Except as provided in division (F) of this section, no person shall pledge, collateralize, hypothecate, assign, convey, sell, exchange, or otherwise dispose of any or all tax credits, or any portion of any or all tax credits allowed under this section.

(2) No credit allowed under this section is subject to execution, attachment, lien, levy, or other judicial proceeding.

(H)

(1)

(a) Except as set forth in division (H)(1)(b) of this section and notwithstanding division (I)(1) of section 5733.04 of the Revised Code to the contrary, each person timely and fully complying with the reporting requirements set forth in division (D) of this section shall not claim, and shall not be entitled to claim, any deduction or adjustment for any Ohio net operating loss carried forward to any one or more franchise tax years after franchise tax year 2005.

(b) Division (H)(1)(a) of this section applies only to the portion of the Ohio net operating loss represented by the disallowed Ohio net operating loss carryforward.

(2) Notwithstanding division (I) of section 5733.04 of the Revised Code to the contrary, with respect to all franchise tax years after franchise tax year 2005, each person timely and fully complying with the reporting requirements set forth in division (D) of this section shall not claim, and shall not be entitled to claim, any deduction, exclusion, or adjustment with respect to deductible temporary differences reflected on the person's books and records on the last day of its taxable year ending in 2004.

(3)

(a) Except as set forth in division (H)(3)(b) of this section and notwithstanding division (I) of section 5733.04 of the Revised Code to the contrary, with respect to all franchise tax years after franchise tax year 2005, each person timely and fully complying with the reporting requirements set forth in division (D) of this section shall exclude from Ohio net income all taxable temporary differences reflected on the person's books and records on the last day of its taxable year ending in 2004.

(b) In no event shall the exclusion provided by division (H)(3)(a) of this section for any franchise tax year exceed the amount of the taxable temporary differences otherwise included in Ohio net income for that year.

(4) Divisions (H)(2) and (3) of this section shall apply only to the extent such items were used in the calculations of the credit provided by this section.

Effective Date: 06-30-2005; 03-30-2006

69 Cal.App.4th 672
Court of Appeal, Second
District, Division 5, California.

WESTSIDE HOSPITAL, Plaintiff and Appellant,
v.
S. Kimberly BELSHE, as Director,
etc., Defendant and Appellant.

No. B112261. | Jan. 28, 1999.
| Certified for Partial Publication.

Hospital filed petition for administrative mandate challenging decision of the Director of the Department of Health Services in Medi-Cal reimbursement case. The Superior Court, Los Angeles County, Robert H. O'Brien, J., denied petition, and hospital appealed. The Court of Appeal, Grignon, Acting P.J., held that six-month limitations period within which hospital was required to file petition for administrative mandate started to run when Director adopted proposed decision of administrative law judge, not when Department mailed a copy of the final decision to the hospital.

Affirmed.

West Headnotes (5)

[1] **Health**

Review; Actions

Six-month limitations period within which hospital was required to file petition for administrative mandate challenging decision of the Director of the Department of Health Services in Medi–Cal reimbursement case started to run when Director adopted proposed decision of administrative law judge, not when Department mailed a copy of the final decision to the hospital; Director's final decision was "issued" within meaning of review statute when it was adopted, not when it was mailed. West's Ann.Cal.Welf. & Inst.Code § 14171(j); Cal.Code Regs. title 22, § 51044.

3 Cases that cite this headnote

[2] **Administrative Law and Procedure**

Time for Proceedings

As a general rule, "issuance" of an administrative order, for purpose of timely filing petition for review, means entry or filing, and not service or mailing, of an order.

1 Cases that cite this headnote

[3] **Health**

Judicial Review; Actions

Terms "adoption" and "issuance" in statute governing review of decisions of the Director of the Department of Health Services in Medi–Cal reimbursement cases refer to the act of the Director finalizing the decision of the Department; act of finalization takes place either by means of the adoption of the administrative law judge's proposed decision or the issuance of a modified or different decision. West's Ann.Cal.Welf. & Inst.Code § 14171(j).

2 Cases that cite this headnote

[4] **Mandamus**

Time to Sue, Limitations, and Laches

Six-month date for filing a petition for writ of administrative mandate in statute governing review of decisions of the Director of the Department of Health Services in Medi–Cal reimbursement cases refers to the act of the Director finalizing the decision whether by adoption or issuance. West's Ann.Cal.Welf. & Inst.Code § 14171(j).

2 Cases that cite this headnote

[5] **Health**

Time

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Six-month time period for filing a petition for writ of mandate challenging decision of the Director of the Department of Health Services in Medi–Cal reimbursement cases begins to run from the date of entry or filing of the order, not mailing. West's Ann.Cal.Welf. & Inst.Code § 14171(j); Cal.Code Regs. title 22, § 51044.

Cases that cite this headnote

Attorneys and Law Firms

**769 *673 Mitchell R. Miller, Los Angeles, for Plaintiff and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Charlton G. Holland, Senior Assistant Attorney General, John H. Sanders, Supervising Deputy Attorney General, and Sandra L. Goldsmith, Deputy Attorney General, for Defendant and Appellant.

Opinion

*674 GRIGNON, Acting P.J.

Westside Hospital appeals from a judgment denying its petition for writ of administrative mandate in favor of S. Kimberly Belshe, Director, State of California, Department of Health Services in this Medi–Cal reimbursement case. We conclude Hospital did not file its petition within the statute of limitations period provided in Welfare and Institutions Code section 14171, subdivision (j), six months from the issuance of the Director's final decision. [1] Therefore, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Hospital, a licensed inpatient acute care facility, is an institutional provider certified to participate in the Medi–Cal program. As a condition of participation in the Medi–Cal program, Hospital is required to file fiscal-year-end cost reports, setting forth costs incurred to provide services to Medi–Cal beneficiaries. The Department audited Hospital's cost report for the fiscal year ending February 28, 1983, and computed Hospital's "final settlement."

On May 14, 1987, Hospital requested an administrative adjustment to the final settlement based on several issues. On December 21, 1988, the Department responded with a final settlement, which included adjustments for some, but not all, of the issues raised by Hospital. Hospital requested a formal administrative hearing on the disputed issues. A hearing was held before an administrative law judge. On March 11, 1993, the administrative law judge submitted a proposed decision denying Hospital's administrative appeal. On March 23, 1993, the Director adopted the proposed decision of the administrative law judge as the final decision pursuant to section 14171. On March 30, 1993, the Department mailed a copy of the final decision to Hospital.

On September 24, 1993, Hospital filed a petition for writ of mandate (Code Civ. Proc., § 1085), writ of administrative mandate (Code Civ. Proc., § 1094.5), and declaratory relief (Code Civ. Proc., § 1060). On February 4, 1997, the Department demurred on the grounds that (1) the petition was filed after the expiration of the six-month statute of limitations contained in section 14171, subdivision (j), for relief under Code of Civil Procedure section 1094.5, and (2) the pleading did not state facts sufficient to constitute a cause of action under Code of Civil Procedure section 1085, 1094.5, or 1060. The trial court overruled the demurrer on the statute of limitations *675 ground, but sustained the demurrer with leave to amend on the ground that the verification was improper. On February 18, 1997, Hospital refiled its petition with a proper verification. On March 5, 1997, the trial court denied the petition on the merits. The trial court entered judgment denying the petition on April 3, 1997. Hospital filed a timely notice of appeal from the judgment. The Department filed a timely notice of cross-appeal from the judgment.

DISCUSSION

I. *Administrative Mandate*

[1] The Department contends Hospital's petition for writ of administrative mandate was untimely under section 14171, subdivision (j), because it was filed more than six months after the date the Director issued the final decision. We agree. Although the trial court decided the petition on the merits, the statute of limitations issue is dispositive. Accordingly, we resolve the appeal on this basis.

**770 The procedures for conducting administrative appeals and issuing decisions relating to final settlements

for institutional providers are contained in section 14171 [2] and ***676** California Code of Regulations, title 22, section 51044. [3] An institutional provider may appeal a final settlement of the Department by filing a timely and specific written statement of disputed issues with the Department. The institutional provider may present any unresolved grievances or complaints at an impartial hearing before an administrative law judge, which must be conducted no later than 300 days after the filing of the statement of disputed issues. At the conclusion of the impartial hearing, the administrative law judge takes the matter under submission. The administrative law judge prepares and submits a proposed decision to the Director as soon as practical, in a form that may be adopted as the decision of the Director. The Department serves a copy of the proposed ****771** decision on each party. The Director may: (1) adopt the proposed decision; (2) reject the proposed decision and have a decision prepared based on the record, after allowing the parties the opportunity to present oral or written argument; or (3) refer the matter back to the administrative law judge to take additional evidence, after which the administrative law judge prepares a new proposed decision.

***677** The Director must adopt a final decision within 300 days after the record of the impartial hearing is closed, unless the Director intends to modify the proposed decision. In the event the Director chooses to modify a proposed decision under section 14171, subdivision (f), the Director must provide written notice to the parties on or before the 300th day following the closure of the record of the hearing and afford the parties an opportunity to present written or oral argument. On or before the 420th day following closure of the record of the hearing, the Director must issue a final decision.

The decision is effective upon adoption by the Director. Copies of the Director's decision are mailed to the provider. The Director's final decision is reviewable in accordance with Code of Civil Procedure section 1094.5 within six months of the "issuance" of the Director's final decision.

The question presented in this appeal is whether the Director's final decision is "issued" when it is "adopted" or when it is "mailed."

"In interpreting a statute, we apply the usual rules of statutory construction. 'We begin with the fundamental rule that our primary task is to determine the lawmakers' intent. [Citation.] ... To determine intent," 'The court turns first to the words themselves for the answer.' " [Citations.] "If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute)....' " [Citation.] We give the language of the statute its 'usual, ordinary import and accord significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose.... Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent.' [Citation.]" (*Kane v. Hurley* (1994) 30 Cal.App.4th 859, 862, 35 Cal.Rptr.2d 809.)

[2] As a general rule, "issuance" of an administrative order means entry or filing, and not service or mailing, of an order. (*Mario Saikhon, Inc. v. Agricultural Labor Relations Bd.* (1983) 140 Cal.App.3d 581, 582–583, 189 Cal.Rptr. 632 [time to file a petition for review runs from "date of the issuance of the [Agricultural Labor Relations Board's] order," and therefore time to file is not extended by Code of Civil Procedure section 1013]; see also ***678** *San Mateo Federation of Teachers v. Public Employment Relations Bd.* (1994) 28 Cal.App.4th 150, 153–156, 33 Cal.Rptr.2d 387 [time to file petition for review of Public Employment Relations Board decision runs from " issuance" of decision, which is not the same as "service," and therefore Code of Civil Procedure section 1013 does not apply to extend time to file]; contra, *Sunnyside Nurseries, Inc. v. ALRB* (1979) 93 Cal.App.3d 922, 929, 156 Cal.Rptr. 152 [issuance occurred when order mailed].) "Issuance" does not include mailing or service. (*Mario Saikhon, Inc. v. Agricultural Labor Relations Bd., supra,* 140 Cal.App.3d at p. 583, 189 Cal.Rptr. 632.) Where the Legislature intends a time limit to run from the date of service or mailing of an order, it specifically so provides. (*Ibid.*)

The meaning of the term "issuance" ascribed to it by appellate decisions interpreting similar statutes is consistent with a reasonable construction of section 14171. Section 14171 sets forth two procedures relating to the Director's final decision. Section 14171, subdivision (e)(3) describes a procedure wherein the Director simply adopts the proposed decision of the administrative law judge as the final decision. The Director is required to "adopt" the proposed decision as the final decision within 300 days after the hearing. (§ 14171, subd. (e)(3)(A).) The Department is required to mail a copy of "the adopted decision" ****772** to the provider within 30 days of the date of the adoption. (*Id.*, subd. (e)(3)(B).)

The adoption procedure set forth in section 14171, subdivision (e)(3)(A) is expressly subject to the alternative final decision procedure set forth in section 14171, subdivision (f). Section 14171, subdivision (f) applies when the Director intends not to adopt the administrative law judge's proposed decision, but rather to "modify" the proposed decision. This subdivision requires notice to the provider of the intent to modify on or before the 300th day following the hearing. Following the provider's opportunity to present argument, the Director is required to "issue" a final decision within 420 days after the hearing. Subdivision (f) contains no separate mailing requirement. Subdivision (j) provides that the final decision of the Director is reviewable by petition for a writ of administrative mandate within six months of the "issuance" of the director's final decision. Subdivision (j) makes no reference to the "adoption" of the final decision.

[3] [4] It is apparent from the foregoing delineation of the statutory final decision procedures that the terms "adoption" and "issuance" refer to the act of the Director finalizing the decision of the Department. The act of finalization takes place either by means of the adoption of the administrative law judge's proposed decision or the issuance of a modified or different decision. Thus, the mailing requirement set forth in subdivision (e)(3)(B) is reasonably interpreted to refer not only to "adopted" final decisions, but also ***679** to "issued" final decisions. Similarly, the six-month date in subdivision (j) for filing a petition for writ of administrative mandate refers to the act of the Director finalizing the decision whether by adoption or issuance. [4]

[5] It is also apparent from the statute that adoption/issuance of a final decision is independent of the mailing of a copy of the decision. It is the Director who adopts or issues the final decision. It is the Department which is required to mail to the provider a copy of the final decision. The six-month time period for filing a petition for writ of mandate begins to run from the date of entry or filing of the order, not mailing. [5] Since mailing is required within 30 days of adoption or issuance and a provider has six months to file a petition for writ of mandate, the provider has ample time in which to seek judicial review of the order.

The final decision in this case was reviewable under Code of Civil Procedure section 1094.5 within six months of the issuance of the Director's final decision. Under section 14171, the Director may adopt the proposed decision of the administrative law judge, modify the proposed decision, or reject the proposed decision and prepare a different decision. It is clear that the phrase "issuance of the Director's decision" encompasses adopting the proposed decision, adopting the proposed decision with modifications, or preparing and adopting an entirely new decision. Case law supports a conclusion that "issuance" means entry or filing of the decision and not service or mailing of the decision. Moreover, the statute and regulations provide separately for issuing the Director's decision and mailing the decision to the parties. However, the time for reviewing the Director's decision expressly runs from issuance of the final decision and not from mailing or service of the final decision. We conclude that the date the Director adopted the final decision, March 23, 1993, was the date the decision was issued for purposes of the statute of limitations. Because Hospital filed its petition for writ of administrative mandate more than six months later on September 24, 1993, the petition was untimely.

II. *Other Causes of Action* **

***680 DISPOSITION**

The judgment is affirmed. S. Kimberly Belshe, Director, State of California, Department ****773** of Health Services is awarded her costs on appeal.

ARMSTRONG, J. and GODOY PEREZ, J., concur.

Parallel Citations

69 Cal.App.4th 672, 99 Cal. Daily Op. Serv. 804, 99 Daily Journal D.A.R. 981

Footnotes

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part II. of discussion.

1 All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

2 Although section 14171 has been amended several times since it was enacted and its subdivision headings have been redesignated, no substantive changes have been made to the provisions at issue. Section 14171 currently provides in pertinent part: "(a) The director shall establish administrative appeal processes to review grievances or complaints arising from the findings of an audit or examination made pursuant to Sections 10722 and 14170 and for final settlements, including, in the case of hospitals, the application of Sections 51536, 51537, and 51539 of Title 22 of the California Code of Regulations. All these processes shall be established by regulation, pursuant to, and consistent with, Section 100171 of the Health and Safety Code [requiring an impartial hearing before an administrative law judge] .... [¶] (e)(1) The administrative appeal process established by the director shall commence with an informal conference with the provider, a representative of the department, and the administrative law judge. The informal conference shall be conducted no later than 90 days after the filing of a timely and specific statement of disputed issues by the provider. The administrative law judge, when appropriate, may assign the administrative appeal to an informal level of review where efforts could be made to resolve facts and issues in dispute in a fair and equitable manner, subject to the requirements of state and federal law. The review conducted at this informal level shall be completed no later than 180 days after the filing of a timely and specific statement of disputed issues by the provider. [¶] (2) Nothing in this subdivision shall prohibit the provider from presenting any unresolved grievances or complaints at an impartial hearing pursuant to subdivision (a). The impartial hearing shall be conducted no later than 300 days after the filing of a timely and specific statement of disputed issues by the provider. [¶] (3)(A) Subject to subdivision (f), ... a final decision in an institutional provider appeal shall be adopted within 300 days after the closure of the record of the impartial hearing. [¶] (B) The department shall mail a copy of the adopted decision to all parties within 30 days of the date of adoption of the decision. [¶] (f) In the event the director intends to modify a proposed decision, on or before ... the 300th day following the closure of the record of the hearing for institutional providers, the director shall provide written notice of his or her intention to the parties and shall afford the parties an opportunity to present written argument. Following this notice, on or before ... the 420th day following closure of the record of the hearing for institutional providers, or within that additional time period as is granted pursuant to the sole request of a provider or at the joint request of the provider and the department, the director shall issue a final decision .... [¶] (j) The final decision of the director shall be reviewable in accordance with Section 1094.5 of the Code of Civil Procedure within six months of the issuance of the director's final decision."

3 Title 22, California Code of Regulations, section 51044 provides in pertinent part as follows: "(a) The hearing officer shall take the matter under submission at the conclusion of the hearing. A proposed decision, in a form that may be adopted as the decision of the Director, shall be submitted to the Director as soon as practical. A copy of the proposed decision, upon submission to the Director, shall be: ... [¶] (2) Served by the Department on each party in the case and each party's representative. [¶] (b) The Director may: [¶] (1) Adopt the proposed decision without reading or hearing the record. [¶] (2) Reject the proposed decision and have a decision prepared based upon the documentary and electronically recorded record, with or without taking additional evidence. The Director shall decide no case provided for in this paragraph without affording the parties the opportunity to present either oral or written argument. [¶] (3) Refer the matter to the hearing officer to take additional evidence. If the case is so assigned, the hearing officer shall prepare a proposed decision as provided in subsection (a), upon the additional evidence and the documentary and electronically recorded record of the prior hearing. A copy of such proposed decision shall be furnished to each party and each party's representative as prescribed in subsection (a). [¶] (c) The decision shall be final upon adoption by the Director. Copies of the decision of the Director shall be mailed by certified mail to the designated representative of the provider. [¶] (d) A dismissal may be issued if a provider fails to appear at a formal hearing. A copy of such dismissal shall be mailed to each party together with a statement of the provider's right to reopen the hearing."

4 The Regulations do not distinguish between adoption and issuance, but simply refer to the act of the Director finalizing the decision as the adoption of the final decision. (Cal.Code Regs., tit. 22, § 51044.)

5 Consistent with our statutory interpretation, the Regulations provide that the decision is final upon adoption by the Director. Copies of the decision are to be mailed to the provider. (Cal.Code Regs., tit. 22, § 51044, subd. (c).)

** See footnote *, *ante*.

End of Document

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29 F.3d 513
United States Court of Appeals,
Ninth Circuit.

STEVEDORING SERVICES OF AMERICA;
Eagle Pacific Insurance Company, Petitioners,
v.
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, United States Department of Labor; Frank Mattera; Long Beach Container Terminal; and Signal Administration, Inc., Respondents.

No. 92-70627. | Submitted May 3, 1994. | Decided July 15, 1994.

Employer petitioned for judicial review of decision of Workers' Compensation Benefits Review Board (Board) awarding medical expenses and disability benefits under Longshore and Harbor Workers' Compensation Act. Motion to dismiss for lack of jurisdiction was made. The Court of Appeals, Leavy, Circuit Judge, held that 60-day limitations period for petitioning for judicial review commenced running upon filing of Board's decision, regardless of lack of actual notice to petitioning party.

Dismissed.

West Headnotes (2)

[1] **Workers' Compensation**

Entitled

Person adversely affected may appeal decision of Workers' Compensation Benefits Review Board, made under Longshore and Harbor Workers' Compensation Act, by filing petition within 60 days following issuance of Board order. Longshore and Harbor Workers' Compensation Act, § 21(C), 33 U.S.C.A. § 921(c).

4 Cases that cite this headnote

[2] **Workers' Compensation**

When Time Begins to Run (Notice)

"Issuance" of decision under Longshore and Harbor Workers' Compensation Act by Workers' Compensation Benefits Review Board (Board) means filing with the clerk of the Board and nothing more and, thus, 60-day limitations period for seeking judicial review commenced running on day of filing regardless of when petitioning party received actual notice. Longshore and Harbor Workers' Compensation Act, § 21(C), 33 U.S.C.A. § 921(c).

5 Cases that cite this headnote

Attorneys and Law Firms

*514 Robert E. Babcock, Littler, Mendelson, Fastiff & Tichy, Portland, OR, for petitioners.

LuAnn Kressley, U.S. Dept. of Labor, Office of the Sol., Washington, DC, for respondent, Director, Office of Workers' Compensation Programs.

Richard Mark Baker, Cantrell, Green Pekich, Cruz & McCort, Long Beach, CA, for respondent, Frank Mattera.

Jack Williams, Glendale, CA, for respondent, Long Beach Container Terminal and Signal Admin., Inc.

Petition for Review of an Order of the Benefits Review Board.

Before: ALARCON, NORRIS and LEAVY, Circuit Judges.

Opinion

Persons

LEAVY, Circuit Judge:

Petitioners Stevedoring Services of America and Eagle Pacific Insurance Company (Stevedoring) seek review of a decision of the Workers' Compensation Benefits Review Board ("the Board"). Stevedoring filed the petition with us more than 60 days after the Board made its determination but less than 60 days after it learned of the decision. We hold that the 60-day limitation period begins running when the Board made its decision, regardless of actual notice. Therefore, we dismiss the petition as untimely.

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FACTS AND PRIOR PROCEEDINGS

In November 1987, Frank Mattera (Mattera) severely injured his right shoulder while working for Stevedoring. Dr. David Morrison recommended that Mattera not return to work. Because Mattera's shoulder was not healing properly, Dr. Morrison performed surgery in February 1988. Stevedoring paid Mattera benefits for temporary total disability until May 1988. Mattera returned to work by taking a job at Long Beach Container Terminal (Long Beach) on May 16, 1988. Two days later, Mattera experienced pain in his right shoulder. He completed his shift and went to Dr. Morrison's office the next morning.

Again Dr. Morrison determined that Mattera was temporarily totally disabled. Dr. Steven Nagelberg performed a second surgery on the shoulder in October 1988. After a successful recovery, Mattera returned to work in January 1989.

Mattera filed for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. §§ 901, *et seq.* [1] ***515** Both Stevedoring and Long Beach argued that the other was responsible for Mattera's medical expenses and disability benefits payable after May 18, 1988. A formal hearing was held before an administrative law judge in September 1989. In January 1990, the administrative law judge determined that Stevedoring was responsible for all of Mattera's benefits because the pain Mattera experienced while working for Long Beach was not the result of a new injury.

Stevedoring appealed the administrative law judge's decision to the Board. On May 28, 1992, the Board affirmed the administrative law judge's decision. That same day, the Clerk of the Board certified that the Board's decision had been sent by certified mail to counsel for all three parties as well as to Mattera and Long Beach. Stevedoring and an insurance company were omitted from those listed on the service certificate. Stevedoring's counsel asserts that he did not receive a copy of the decision. He first learned of it (the record does not disclose how) on August 4, 1992. Stevedoring filed this appeal on September 14, 1992.

A motions panel of this court previously granted Mattera's and Long Beach's motion to dismiss the appeal for lack of jurisdiction on the ground that the appeal was not timely filed. Later the panel vacated the dismissal and reinstated the appeal. After a thorough review of the law and facts, we again dismiss this appeal as untimely.

ANALYSIS

[1] Stevedoring asserts that its petition for review was timely filed because it filed it within 60 days of when its counsel first learned of the Board's decision. Under 33 U.S.C. § 921(c), a person adversely affected may appeal the Board's decision by filing a petition within 60 days "following the issuance of such Board order." [2] At issue in this appeal is the meaning of the word "issuance" as used in § 921(c). If "issuance" occurred on the date the Board filed its decision with the Clerk, the petition is untimely. If "issuance" occurred on the date the parties learned of the decision, the petition for review is timely.

[2] Stevedoring argues that *Nealon v. California Stevedore & Ballast Co.*, 996 F.2d 966 (9th Cir.1993) controls the issue. In *Nealon*, we faced the issue of the definition of the word "filed" under 33 U.S.C. §§ 921(a) and 919(e), which dictate the procedural requirements for an appeal of an administrative law judge's decision to the Board. We held that under 33 U.S.C. §§ 921(a) and 919(e) the word "filed" means both (1) filed in the office of the deputy commissioner, and (2) served on the parties. Stevedoring would like us to hold that "issuance" under § 921(c) and its regulations has the same meaning as "filed" under §§ 921(a) and 919(e). Section 921(a) provides:

> A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this title, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

Section 919(e) provides:

> The order rejecting the claim or making the award ... shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by registered mail or by certified mail to the claimant and to the employer at the last known address of each.

The regulations under § 921(c) provide in relevant part:

> The original of the decision shall be filed with the Clerk of the Board. A copy of the Board's decision shall be sent by certified mail or otherwise presented to all parties to the appeal and the Director.

20 C.F.R. § 802.403(b).

> Within 60 days after a decision by the Board has been filed pursuant to § 802.403(b), any party adversely affected or aggrieved by such decision may file a petition for review with the appropriate U.S. Court of Appeals pursuant to section [9]21(c).

*516 20 C.F.R. § 802.410(a). Stevedoring concludes, without discussing the different sections, that the language of §§ 921(a) and 919(e) is so similar to the language in § 921(c) and its regulations, that *Nealon* also controls the issue under § 921(c).

Section 921(a) controls appeals of an administrative law judge's opinion to the Board. Section 921(c) controls appeals of the Board's decisions to the federal courts of appeals. Every circuit that has decided the issue of whether "filing" under § 921(a) required service on the parties has held that it does. *Nealon; Jewell Smokeless Coal Corp. v. Looney,* 892 F.2d 366, 396 (4th Cir.1989); *Patton v. Director, OWCP,* 763 F.2d 553, 556-557 (3d Cir.1985); *Youghiogheny and Ohio Coal Co. v. Benefits Review Board,* 745 F.2d 380, 382 (6th Cir.1984).

On the other hand, every circuit that has faced the definition of "issuance" in § 921(c) has determined that it means filing with the Board's clerk and nothing more. *Brown v. Director, OWCP,* 864 F.2d 120, 123 (11th Cir.1989); *Danko v. Director, OWCP,* 846 F.2d 366, 369 (6th Cir.1988); *Butcher v. Big Mountain Coal, Inc.,* 802 F.2d 1506, 1507-08 (4th Cir.1986); *Clay v. Director, OWCP,* 748 F.2d 501, 502-03 (8th Cir.1984); *Pittston Stevedoring Corp. v. Dellaventura,* 544 F.2d 35, 43-44 (2d Cir.1976). [3]

> This is a court of limited jurisdiction, exercising only those powers delegated to us by Congress. We can review decisions of the Benefits Review Board only when they are brought before us under the conditions and within the time specified by statute.
>
> *Clay,* 748 F.2d at 503. "The sixty-day filing period is a *jurisdictional* requirement." *Felt v. Director, OWCP,* 11 F.3d 951, 952 (9th Cir.1993) (emphasis in original). The regulations cannot extend the jurisdictional limits placed on the courts by Congress.

In *Dellaventura,* the Clerk of the Board sent a copy of the Board's decision to the attorney for the employer rather than to the employer. 544 F.2d at 43. The employer filed its notice of appeal after the expiration of the 60-day time period provided for in § 921(c). *Id.* The employer argued that the Board's decision was not "issued" until "a copy of [it] shall be sent by certified mail or served personally on all parties to the appeal and the Director" as required by the regulations. *Id.* (internal quotation omitted). The court noted that "[t]he rule does not say when this [notice] should be done." *Id.* It held "[w]e see no reason not to read 33 U.S.C. § 921(c) as meaning what it says. The policy requiring that appeals be timely taken is so strong that ministerial failures by a clerk cannot be allowed to overcome it." *Id.* at 44 (citations omitted). The appeal was dismissed as untimely. *Id.*

We agree with this analysis. "Issuance" in § 921(c) means filed with the Clerk of the Board, nothing more. The meaning of "filing" under §§ 921(a) and 919(e) is irrelevant. This appeal is DISMISSED for lack of jurisdiction because the petition was not timely filed.

Parallel Citations

1995 A.M.C. 912

Footnotes

* The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed.R.App.P. 34(a) and Ninth Circuit Rule 34-4.

1 All references to code sections are to 33 U.S.C. unless otherwise indicated.

2 Section 921(c) reads in relevant part:

> Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside....

3 Interestingly, the Fourth and Sixth Circuits have decided the definition of "filing" under § 921(a) and of "issuance" under § 921(c) without reference to the case in that circuit which decided the other subsection's meaning. These two sets of decisions developed independently and apparently without any reference to one another.

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United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 18. Longshore and Harbor Workers' Compensation (Refs & Annos)

33 U.S.C.A. § 921

§ 921. Review of compensation orders

Currentness

(a) Effectiveness and finality of orders

A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this title, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subsection (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) Benefits Review Board; establishment; members; chairman; quorum; voting; questions reviewable; record; conclusiveness of findings; stay of payments; remand

(1) There is hereby established a Benefits Review Board which shall be composed of five members appointed by the Secretary from among individuals who are especially qualified to serve on such Board. The Secretary shall designate one of the members of the Board to serve as chairman. The Chairman shall have the authority, as delegated by the Secretary, to exercise all administrative functions necessary to operate the Board.

(2) For the purpose of carrying out its functions under this chapter, three members of the Board shall constitute a quorum and official action can be taken only on the affirmative vote of at least three members.

(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier.

(4) The Board may, on its own motion or at the request of the Secretary, remand a case to the administrative law judge for further appropriate action. The consent of the parties in interest shall not be a prerequisite to a remand by the Board.

(5) Notwithstanding paragraphs (1) through (4), upon application of the Chairman of the Board, the Secretary may designate up to four Department of Labor administrative law judges to serve on the Board temporarily, for not more than one year. The Board is authorized to delegate to panels of three members any or all of the powers which the Board may exercise. Each such panel shall have no more than one temporary member. Two members shall constitute a quorum of a panel. Official adjudicative action may be taken only on the affirmative vote of at least two members of a panel. Any party aggrieved by a decision of a panel of the Board may, within thirty days after the date of entry of the decision, petition the entire permanent Board for review of the panel's decision. Upon affirmative vote of the majority of the permanent members of the Board, the petition shall be

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granted. The Board shall amend its Rules of Practice to conform with this paragraph. Temporary members, while serving as members of the Board, shall be compensated at the same rate of compensation as regular members.

(c) Court of appeals; jurisdiction; persons entitled to review; petition; record; determination and enforcement; service of process; stay of payments

Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of Title 28. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified. The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier. The order of the court allowing any stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that irreparable damage would result to the employer, and specifying the nature of the damage.

(d) District court; jurisdiction; enforcement of orders; application of beneficiaries of awards or deputy commissioner; process for compliance with orders

If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the United States District Court for the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

(e) Institution of proceedings for suspension, setting aside, or enforcement of compensation orders

Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 918 of this title.

CREDIT(S)

(Mar. 4, 1927, c. 509, § 21, 44 Stat. 1436; June 25, 1936, c. 804, 49 Stat. 1921; June 25, 1948, c. 646, § 32(b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Oct. 27, 1972, Pub.L. 92-576, § 15(a), (b), 86 Stat. 1261, 1262; Mar. 27, 1978, Pub.L. 95-251, § 2(a)(10), 92 Stat. 183; Sept. 28, 1984, Pub.L. 98-426, § 15, 98 Stat. 1649.)

Notes of Decisions (469)

33 U.S.C.A. § 921, 33 USCA § 921
Current through P.L. 113-200 approved 12-4-2014

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88 F.3d 1001
United States Court of Appeals,
Federal Circuit.

Paula HERVEY, formerly Jones, and Dale Hervey, parents and natural guardians of Sharina Rae–Dawn Hervey, deceased, Petitioners–Appellants,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES, Respondent–Appellee.

No. 96–5007. | June 28, 1996.

Petitioners under National Childhood Vaccine Injury Act sought review of decision of special master denying compensation. The Court of Federal Claims, Miller, J., held that motion for review was time barred and refused to entertain it. Petitioners appealed. The Court of Appeals, Bryson, Circuit Judge, held that: (1) date of issuance of special master's decision, for purposes of Vaccine Act section requiring that motion for review be filed within 30 days of "issuance" of decision, was date on which decision was filed with clerk of Court of Federal Claims, and (2) application of that statute as written did not violate due process, even though it gave petitioners only 20 days to prepare motion for review.

Affirmed.

West Headnotes (2)

[1] United States

and review of determination

Date of issuance of special master's decision, for purposes of National Childhood Vaccine Injury Act section requiring that motion for review of special master's decision be filed within 30 days of "issuance" of decision, was not date on which decision was received by petitioners' counsel, but rather, was date on which decision was filed with clerk of Court of Federal Claims. Public Health Service Act, § 2112(e)(1), as amended, 42 U.S.C.A. § 300aa-12(e)(1).

5 Cases that cite this headnote

[2] Constitutional Law

Public health

United States

Effect.

and review of determination

Application of National Childhood Vaccine Injury Act section requiring that motion for review of special master's decision be filed within 30 days of issuance of decision did not violate due process, even though it gave petitioners only 20 days to prepare motion for review, due to delay in receipt of decision by petitioners' counsel; 30–day review period, even when shortened by delivery delay, is not unreasonably short period of time within which to seek review. U.S.C.A. Const.Amend. 5; Public Health Service Act, § 2112(e)(1), as amended, 42 U.S.C.A. § 300aa–12(e)(1).

5 Cases that cite this headnote

Attorneys and Law Firms

***1001** Alan W. Gentges, Savage, O'Donnell, Scott, McNulty, Affeldt & Gentges, of Tulsa, Oklahoma, argued, for petitioners-appellants. With him on the brief was M. Alan Souter.

Richard A. Schollmann, Attorney, Torts Branch, Civil Division, Department of Justice, of Washington, D.C., argued, for respondent-appellee. With him on the brief were Frank W. Hunger, Assistant Attorney General, Helene M. Goldberg, Director, and John Lodge Euler, Deputy Director.

Before ARCHER, Chief Judge, NIES, Senior Circuit Judge, and BRYSON, Circuit Judge.

Opinion

BRYSON, Circuit Judge.

In this Vaccine Act case, the petitioners sought review of the decision of a special master denying compensation. Their petition for review, however, was not filed within the 30–day period allotted under the statute. For that reason, the Court

of Federal Claims held the motion time-barred and refused to entertain it. We affirm.

I

In 1991, the petitioners filed a petition for compensation under the National Childhood Vaccine Injury Act (the Vaccine Act), 42 U.S.C. §§ 300aa-1 to 300aa-34. The case was assigned to a special master, who held a hearing and issued a decision on July 14, 1995, denying compensation. The special ***1002** master concluded that the petitioners had failed to prove that their daughter had experienced a qualifying injury that led to her death.

The Vaccine Act permits a petitioner to seek review of a special master's decision by filing a motion for review in the Court of Federal Claims. To obtain review, the petitioner must file a motion in the Court of Federal Claims within 30 days of the issuance of the special master's decision. 42 U.S.C. § 300aa-12(e)(1). The petitioners in this case did not file their motion for review in the Court of Federal Claims until August 23, 1995, which was 40 days after the special master's decision was filed. Holding that the motion was not filed within 30 days of the issuance of the special master's decision and that the 30-day period in Section 12(e)(1) of the Vaccine Act is jurisdictional, the Court of Federal Claims directed that the motion be returned unfiled. The petitioners then prosecuted this appeal, seeking to have their case reinstated and returned to the Court of Federal Claims for further proceedings there.

II

The language of the Vaccine Act and a prior decision of this court foreclose the petitioners' contention that their motion for review was timely.

[1] Section 12(e)(1) of the Vaccine Act, 42 U.S.C. § 300aa-12(e)(1), provides as follows, in pertinent part:

> Upon issuance of the special master's decision, the parties shall have 30 days to file with the clerk of the United States Court of Federal Claims a motion to have the court review the decision.

In *Widdoss v. Secretary of the Dep't of Health & Human Servs.*, 989 F.2d 1170 (Fed.Cir.), ***cert. denied,*** 510 U.S. 944, 114 S.Ct. 381, 126 L.Ed.2d 331 (1993), this court held that the 30-day time period for a motion for review is jurisdictional, and that neither the Court of Federal Claims nor this court may excuse a failure to satisfy the 30-day filing requirement. The only remaining question under the statute is whether the petitioners' filing on August 23, 1995, was within 30 days of the "issuance of the special master's decision." We hold that the date of "issuance" of the special master's decision was not the date on which it was received by the petitioners' counsel, as the petitioners contend, but rather the date on which the decision was filed with the clerk of the Court of Federal Claims.

The term "issuance" in section 12(e)(1) cannot be construed to mean "receipt." The pertinent common meaning of the verb "issue" is "to be given out officially, to be published," and its legal meaning is "to send out officially ... to publish or utter." *Webster's New International Dictionary* 1319 (2d ed. 1953). Both of those definitions denote promulgation of the decision by the decisionmaker, not its subsequent receipt by the parties. *See also Black's Law Dictionary* 745 (5th ed. 1979) ("issue" means "to send forth, to emit, to promulgate"); *Webster's Third New International Dictionary* 1201 (1968) ("issue" means "the act of officially putting forth ... or proclaiming or promulgating (as a written order or directive)").

To be sure, the term "issuance," as used in section 12(e)(1), could be accorded several slightly different meanings. For example, it could be interpreted to mean rendition, to mean public announcement, or to mean formal filing with the clerk of the court. Rule 23 of the Vaccine Rules, R.Ct.Fed.Cl., Appendix J, interprets the term "issuance" to mean filing, so that the 30-day review period begins to run when the special master's decision is filed with the clerk of the Court of Federal Claims. That interpretation is a reasonable one, and it has the virtue of providing an unambiguous and well-documented starting point for the 30-day period.

That interpretation of the term "issuance" is consistent with this court's decision in the *Widdoss* case. The special master filed her decision in that case on June 7, 1991, and the motion to review that decision was held to be untimely when it was filed on July 9 of the same year. This court held that the date of "issuance" of the special master's decision, within the meaning of Section 12(e)(1) of the Vaccine Act, was the date

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the special master's decision was "actually issued," *i.e.*, June 7, 1991, the date it was filed. 989 F.2d at 1175.

***1003** We therefore hold that the date of issuance for purposes of Section 12(e)(1) was July 14, 1995, the date the special master's decision was filed with the clerk of the Court of Federal Claims. The period within which a motion for review had to be filed thus ended on August 14, 1995, the Monday following the end of the 30–day period that began on July 14. The petition for review, which was not filed until August 23, 1995, was therefore nine days out of time.

The petitioners do not make an effort to square the language of the statute with their position that the 30–day period should run from their counsel's receipt of the special master's opinion. Instead, they argue that the general policies of the Vaccine Act would be disserved by making the amount of time available for seeking review of a special master's decision depend on how long it takes for a party to receive notice of the decision. In this case, for example, the petitioners contend that they did not receive a copy of the decision until July 24, 1995, after 10 days of the 30–day period had expired. At that time, they argue, they were left with only 20 days within which to prepare a motion for review, rather than the 30 days that the statute contemplated. While it is true that the time consumed in delivering notice of a decision to the parties or their counsel may result in some reduction in the amount of time allotted to prepare the motion for review, the concern raised by that problem is not sufficient to overcome the very clear statutory language. Congress specified that a motion for review would have to be filed within 30 days of "issuance" of the special master's decision, not 30 days of its receipt. For purposes of the petitioners' statutory claim, that is the end of the matter.

[2] The petitioners make a constitutional claim as a backup to their statutory argument. They claim that applying the statute as written, which gave them only 20 days to prepare their motion for review in the Court of Federal Claims, resulted in a violation of the Due Process Clause of the Fifth Amendment.

We can find no support for this argument in any principle of constitutional law. Although the petitioners argue that due process would be denied in a case in which a petitioner did not receive notice of the special master's decision until after the 30–day period had expired, that is not this case and we need not address that hypothetical case in order to decide the due process question presented here. The petitioners had 20 days within which to decide whether to seek review of the special master's decision and to prepare and file their motion. A 30–day review period, even when shortened somewhat by a delivery delay, is not an unreasonably short period of time within which to seek review of a lower tribunal's decision. *See* 28 U.S.C. § 2107; Fed.R.App.P. 4(a) (standard 30–day period within which to take an appeal from a decision of a federal district court in a civil case runs from the date the order or judgment is entered, regardless of when the losing party receives notice); Fed.R.App.P. 4(b) (only 10 days allotted to a defendant to notice an appeal in a criminal case); *see also* Fed.R.Civ.P. 50(b), 59(b) (in civil cases, motions for judgment as a matter of law or for a new trial must be filed within 10 days of judgment); Fed.R.Crim.P. 29(c), 33, 34 (in criminal cases, motions for judgment of acquittal, new trial, or arrest of judgment must be filed within seven days of verdict).

Because we find no due process violation flowing from the loss of 10 days of the 30–day period for filing a motion for review in the Court of Federal Claims, we conclude that the petitioners' motion was jurisdictionally out of time and therefore was correctly held insufficient to preserve the petitioners' right to review of the special master's decision.

AFFIRMED.

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88 F.3d 1001
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Federal Circuit.

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Affirmed.

West Headnotes (2)

[1] United States

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Opinion

BRYSON, Circuit Judge.

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the special master's decision was "actually issued," *i.e.*, June 7, 1991, the date it was filed. 989 F.2d at 1175.

***1003** We therefore hold that the date of issuance for purposes of Section 12(e)(1) was July 14, 1995, the date the special master's decision was filed with the clerk of the Court of Federal Claims. The period within which a motion for review had to be filed thus ended on August 14, 1995, the Monday following the end of the 30–day period that began on July 14. The petition for review, which was not filed until August 23, 1995, was therefore nine days out of time.

The petitioners do not make an effort to square the language of the statute with their position that the 30–day period should run from their counsel's receipt of the special master's opinion. Instead, they argue that the general policies of the Vaccine Act would be disserved by making the amount of time available for seeking review of a special master's decision depend on how long it takes for a party to receive notice of the decision. In this case, for example, the petitioners contend that they did not receive a copy of the decision until July 24, 1995, after 10 days of the 30–day period had expired. At that time, they argue, they were left with only 20 days within which to prepare a motion for review, rather than the 30 days that the statute contemplated. While it is true that the time consumed in delivering notice of a decision to the parties or their counsel may result in some reduction in the amount of time allotted to prepare the motion for review, the concern raised by that problem is not sufficient to overcome the very clear statutory language. Congress specified that a motion for review would have to be filed within 30 days of "issuance" of the special master's decision, not 30 days of its receipt. For purposes of the petitioners' statutory claim, that is the end of the matter.

[2] The petitioners make a constitutional claim as a backup to their statutory argument. They claim that applying the statute as written, which gave them only 20 days to prepare their motion for review in the Court of Federal Claims, resulted in a violation of the Due Process Clause of the Fifth Amendment.

We can find no support for this argument in any principle of constitutional law. Although the petitioners argue that due process would be denied in a case in which a petitioner did not receive notice of the special master's decision until after the 30–day period had expired, that is not this case and we need not address that hypothetical case in order to decide the due process question presented here. The petitioners had 20 days within which to decide whether to seek review of the special master's decision and to prepare and file their motion. A 30–day review period, even when shortened somewhat by a delivery delay, is not an unreasonably short period of time within which to seek review of a lower tribunal's decision. *See* 28 U.S.C. § 2107; Fed.R.App.P. 4(a) (standard 30–day period within which to take an appeal from a decision of a federal district court in a civil case runs from the date the order or judgment is entered, regardless of when the losing party receives notice); Fed.R.App.P. 4(b) (only 10 days allotted to a defendant to notice an appeal in a criminal case); *see also* Fed.R.Civ.P. 50(b), 59(b) (in civil cases, motions for judgment as a matter of law or for a new trial must be filed within 10 days of judgment); Fed.R.Crim.P. 29(c), 33, 34 (in criminal cases, motions for judgment of acquittal, new trial, or arrest of judgment must be filed within seven days of verdict).

Because we find no due process violation flowing from the loss of 10 days of the 30–day period for filing a motion for review in the Court of Federal Claims, we conclude that the petitioners' motion was jurisdictionally out of time and therefore was correctly held insufficient to preserve the petitioners' right to review of the special master's decision.

AFFIRMED.

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544 F.2d 35
United States Court of Appeals,
Second Circuit.

PITTSTON STEVEDORING CORPORATION and the Home Insurance Company, Petitioners,
v.
Anthony DELLAVENTURA,
and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, United States Department of Labor., Respondents,
NORTHEAST MARINE TERMINAL COMPANY, INC., Employer, and State Insurance Fund, Carrier, Petitioners,
v.
Ralph CAPUTO, Claimant, and Director, Office of Workers' Compensation Programs, U.S.D.L., Respondents.
PITTSTON STEVEDORING CORPORATION, Petitioner,
v.
John SCAFFIDI and Director, Office of Workers' Compensation Programs, U.S.D.L., Respondents.
INTERNATIONAL TERMINAL OPERATING COMPANY, INC., Self-Insured Employer-Petitioner,
v.
Carmelo BLUNDO, Claimant,
and
Director, Office of Workers' Compensation Programs, U. S. D. L., Respondents.

Nos. 1004, 1014, 1044, 1111, Dockets 76-4042, 76-4009, 76-4043 and 76-4249.
| Argued May 20, 1976. | Decided July 1, 1976. | Certiorari Granted Dec. 6, 1976.

See 97 S.Ct. 522.

Proceeding was brought for review of orders of the Benefits Review Board affirming compensation awards to four employees under Longshoremen's and Harbor Workers' Compensation Act as amended in 1972. The Court of Appeals, Friendly, Circuit Judge, held that one petition, which was not filed within 60 days after issuance of Board order, was not timely; that where insurance carrier paid one award in full and chose not to appeal, employer, to which no effective relief could be afforded, could not appeal; and that 1972 amendments to Act at least covered employees who met situs requirements and were engaged in stripping or stuffing containers or handling of cargo up to point where consignor had actually begun its movement from pier, or in case of loading, from time consignee had stopped vehicle at pier, provided in latter instances that employee had spent significant part of his time in typical longshoring activity of taking cargo on or off vessel.

One petition dismissed as untimely; one petition dismissed for lack of justiciable controversy; and two other petitions denied on the merits.

Lumbard, Circuit Judge, filed concurring and dissenting opinions.

West Headnotes (18)

[1] Workers' Compensation
Time for Proceeding
Workers' Compensation
Excuse for delay, and extension of time

Petition for review of order of the Benefits Review Board affirming compensation award to employee under Longshoremen's and Harbor Workers' Compensation Act which was filed more than 60 days after issuance of Board order was untimely and did not constitute appropriate case for granting relief on grounds of "excusable neglect" in view of facts that attorney for parties received copy of decision within 60-day period, did not deny that he advised his clients, and offered no explanation for having failed to file petition within allotted time, and was therefore dismissed. Longshoremen's and Harbor Workers' Compensation Act, § 21(c) as amended 33 U.S.C.A. § 921(c).

18 Cases that cite this headnote

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[2] **Federal Courts**

and Employment

Workers' Compensation

Entitled

Liberalization of notions as to what makes a person "adversely affected or aggrieved" for purposes of appeal from decision of Benefits Review Board did not eliminate requirement that in order for controversy to be justiciable, court must be able to afford effective relief. Longshoremen's and Harbor Workers' Compensation Act, § 21(c), as amended 33 U.S.C.A. § 921(c).

8 Cases that cite this headnote

[3] **Workers' Compensation**

and performance of award

Where issue of liability is determined against an employer and its insurer, and insurer pays damages in full even without consent of insured and chooses not to appeal, employer cannot appeal from judgment against him.

1 Cases that cite this headnote

[4] **Workers' Compensation**

and performance of award

Workers' Compensation

withdrawal, or abandonment of appeal

Where employer's insurance carrier paid compensation award under Longshoremen's and Harbor Workers' Compensation Act in full and chose not to appeal, employer, to which no effective relief could be afforded on appeal and which was asking for advisory opinion that award should not have been made, could not appeal, and thus employer's petition for review of order affirming award was dismissed as not presenting a justiciable controversy. Longshoremen's and Harbor Workers' Compensation Act, § 21(c) as amended 33 U.S.C.A. § 921(c).

Cases that cite this headnote

[5] **Workers' Compensation**

in general

Where question on petitions for review of orders of Benefits Review Board affirming compensation awards under Longshoremen's and Harbor Workers' Compensation Act was not whether line established by Congress was sufficiently elastic to include employees but main issue was whether Congress placed line at "point of rest" or much further landward, statutory presumption that claim comes within provisions of Act did not come into play so as to require any doubt in meaning of new coverage provision to be resolved in favor of coverage. Longshoremen's and Harbor Workers' Compensation Act, §§ 3, 20, 20(a) as amended 33 U.S.C.A. §§ 903, 920, 920(a).

5 Cases that cite this headnote

[6] **Workers' Compensation**

evidence

On petitions for review of orders of Benefits Review Board affirming compensation awards under Longshoremen's and Harbor Workers' Compensation Act, standard of review was that factual findings of Board were conclusive if supported by substantial evidence in the record considered as a whole. Longshoremen's and Harbor Workers' Compensation Act, § 21(b)(3) as amended 33 U.S.C.A. § 921(b)(3).

1 Cases that cite this headnote

[7] **Administrative Law and Procedure**

employment, and public officials

Workers' Compensation

and Operation of Statutes in General

On petitions for review of orders of Benefits Review Board affirming compensation awards to employees under Longshoremen's and Harbor Workers' Compensation Act, question whether 1972 Amendments to Act should be so interpreted as to include employees was not kind of question which justified or required judicial deference to Board in view of facts that Board was not policymaking agency, that decisions of Board were rendered in series of short opinions on isolated facts and contained no in-depth study of problem, and that case depended in no small measure on prior judicial decisions and legislative history, subjects on which court had greater competence than board. Longshoremen's and Harbor Workers' Compensation Act, § 1 et seq. as amended 33 U.S.C.A. § 901 et seq.

17 Cases that cite this headnote

[8] Workers' Compensation

Federal

acts

On petitions for review of orders of Benefits Review Board affirming compensation awards to employees under Longshoremen's and Harbor Workers' Compensation Act, little weight was given to arguments made on both sides that were based on definitions of longshoreman or maritime employment or contracts formulated in different contexts. Act Aug. 12, 1953, 67 Stat. 541; Longshoremen's and Harbor Workers' Compensation Act, § 41(a) as amended 33 U.S.C.A. § 941(a); Carriage of Goods by Sea Act, § 1(e), 46 U.S.C.A. § 1301(e).

2 Cases that cite this headnote

[9] Statutes

Liberal

or strict construction

Remedial legislation should be construed liberally.

Cases that cite this headnote

Construction

[10] Workers' Compensation

Federal

acts

Claimant, who was clearly on a pier and terminal adjoining water, a part of which was used for loading and unloading vessels, at time of his injury, was injured on "navigable waters" within expanded definition provided by Longshoremen's and Harbor Workers' Compensation Act which includes any adjoining pier or other adjoining area customarily used by employer in loading, unloading, repairing or building a vessel and thus met situs test of the Act. Longshoremen's and Harbor Workers' Compensation Act, § 3(a) as amended 33 U.S.C.A. § 903(a).

5 Cases that cite this headnote

[11] Workers' Compensation

Federal

acts

Longshoremen's and Harbor Workers' Compensation Act provision defining "employee" as, inter alia, any person engaged in maritime employment, including any longshoremen or other person engaged in longshoring operations, is to be construed no differently than if it said "any longshoreman or other person engaged in longshoring activity or engaged in other maritime employment." Longshoremen's and Harbor Workers' Compensation Act, § 2(3) as amended 33 U.S.C.A. § 902(3).

1 Cases that cite this headnote

[12] Workers' Compensation

Federal

acts

Longshoreman may be covered under Longshoremen's and Harbor Workers' Compensation Act even when he is

not engaged in traditional longshoring activity. Longshoremen's and Harbor Workers' Compensation Act, § 1 et seq. as amended 33 U.S.C.A. § 901 et seq.

1 Cases that cite this headnote

[13] **Workers' Compensation**

Federal acts

Congress in enacting 1972 amendments to Longshoremen's and Harbor Workers' Compensation Act intended to cover employees engaged in stripping and stuffing containers if they met situs test requiring injury to occur on navigable waters, including, inter alia, any adjoining pier, or drydock or other adjoining area customarily used by employer in loading, unloading, repairing or building vessel, irrespective of employee's position vis-a-vis "point of rest." Longshoremen's and Harbor Workers' Compensation Act, § 3(a) as amended 33 U.S.C.A. § 903(a).

2 Cases that cite this headnote

[14] **Workers' Compensation**

Federal acts

In enacting 1972 amendments to Longshoremen's and Harbor Workers' Compensation Act, Congress was concerned with providing uniformity of coverage for persons engaged in loading or unloading functions on piers and wished to minimize occasions when longshoremen and other harbor workers would be walking from Act's liberalized benefits to much lower ones provided by state compensation laws; such concern for uniformity was not limited to rectifying disparity between longshoreman making up draft on ship and longshoreman receiving it on pier but extended to disparity that would result if line were drawn between latter and longshoreman, perhaps the very same one, who moved unloaded cargo to another place on the pier. Longshoremen's and Harbor Workers' Compensation Act, §§ 2(3), 3(a) as amended 33 U.S.C.A. §§ 902(3), 903(a).

2 Cases that cite this headnote

[15] **Workers' Compensation**

Federal acts

Five-day delay in picking up cargo by consignee did not require that cargo be regarded as "stored" for purposes of determining whether employee injured while unloading such cargo was covered under 1972 amendments to Longshoremen's and Harbor Workers' Compensation Act. Longshoremen's and Harbor Workers' Compensation Act, §§ 2(3), 3(a) as amended 33 U.S.C.A. §§ 902(3), 903(a).

Cases that cite this headnote

[16] **Workers' Compensation**

Federal acts

Amendments to Longshoremen's and Harbor Workers' Compensation Act at least cover employees who meet situs requirement that injury occur on navigable waters, which include, inter alia, any adjoining pier or other area customarily used by employer in loading or unloading vessel, and who are engaged in stripping or stuffing containers or handling of cargo up to point where consignee has actually begun its movement from pier, or in case of loading, from time when consignor has stopped his vehicle at pier, provided in latter instances that employee has spent significant part of his time in typical longshoring activity of taking cargo on or off a vessel. Longshoremen's and Harbor Workers' Compensation Act, §§ 2(3), 3(a) as amended 33 U.S.C.A. §§ 902(3), 903(a).

10 Cases that cite this headnote

[17] **Admiralty**

Personal injuries

Congress had power to expand concept of maritime tort to include injuries suffered by persons on structures adjoining navigable waters in course of employment related to ships. Longshoremen's and Harbor Workers' Compensation Act, § 1 et seq. as amended 33 U.S.C.A. § 901 et seq.

1 Cases that cite this headnote

[18] Workers' Compensation

Persons affected

Extension of coverage afforded by 1972 amendments to Longshoremen's and Harbor Workers' Compensation Act could be predicated on portion of Congress' jurisdiction relating to maritime contracts where there is no "locality" test since contracts of employment relating to maritime matters are within that jurisdiction and claims under Longshoremen's and Harbor Workers' Compensation Act are by employee engaged in maritime employment against an employer. Longshoremen's and Harbor Workers' Compensation Act, §§ 2(3), 3(a) as amended 33 U.S.C.A. §§ 902(3), 903(a).

1 Cases that cite this headnote

Attorneys and Law Firms

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Leonard J. Linden, New York City (Linden & Gallagher, New York City, of counsel), for International Terminal Operating Co., Inc.

Angelo C. Gucciardo, New York City (Israel, Adler, Ronca & Gucciardo, New York City, of counsel), for respondents Dellaventura, Caputo, Scaffidi and Blundo.

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Thomas W. Gleason, Jr., New York City (Irwin Herschlag, New York City, of counsel), for International Longshoremen's Association, AFL-CIO, amicus curiae.

Thomas D. Wilcox, Washington, D.C., for National Association of Stevedores, amicus curiae.

Before LUMBARD, FRIENDLY and OAKES, Circuit Judges.

Opinion

FRIENDLY, Circuit Judge:

We have here four petitions under 33 U.S.C. s 921(c) by employers, in some instances joined by their insurance carriers, to review orders of the Benefits Review Board (BRB) affirming compensation awards made to four employees under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), as amended in 1972, 33 U.S.C. ss 901 et seq.[1] They present a *39 question of considerable importance, namely, how far the 1972 Amendments extended the coverage of LHWCA.

Presented with the same general issue, a divided panel of the Fourth Circuit ruled in favor of the employers, I.T.O. Corporation of Baltimore v. Benefits Review Board, U. S. Dep't of Labor and Adkins, 529 F.2d 1080 (4 Cir. 1975), holding that the Act extended benefits only to persons injured while unloading cargo from the ship to what the majority termed a "first point of rest," i. e., the first place where the cargo is deposited on a pier or terminal area after being unloaded, and to persons injured while loading cargo from the "last point of rest," 529 F.2d at 1081. The I.T.O. case has been reheard en banc. We are told that only one other circuit has construed the extended coverage provisions here at issue, Weyerhaeuser Co. v. Gilmore, 528 F.2d 957 (9 Cir. 1975), rehearing denied, Feb. 6, 1976, petition for cert. filed, No. 75-1620, 44 U.S.L.W. 3645 (U.S. May 6, 1976), a case we do not consider to be truly relevant, but that the issue here presented is sub judice in the First Circuit, John T. Clark & Son of Boston, Inc. v. William Stockman, No. 75-1360, argued Jan. 5, 1976, and in the Fifth Circuit. Given the importance of the question, the number of courts of appeals endeavoring to find an answer, and the divergence of opinion already manifested, it seems unlikely that the opinion of any court of appeals will be the last word to

be said. In consequence we shall not dwell on the long history of the problem of affording appropriate remedies for longshoremen and harbor workers against their employers which had its inception in Southern Pacific Co. v. Jensen, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917) a history which is interestingly traced in Gilmore & Black, The Law of Admiralty ss 6-45 to -49 (2d ed. 1975) but will proceed directly to the cases in hand.

I. The 1972 Amendments

The situation that led to adoption of the 1972 Amendments was described as follows in the portion of the Senate Report headed "Need for the Bill," S.Rep.No.92-1125, 92d Cong., 2d Sess. 4-5 (1972), U.S.Code Cong. & Admin.News 1972, p. 4698.

Since 1946, due to a number of decisions by the U.S. Supreme Court, it has been possible for an injured longshoreman to avail himself of the benefits of the Longshoremen's and Harbor Workers' Compensation Act and to sue the owner of the ship on which he was working for damages as a result of his injury. The Supreme Court has ruled that such ship owner, under the doctrine of seaworthiness, was liable for damages caused by any injury regardless of fault. In addition, shipping companies generally have succeeded in recovering the damages for which they are held liable to injured longshoremen from the stevedore on theories of express or implied warranty, thereby transferring their liability to the stevedore company, the actual employer of the longshoremen.

The social costs of these law suits, the delays, crowding of court calendars and the need to pay for lawyers' services have seldom resulted in a real increase in actual benefits for injured workers.

For a number of years representatives of the employees have attempted to have the benefit levels under the Act raised so that injured workers would be properly protected by the Act. At the same time, employer groups indicated their willingness to increase such payments but indicated they could do so only if the Longshoremen's and Harbor Workers' Compensation Act were to again become the exclusive remedy against the stevedore as had been intended since its passage in 1927 until modified by various Supreme Court decisions.

***40** The bill reported by the committee meets these objections by specifically eliminating suits against vessels brought for injuries to longshoremen under the doctrine of seaworthiness and outlawing indemnification actions and "hold harmless" or indemnity agreements. It continues to allow suits against vessels or other third parties for negligence. At the same time it raises benefits to a level commensurate with present day salaries and with the needs of injured workers whose sole support will be payments under the Act.

In practical terms the bill was a trade-off. See Landon v. Lief Hoegh and Co., Inc., 521 F.2d 756, 761-62 (2 Cir. 1975), cert. denied, 423 U.S. 1053, 96 S.Ct. 783, 46 L.Ed.2d 642 (1976). Stevedores and other employers were pushing for complete abolition of the three-way damage action possible under Seas Shipping Co., Inc. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946), which held longshoremen and other harbor workers to be "seamen" entitled to sue the ship for unseaworthiness, and Ryan Stevedoring Co., Inc. v. Pan-Atlantic S. S. Corp., 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956), which permitted the shipowner to seek indemnity for any liability thus entailed from an injured worker's employer. This triangle in effect exposed the employer (already liable for and often having paid the limited benefits provided by the LHWCA) to an unlimited liability to the employee for damages and to the shipowner for its counsel fees in defending the employee's suit. The unions representing longshoremen and other harbor workers, which for years had been seeking increased benefits under the Act, opposed Congressional repeal of their Sieracki-created status as "seamen" in part on the grounds that the LHWCA's benefits were so low that workers needed the additional protection of the "unseaworthiness" doctrine. The compromise between these positions effected by the 1972 Amendments was this: The Sieracki action for unseaworthiness was eliminated, longshoremen in the future could sue the ship only for negligence, and employers were immunized from indemnity suits by shipowners. 33 U.S.C. s 905(b). In return, the workers were to secure increased benefits under LHWCA and, what is here pertinent, an extension of that statute's coverage. Thus the Senate Committee said that the principal purpose of the Amendments was "to upgrade the benefits, extend coverage to protect additional workers, provide a specified cause of action for damages against third parties, and to promulgate administrative reforms," Sen.Rep., supra, p. 1.

The change in the coverage section was dramatic. Before amendment the first sentence of 31 U.S.C. s 903(a) read:

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury

> occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.

The Amendments altered this to read:

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

In place of the definition of "employee" previously contained in s 902(3) as "not includ(ing) a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net," the Amendments defined the term as follows:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any ***41** person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

The definition of "employer," s 902(4),

> (4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock).

was modified by inserting after "navigable waters of the United States" the expansion of that term by the parenthetical phrase in s 903. [2]

Thus, under the Amendments there are two tests for coverage under the Act: a "situs" test requiring the injury to occur on the "navigable waters" as now defined, and a "status" test which requires that the employee be "engaged in maritime employment," etc. While the situs test has been liberalized, the creation of an employee status test adds a new element to the coverage requirements. [3] The problem with which we are here concerned arises from Congress' failure to supply any definition of two terms in s 902(3) "engaged in maritime employment" and "any longshoreman or other person engaged in longshoring operations."

Two of the cases before us, relating to claimants Blundo and Scaffidi, concern the loading or unloading of containers; the other two, relating to claimants Dellaventura and Caputo, involve loading of ordinary cargo into consignees' trucks on the pier.

(1) Blundo. Claimant Blundo was employed as a "checker" by the International Terminal Operating Co. (ITO). [4] He was injured while checking cargo being removed from a container at the 19th Street pier in Brooklyn when he walked around a draft containing cargo to mark it, slipped on some ice and fell. He was working on the stringpiece within 30 to 40 feet of the water. The container he was checking had been unloaded a few days before at a different pier and then taken by a truckman over city streets to the 19th Street pier where it was opened by the United States Customs Office and then stripped. The Administrative Law Judge (ALJ) found that the 19th Street pier was not utilized by the employer for the actual loading or unloading of vessels but rather for the storage of commodities and for the "stripping, or stuffing, i. e., loading or unloading of containers." The BRB affirmed his findings as to the employee's status and the situs of the accident and upheld a compensation award under the LHWCA.

(2) Scaffidi. Claimant Scaffidi was employed by Pittston Stevedoring Corp. as a "hustler" operator, a kind of trucker who moves containers within a terminal. On March 12, 1973, Scaffidi drove a hustler loaded with containers of cargo from the Columbia Street Pier in Brooklyn, New York, through some ten blocks of public streets to Pier 12. On arriving at Pier 12 he backed the container to a receiving platform on the dock in preparation for loading the container on to the ship. When the container was opened, a large case fell out

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and injured him. The BRB affirmed the findings of the ALJ on the ground that the operator of a hustler used to transport containers within a terminal is engaged in an essential step in the overall process of loading cargo aboard a vessel, which was maritime employment as contemplated in 33 U.S.C. s 902(3). It found that the fact that the container had been transported over public streets was irrelevant.

(3) Dellaventura. Claimant Dellaventura, employed by Pittston Stevedoring Corporation ***42** as a "sorter," was injured on June 27, 1973 at Pier 20 of the Pouch Terminal on Staten Island while helping to load a truck, belonging to a consignee, with coffee bags which had been offloaded from the ship "CAMPECHE" on or about February 16, 1973. Dellaventura slipped on some loose coffee beans while inside the truck. At times Dellaventura's responsibilities included going into the holds of ships to assist in sorting and loading or off-loading cargo. The accident occurred about 30 feet from the water's edge on the pier. The record affords no explanation for the consignee's 133-day delay in picking up the bags of coffee beans, but the ALJ found that the pier contained no warehouse facilities. The BRB affirmed his decision on the grounds set forth in Avvento v. Hellenic Lines, BRB No. 74-153, 1 BRBS 174, 1975 A.M.C. 153 (Nov. 12, 1974), which held that " 'until cargo is delivered to a trucker or other carrier who is to pick it up for further trans-shipment, such cargo is in maritime commerce and all employees engaged in its movement to that point are engaged in maritime employment.' "

(4) Caputo. Claimant Caputo was usually employed as "terminal labor" by Pittston Stevedoring Corp. When there was no work available at Pittston, he would take a "shape up" job as a longshoreman wherever it was available and on the day of the accident was working for Northeast Marine Terminal Co., Inc. at their terminal adjoining the water in Brooklyn. He was injured while helping a cargo consignee's truckdriver load boxes of cheese, discharged from a vessel at least five days previously, inside the consignee's truck; the injury occurred while he was rolling a dolly loaded with the cheese on it into the truck. Caputo and the employer stipulated that the work he was doing when injured involved the same risk as would obtain wherever and by whomsoever trucks were loaded or unloaded with dollies. But the ALJ found the stipulation lacked significance "in view of the situs where the injury actually occurred." The ALJ made an award in his favor and the BRB concurred.

III. Motion to Dismiss Petitions in Sellaventura's Case as Untimely

[1] Dellaventura and the Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor (OWCP), by his attorney, the Solicitor of Labor, have moved to dismiss the petitions of the employer, Pittston Stevedoring Corp., and its insurance carrier, The Home Insurance Co., as untimely. We grant Dellaventura's motion, thereby rendering it unnecessary to decide whether the Solicitor of Labor was entitled to make one.[5]

***43** The statute, 33 U.S.C. s 921(c), provides that a person adversely affected or aggrieved by a final order of the BRB may obtain review by the court of appeals for the circuit where the injury occurred "by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside." The BRB's order was issued on October 9, 1975, but the petition for review was not filed until February 5, 1976.

Petitioners' basis for resisting the motion is as follows: The BRB's Rules and Regulations, 20 C.F.R. s 802.403(b), provide that the original of any BRB decision shall be filed with the Clerk of the Board, which was done here, and that "(a) copy of the Board's decision shall be sent by certified mail or served personally on all parties to the appeal and the Director." The rule does not say when this should be done. Apparently no such notice was sent to the employer or the insurance carrier but the attorney who represented both parties before the BRB and in this court acknowledges that he received a copy within the 60-day period and does not deny that he advised his clients.

Like 28 U.S.C. s 2344 and similar provisions in the statutes for the review of orders of other agencies, 33 U.S.C. s 921(c) makes the time for seeking review start to run from the entry of the agency's order, even though the agency is under a duty to give notice. See Willow Crossing Dairy Farm v. Hardin, 327 F.Supp. 798 (W.D.Pa.1970) (where review section of Agricultural Adjustment Act provided for filing of review petition within 20 days of "entry" of judgment, word "entry" is to be interpreted ***44** normally and petition filed September 28 to review order of September 2 was not timely and did not vest the court with jurisdiction even though counsel for plaintiff did not receive notice of ruling until September 8). The BRB's regulations count the 60-day period from the date on which the decision is "filed," 20 C.F.R. s

802.410.[6] In the parallel situation of review of judgments of district courts in civil cases Rule 4(a) of the Federal Rules of Appellate Procedure likewise makes the entry of judgment the critical date; F.R.Civ.P. 77(d) directs the clerk to serve notice of the entry of a judgment or order but expressly provides that "(l)ack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure," namely, "upon a showing of excusable neglect."

We see no reason not to read 33 U.S.C. s 921(c) as meaning what it says. Cf. United States v. Michel, 282 U.S. 656, 51 S.Ct. 284, 75 L.Ed. 598 (1931); American Construction Co. v. United States, 107 F.Supp. 858, 123 Ct.Cl. 408 (1952), cert. denied, 345 U.S. 922, 73 S.Ct. 780, 97 L.Ed. 1354 (1953). The policy requiring that appeals be timely taken is so strong that ministerial failures by a clerk cannot be allowed to overcome it. The Act, like many other administrative review statutes, does not seem even to encompass the "excusable neglect" escape hatch provided for untimely appeals from the district courts. But even if it should be construed as doing so, this would be a most inappropriate case for granting relief. The clerk made the pardonable error of notifying the attorney rather than the parties, exactly what a clerk of a district court is directed to do, F.R.Civ.P. 5(b) and 77(d), and the attorney offers no explanation for having failed to file the petition within the allotted time.

IV Motion to Dismiss Petition in Scaffidi's Case as Not Presenting a Justiciable Contoversy

In the proceedings up through the decision of the ALJ, the caption of this case named both Pittston and Gulf Insurance Company, its insurance carrier, as respondents; both were represented by the same attorney. After the ALJ's decision the insurance carrier paid the award and chose not to contest it further. Pittston then engaged its present attorney who altered the caption. Apparently the claimant made no point before the BRB that the carrier's payment of the award mooted the case; he does now. Despite the general rule that objections not raised before an administrative body cannot be raised on review, we must consider this one since it goes to our jurisdiction.

We see no basis on which a reversal of the BRB's decision would enable the insurance carrier to recover from Scaffidi a payment the liability for which it chose not to contest, and Pittston, which was invited to file a reply brief on the issue, does not suggest one. Cf. Federal Insurance Co. v. Detroit Fire & Marine Insurance Co., 202 F. 648 (6 Cir.), cert. denied, 229 U.S. 620, 33 S.Ct. 778, 57 L.Ed. 1354 (1913) (insurer which paid its share of loss and failed to join other subrogated insurers in third party suit held entitled to recover ratable share of damages won). Pittston claims instead that it is nonetheless a "person adversely affected or aggrieved" by the BRB's order, 33 U.S.C. s 921(c), since the award will adversely affect its experience rating and thus increase its future premiums. Cf. ***45** Travelers Insurance Co. v. Belair, 284 F.Supp. 168 (D.Mass.1968).

Pittston's contention that this interest affords it standing immediately encounters Gange Lumber Co. v. Rowley, 326 U.S. 295, 66 S.Ct. 125, 90 L.Ed. 85 (1945). The Court there held that the appellant-employer had failed to make a showing of substantial injury to any legally protected interest which would entitle it to question the validity under the due process clause of a state statute retroactively extending the time period in which workmen's compensation awards could be modified. Under the state's system, all awards were paid out of a state insurance fund supported by employer contributions of "premiums." Rejecting the employer's argument that its future premium rates would be adversely affected by the increased award, the Court held that the effect of any one accident was too minimal and its possible injury to the employer too speculative to establish the justiciability of the case.[7]

The Gange decision, however, has been severely criticized by Professor Davis. He notes that under the state statute the employer was permitted to appeal, and characterizes the result as "unique," "the extreme one of denying the employer's standing even though the statute conferred such standing." 3 Davis, Administrative Law Treatise s 22.13, n.4 (1958). It may well be that under the more liberal concepts of standing developed in such cases as Ass'n of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970), and Barlow v. Collins, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970), Gange Lumber Co. would not be followed. However, even on the standing issue alone, an overruling of Gange Lumber Co. would hardly carry the day for Pittston on this record where it has submitted nothing but conclusory assertions of adverse effect on future premiums.[8]

[2] **[3]** **[4]** However all this may be, the liberalization of notions as to what makes a person "adversely affected or aggrieved" does not eliminate the requirement that in order for a controversy to be justiciable, the court must be able

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to afford effective relief. See Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976); Warth v. Seldin, 422 U.S. 490, 504-05, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); North Carolina v. Rice, 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971); Local No. 8-6, Oil, Chemical & Atomic Workers Internat'l Union, AFL-CIO v. Missouri, 361 U.S. 363, 367, 80 S.Ct. 391, 4 L.Ed.2d 373 (1960); St. Pierre v. United States, 319 U.S. 41, 42, 63 S.Ct. 910, 87 L.Ed. 1199 (1943); McKee v. Turner, 491 F.2d 1106 (9 Cir. 1974). As indicated, Pittston has not claimed that Scaffidi will not retain his award even if we should reverse the BRB; what it is asking is simply an advisory opinion that the award should not have been made. [9] We do not doubt that ***46** where insurance only partially covers the liability, the employer may appeal from a judgment even though the insurer has paid its part. See Moore v. Columbia Casualty Co., 174 F.Supp. 566 (S.D.Ill.1959); Queen Ins. Co. of America v. Meyer Milling Co., 43 F.2d 885 (8 Cir. 1930). But where the issue of liability is determined against an insured and its insurer, and the insurer pays the damages in full even without the consent of the insured and chooses not to appeal, the insured cannot appeal from the judgment against him. Ross v. Stricker, 153 Ohio St. 153, 91 N.E.2d 18 (1950), discussed in 19 Couch on Insurance 2d s 78.228. In short, as the Supreme Court has said, albeit in a different context, once an insurer "has paid an entire loss suffered by the insured, it is the only real party in interest and must sue in its own name." United States v. Aetna Casualty & Surety Co., 338 U.S. 366, 380-81, 70 S.Ct. 207, 215, 94 L.Ed. 171 (1949); Link Aviation, Inc. v. Downs, 117 U.S.App.D.C. 40, 325 F.2d 613 (1963). See also Zauderer v. Continental Casualty Co., 140 F.2d 211 (2 Cir. 1944). This seems a reasonable application of the general rule that a party who has no interest in a fund cannot appeal from an order disbursing the fund. Seaboard Surety Co. v. United States, 306 F.2d 855 (9 Cir. 1962), and cases cited at 306 F.2d at 859, n.6. We therefore dismiss Pittston's petition. [10]

V. Interpretation of the Statute

With these preliminaries out of the way, we can now undertake our main task the interpretation of the coverage clauses of the 1972 Amendments.

Admitting as they must that the Amendments worked some extension of coverage, petitioners and the National Association of Stevedores (NAS), as amicus curiae, would limit this to factual situations generally comparable to those in Nacirema Operating Co., Inc. v. Johnson, 396 U.S. 212, 90 S.Ct. 347, 24 L.Ed.2d 371 (1969). There the Court held that the Act, as it then stood, did not cover longshoremen killed or injured on a pier while attaching cargo from railroad cars to ships' cranes for removal to the ships, although coverage presumably would have existed had they been hurled into the water, Marine Stevedoring Corp. v. Oosting, 238 F.Supp. 78 (E.D.Va.1965), aff'd, 398 F.2d 900 (4 Cir. 1968) (en banc), [11] or injured on deck while performing part of the same operation, Calbeck v. Travelers Ins. Co., 370 U.S. 114, 82 S.Ct. 1196, 8 L.Ed.2d 368 (1962). Resting its decision solely on statutory grounds, the Court said that "(t)he invitation to move" the line dividing the coverage of LHWCA "landward must be addressed to Congress, not to this Court," 396 U.S. at 224, 90 S.Ct. at 354. Petitioners argue that the BRB's rationale in effect reads the "status" requirement out of the Act by affording ***47** coverage to any longshoreman injured on a pier no matter what he is actually doing when injured.

The respondent employees, the International Longshoremen's Association (ILA), as amicus curiae, and the Solicitor of Labor (see note 5, supra) contend that the extension was much more substantial. Their position is that the process of unloading a vessel continues until the cargo is deposited on the consignee's truck on the pier (or begins, in the case of loading, when the goods are being removed from the delivery truck), and that anyone physically participating in this process is engaged in "maritime employment." We disagree with petitioners, without having to decide whether we would go to the full extent urged by their adversaries.

A.

We begin our analysis by remarking on the unsatisfactory state of the records before us, even if we include for this purpose the two petitions which we have dismissed. When cases of this nature began coming to the BRB shortly after the enactment of the Amendments, it should have realized that it was faced with a major task of statutory construction in determining what constitutes "maritime employment" or being a "longshoreman or other person engaged in longshoring operations" which task could be performed satisfactorily only in the light of an extensive factual background detailing the structure of work on the various piers of this country. The following are illustrative of facts we would like to know but on which these records shed little or no light, even as regards the port of New York, let alone the rest of the nation. Does one gang normally take cargo off or on the ship while another is responsible for transportation

beyond the "point of rest"? Does the same gang always, sometimes, or often perform both jobs? Is all work on the pier normally conducted by a single employer or is there a division between the stevedore and the "terminal operator"? Even if there is only one employer, does he segregate the employees in their work assignments, by having different collective bargaining agreements or otherwise? Are separate charges made for services beyond the "point of rest" and, if so, for what? Does the "point of rest" shift about on the same pier? Just what is the normal practice for stripping and stuffing containers with goods belonging to different owners or destined to different consignees? Is this work normally done on the pier or in warehouses not adjoining navigable waters? What determines the choices? Does the hazardous nature of the employment stop at the point of rest or continue so long as the cargo is on the pier? Do the hazards change in frequency or degree as the longshoreman moves away from the water? The consolidation of several cases presenting different factual situations in a single large proceeding might have enabled the BRB to make meaningful distinctions. Instead of developing such a record and laying down guidelines for the ALJ's, the BRB has handled each case on an individual basis, [12] and without establishing any record support for the interpretive rules announced therein.

If we were sitting as a court of last resort, we would remand these cases to the BRB on our own motion with directions to cause such a hearing to be held. But with the cases in their present posture in this circuit and others, we think it more helpful for us to state our views on what is now before us. [13]

***48 B.**

Perhaps the most useful way to approach the issue is to begin by discussing certain arguments we have not found to be particularly helpful.

[5] (1) The "presumption" of coverage, 33 U.S.C. s 920. The claimants, the Solicitor of Labor, and the ILA place great reliance on a provision in the LHWCA as originally adopted in 1927, 33 U.S.C. s 920, and still in effect, that four things shall be presumed in the absence of substantial evidence to the contrary. One of these is "(t)hat the claim comes within the provisions of this chapter." 33 U.S.C. s 920(a). They contend that if the meaning of the new coverage provision, 33 U.S.C. s 903, is in any way doubtful, this presumption requires the doubt to be resolved in favor of coverage. We do not think this was what Congress had in mind; the very fact that the presumption can be overcome by substantial contrary evidence indicates its inapplicability to an interpretive question of general import such as this. See Crowell v. Benson, 285 U.S. 22, 64-65, 52 S.Ct. 285, 76 L.Ed. 598 (1932).

Even in cases holding that the accordion-like phrase "arising out of and in the course of employment," 33 U.S.C. s 902(2), could be widely stretched, the Court has done little more than mention the presumption, Cardillo v. Liberty Mutual Ins. Co., 330 U.S. 469, 474, 67 S.Ct. 801, 91 L.Ed. 1028 (1947); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359, 361, 85 S.Ct. 1012, 13 L.Ed.2d 895 (1965) (per curiam), resting its decision mainly on the principle with respect to the scope of review discussed below. In O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 71 S.Ct. 470, 95 L.Ed. 483 (1951), the Court did not rely on the presumption at all, even in the face of a strong dissent. The Court's decisions dealing with questions of coverage of the sort presented here will be searched in vain for any mention of the presumption, see, e. g., Parker v. Motor Boat Sales, Inc., 314 U.S. 244, 62 S.Ct. 221, 86 L.Ed. 184 (1941); Norton v. Warner Co., 321 U.S. 565, 64 S.Ct. 747, 88 L.Ed. 931 (1944); Calbeck v. Travelers Ins. Co., supra, 370 U.S. 114, 82 S.Ct. 1196, 8 L.Ed.2d 368 (1962); Nacirema Operating Co., Inc. v. Johnson, supra, 396 U.S. 212, 90 S.Ct. 347, 24 L.Ed.2d 371 (1969), [14] although in Norton and Nacirema coverage was rejected. The cases in this court, Michigan Mutual Liability Co. v. Arrien, 344 F.2d 640, 645-46 (2 Cir.), cert. denied, 382 U.S. 835, 86 S.Ct. 80, 15 L.Ed.2d 78 (1965), and Overseas African Construction Corp. v. McMullen, 500 F.2d 1291, 1296 (2 Cir. 1974), likewise treat the presumption as merely an embodiment of the "rule . . . that so long as any reasonable inference from the facts supports jurisdiction under the statutory presumption that jurisdiction may be found." 500 F.2d at 1296. Here the question is not whether a line established by Congress is sufficiently elastic to include the claimant; the main issue is whether Congress placed the line at the "point of rest" or much further landward. Only if we have made the latter basic decision might the presumption come into play in ruling on cases near the border. See Davis v. Department of Labor, 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246 (1942).

[6] (2) "Deference" to the BRB. We likewise see no merit in the contention of claimants and the Solicitor of Labor that we are confined in our decision because of the deference owed to the BRB. We agree that the standard of review we must apply is that factual findings of the BRB are conclusive if supported by substantial evidence in the record considered as a whole since, as held in Potenza v. United Terminals, Inc.,

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524 F.2d 1136 (2 Cir. 1975), it is of no moment that 33 U.S.C. s 921(b)(3) while applying this standard to the BRB's review ***49** of the ALJ's findings of fact does not expressly extend it to review in the court of appeals. But we are still confronted with the ever troubling question whether the determination at issue, namely, whether the 1972 Amendments should be so interpreted as to include these claimants, is the kind of question which justifies or requires judicial deference.

We think it is time to recognize, in line with Professor Kenneth Culp Davis' brilliant discussion, 4 Administrative Law Treatise ss 30.01-.09 and the corresponding sections in the 1970 Supplement, that there are two lines of Supreme Court decisions on this subject which are analytically in conflict, with the result that a court of appeals must choose the one it deems more appropriate for the case at hand. [15] Leading cases supporting the view that great deference must be given to the decisions of an administrative agency applying a statute to the facts and that such decisions can be reversed only if without rational basis are Rochester Telephone Corp. v. United States, 307 U.S. 125, 146, 59 S.Ct. 754, 83 L.Ed. 1147 (1939); Gray v. Powell, 314 U.S. 402, 411-12, 62 S.Ct. 326, 86 L.Ed. 301 (1941); and NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130-31, 64 S.Ct. 851, 88 L.Ed. 1170 (1944). The rationale of these decisions was applied in the three "arising out of and in the course of employment" Supreme Court cases under the LHWCA Cardillo, O'Leary and O'Keeffe, cited above. Indeed, the Court seems to have rejected the findings of the LHWCA's Deputy Commissioners only once since the statute was enacted, Norton v. Warner Co., supra, 321 U.S. 565, 64 S.Ct. 747, 88 L.Ed. 931. However, there is an impressive body of law sanctioning free substitution of judicial for administrative judgment when the question involves the meaning of a statutory term. Illustrative cases are Office Employees International Union, Local No. 11, AFL-CIO v. NLRB, 353 U.S. 313, 77 S.Ct. 799, 1 L.Ed.2d 846 (1957), and Davies Warehouse Co. v. Bowles, 321 U.S. 144, 150, 64 S.Ct. 474, 88 L.Ed. 635 (1944). In one of its most recent decisions on the subject, Morton v. Ruiz, 415 U.S. 199, 237, 94 S.Ct. 1055, 1075, 39 L.Ed.2d 270 (1974), the Court held that "In order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose"; this very nearly eliminates the "deference" principle as regards statutory construction altogether since if the agency's determination is found by a court to be consistent with the congressional purpose, it presumably would be affirmed on that ground without any need for deference.

[7] There are several other reasons not to rest decision on the "deference" approach in these cases. One is that unlike the F.C.C. in the Rochester Telephone case, the Bituminous Coal Division of the Department of the Interior in Gray v. Powell, or the NLRB in the Hearst case, the BRB is not a policy making but entirely an umpiring agency. When Congress has charged an agency with the duty to make and implement a national policy, it is more likely that Congress intended the agency to have some flexibility, free from judicial intrusion, in interpreting the Congressional grant. Compare Rochester Telephone Corp. v. United States, supra, 307 U.S. at 146, 59 S.Ct. 754; Permian Basin Area Rate Cases, 390 U.S. 747, 767, 88 S.Ct. 1344, 20 L.Ed.2d 312 (1968). A second factor is the way in ***50** which the agency has gone about its job. As suggested above, we would be much more inclined to defer to a considered judgment of the BRB rendered on a full record than to this series of short opinions on isolated facts which contain no in-depth study of the problem. A somewhat related point is that although the BRB's decisions have been "consistent and contemporaneous," the issue arose almost immediately after the 1972 Amendments became effective at a time when the BRB had little experience in the administration of the Act; yet its initial decisions, surely not the result of any great expertise, became the basis for all the others. "(A)n agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate." FMC v. Seatrain Lines, Inc., 411 U.S. 726, 745, 93 S.Ct. 1773, 1785, 36 L.Ed.2d 620 (1973). Finally, this is a case where understanding of the statute depends in no small measure on prior judicial decisions and legislative history subjects on which a court has a greater competence than the BRB. We therefore reject the argument that the BRB's decisions in these cases must be affirmed if they are rational but wrong.

[8] (3) Other definitions. We likewise give little weight to arguments made on both sides which are based on definitions of "longshoreman" or maritime employment or contracts formulated in different contexts and for different purposes. The ILA relies on Congress' approval, Act of Aug. 12, 1953, ch. 407, 67 Stat. 541, of definitions (reproduced in the margin) [16] in a compact between New York and New Jersey creating the bi-state Waterfront Commission. To assume that the 1972 Congress had in mind this action of its predecessor of 1953 is to attribute a degree of acumen few Congressmen would claim. Beyond that, the purposes of the two enactments were quite different; it is for that reason that paragraph (b) of the definitional section of the Act includes persons, notably

clerical workers, clearly not embraced under the most liberal construction of the 1972 Amendments.

On the other hand, a narrow definition of "longshoring operations"[17] formulated by the Secretary of Labor in 1960 as part of safety regulations issued in respect of "all employments covered by this chapter," 33 U.S.C. s 941(a), is likewise not dispositive of the meaning of the words used in the Amendments since under the old statute covered employment was limited to injuries occurring "upon the navigable waters of the United States (including (only) any drydock)." And despite the definition of "carriage of goods" as covering "the period from the time when the goods are loaded on to the time when they are discharged from the ship" contained in the Carriage of ***51** Goods by Sea Act (COGSA), 46 U.S.C. s 1301(e), we have held that the contract of carriage, obviously a maritime contract, persists after unloading and that the carrier remains liable, not as a carrier but as a bailee, until it delivers the cargo to the consignee or places it in a public dock or warehouse. David Crystal, Inc. v. Cunard Steamship Co., 339 F.2d 295, 298 (2 Cir. 1964), cert. denied, 380 U.S. 976, 85 S.Ct. 1339, 14 L.Ed.2d 271 (1965); Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800, 811-12 (2 Cir. 1971); Cameco, Inc. v. S.S. American Legion Lines, 514 F.2d 1291, 1295-96 (2 Cir. 1974).

[9] (4) Liberal construction of remedial legislation. There is more force in the contention of the claimants and the Solicitor that a broad reading of the 1972 Amendments is required by the oft-iterated principle that remedial legislation should be construed liberally. The Supreme Court said, as to this very statute, although in a quite different context, Voris v. Eikel, 346 U.S. 328, 333, 74 S.Ct. 88, 92, 98 L.Ed. 5 (1953):

> This Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.

Petitioners do not altogether overcome this point by arguing that a statute must be construed with reference to the mischief intended to be overcome, see Heydon's Case, 3 Co.Rep. 7a, 76 Eng.Rep. 637 (1584), and that all that Congress intended to "remedy" was the unjust result of Nacirema Operating Co. v. Johnson, supra, 396 U.S. 212, 90 S.Ct. 347, 24 L.Ed.2d 371, by accepting the invitation which, pursuant to Mr. Justice White's suggestion, the unions extended to it.[18] The statutory language can fairly be read to do more than that and thus the liberality principle tends in favor of such a reading.

C.

[10] With this background we address ourselves, at long last, to the words of the statute with the aid of the legislative history. There is no question that claimants met the situs test of s 903(a),[19] and concededly ***52** all worked for covered "employers" under the Act; the question is whether each now Blundo and Caputo was a "person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations . . . ." s 902(3).[20]

[11] If there were any doubt on the face of the statute, the legislative history makes clear that s 902(3), as here relevant, is to be construed no differently than if it said "any longshoreman or other person engaged in longshoring activity or engaged in other maritime employment." Cf. Argosy Limited v. Hennigan, 404 F.2d 14, 20 (5 Cir. 1968); United States v. Gertz, 249 F.2d 662, 666 (9 Cir. 1957). The Senate Committee on Labor & Public Welfare stated, Sen.Rep.No.92-1125, 92d Cong.2d Sess., at 13:

It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.

The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

The House Committee Report, No. 92-1441, 92d Cong.2d Sess. contained identical language.

[12] Secondly, and more important, Congress perceived a need to provide expressly for coverage for "any longshoreman" in addition to what it had established for a person engaged in "longshoring operations." A "longshoreman" may thus be covered at some times even when he is not engaged in traditional longshoring activity. This alone is sufficient to condemn the "point of rest" doctrine. Petitioners concede that persons engaged in moving unloaded cargo to its first point of rest or moving cargo to be loaded from its last point of rest are engaged in "longshoring operations." If they alone were to be covered, there was no need to provide also for "any longshoreman."

What then did Congress mean by that phrase? Obviously it is not enough that a claimant calls himself a longshoreman or that a longshoreman's union in a particular port has forced employers to hire its members for such unlongshoreman-like positions as clerks or guards. But see Weyerhaeuser v. Gilmore, supra, 528 F.2d at 962.

The reports of the Senate and House committees go a long way toward supplying an answer. Immediately after the two paragraphs quoted above came the following:

> The intent of the Committee is to permit a uniform compensation system to *53 apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i. e. a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters.

[13] Two conclusions emerge from this with seeming certainty: One is that Congress was concerned about "the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels," new facts of life on the waterfront which, as this court noted in Intercontinental Container Transport Corp. v. New York Shipping Ass'n, 426 F.2d 884, 886 (2 Cir. 1970), mean that a good deal more of the longshoreman's traditional jobs are now performed on shore. Stripping a container of goods destined to different consignees is the functional equivalent of sorting cargo discharged from a ship; stuffing a container is part of the loading of the ship even though it is performed on shore and not in the ship's cargo holds. Congress intended to cover men engaged in these activities if they met the situs test contained in the Act irrespective of the employee's position vis-a-vis a "point of rest." The committees said expressly that "checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment." Congress did not say they were covered only if they unloaded the container at the spot where a crane had first deposited the container or loaded it at a place on the water's edge; one of the advantages of containers is that they permit loading or unloading to be done at less congested locations. It sufficed for coverage if an accident arising from the stripping or stuffing of containers occurs at a place within the situs test. One answer to petitioners' argument that stuffing or stripping a container on a pier is no different from doing the same job a mile away is that Congress may have doubted

its power, under the admiralty clause of Article III, to go further than it did. This would decide Blundo's case if he had been "checking" the container at the pier where it was first deposited even if it had been moved several times. We fail to perceive any significant difference because, for the convenience of someone, it had been moved to another pier. The cargo had not yet been delivered to the consignee; the unloading process still had not been completed. [21]

*54 [14] The second conclusion is that Congress was concerned with providing uniformity of coverage for persons engaged in the loading or unloading functions on the piers. It wished to minimize the occasions when longshoremen and other harbor workers would be walking from the liberalized benefits of LHWCA to the much lower ones provided by state compensation laws. [22] Petitioners argue that Congress was concerned with providing uniformity only in the Nacirema situation, where the same employee engaged in the same unloading or loading operation would have been protected by the federal statute if a draft of cargo hit him while he was on the ship but not if his injury occurred on the pier itself, and point to the fact that the illustration used by the committees was a case where cargo is "unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters." But the committees stated their intention more broadly "to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." The concern for uniformity was not limited to rectifying the disparity between the longshoreman making up the draft on the ship and the longshoreman receiving it on the pier; it extended to the disparity that would result if a line were drawn between the latter and a longshoreman, perhaps the very same one, who moved the unloaded cargo to another place on the pier. [23] The committees' language clearly is broad enough to cover a person like Caputo who spent a significant part of his time in working on vessels, so long as he did not come within the category mentioned as being excluded employees who are not engaged in loading or unloading a vessel, "(t)hus, employees whose responsibility is only to pick up stored cargo for further trans-shipment."

[15] Petitioner asserts that Caputo came within both descriptions of excluded persons. Clearly he did not come within the second. His responsibility was to perform a variety of jobs on the pier, on both sides of the "point of rest," including going on vessels. Also we would not regard the cargo as "stored" within the committees' meaning simply because the consignee had delayed five days in picking it up. [24] The question whether he was engaged in loading or unloading (here unloading) is closer. If his injury had occurred while he was moving the boxes of cheese from a previous position on the pier to the consignee's trucks, he clearly would have been engaged in "unloading," in the way that term is used in ordinary speech. That being so, it would be wholly artificial to draw a distinction because his injury occurred while he was inside the consignee's truck. See note 21, supra. To be sure, the carrier would probably have fulfilled its legal duty if it had instructed the stevedores simply to place cargo alongside consignees' trucks and leave the loading of the trucks to them. But, so far as we can gather from this meagre record, that is not the life of the waterfront. The driver needs help in loading or unloading his truck, it would be *55 uneconomical for him to carry a sufficient supply of helpers, everyone wants the truck off the pier as soon as possible, so the stevedores have their employees lend a hand. It is not clear whether an additional charge is collected for this, but we not think it matters. Neither do we think it matters that the stevedore might not be liable for mishandling by a longshoreman within the truck.

Petitioners make a significant argument that the high benefits under the Amendments were provided because of the extremely hazardous nature of longshoring and that these extraordinary hazards no longer exist once the cargo is beyond the "point of rest." Indeed, in Caputo's case the parties stipulated that what Caputo was doing was the same, and entailed the same risk of injury, as exists wherever and by whomsoever trucks are loaded or unloaded with dollies. The Senate Report, p. 2, refers to "high-risk occupations such as those covered by this Act" and says that "(l)ongshoring, for example, has an injury frequency rate which is well over four times the average for manufacturing operations." What we do not know is what types of operations were considered to be longshoring for the purpose of these calculations. Also, as shown by the case of Blundo, who slipped on ice while he was checking the contents of a container that was being stripped on a pier other than the one where the vessel was unloaded, unusual hazards can exist due to the exposure of piers to the elements which would not exist in a manufacturing plant or in a garage or warehouse where containers removed from trucks were being stripped. Doubtless the hazards of longshoring vary with the particular tasks being performed, and may in some instances be no greater than those encountered by persons doing similar work in places other than piers or terminals adjoining the water's edge. [25] However all this may be, we find nothing in the words of the statute or its legislative

history that would enable us to construct a "hazard" test; Congress' intention was rather to provide uniformity of coverage for workers injured while engaged in the process of loading or unloading ships who met the situs test. We note in this connection that the increased benefits inure to shipbuilders meeting the situs test, although much of their work is performed in facilities no more hazardous than those not within the expanded definition of "navigable waters" and that the benefit schedules of LHWCA apply to all industrial accidents in the District of Columbia, Act of May 17, 1928, ch. 612, 45 Stat. 600 (1928), 36 D.C.Code s 501 (1973).

In a variation of the argument last considered, petitioners contend that because of the higher benefits payable under LHWCA than under state compensation acts, construing the Amendments to apply beyond the point of rest will increase the already high expense of stevedores to an extent that Congress could not have intended. Clearly, as explained at the outset, the act was a trade-off a gain to the stevedores in doing away with the Sieracki-Ryan triangle, a gain to the workers in higher benefits and in moving the Jensen line shoreward. Just how much added cost Congress meant to impose on stevedores by the second part of the bargain is impossible to determine.[26] What is clear is that Congress had a profound distaste for a regime in which employees engaged in the rough and tumble ***56** work described in the Amendments should be covered under the Federal Act at one moment and under state acts at another.

[16] We therefore hold that the Amendments at least cover all persons meeting the situs requirements (1) who are engaged in stripping or stuffing containers or (2) are engaged in the handling of cargo up to the point where the consignor has actually begun its movement from the pier (or in the case of loading, from the time when the consignee has stopped his vehicle at the pier), provided in the latter instances that the employee has spent a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel. That is as far as we need to go to affirm Blundo's and Caputo's awards; whether the proviso is essential can be left for another day. The facts of these cases likewise do not require us to formulate a rule for the situation wherein the goods have been deposited in a public warehouse by the stevedore in unloading or the shipper in loading.

Petitioners say, as indicated above, that in effect our construction reads the status requirement out of the Act. We concede it goes some way in that direction. But it does not do so completely; we part company with Gilmore & Black when they assert that the committee reports should be disregarded and the Amendments then "can fairly be read to cover all employment-related injuries which occur within the Act's territorial limits." The Law of Admiralty, s 6.51 at 430 (1975).[27] We believe our position avoids some of the more problematic possibilities lurking in the new "status" requirement, and accords with the liberal interpretation which must be given this remedial statute and its remedial amendments. See Comment, Broadened Coverage Under the LHWCA, 33 La.L.Rev. 683, 693 (1973).

In so construing the Amendments we have necessarily assumed that the construction would be constitutional. We think that assumption is well founded.

VI. Constitutionality

It is beyond dispute that "Although containing no express grant of legislative power over the substantive law, the provision (of Article III as to admiralty and maritime jurisdiction) was regarded from the beginning as implicitly investing such power in the United States." Panama R. R. Co. v. Johnson, 264 U.S. 375, 386, 44 S.Ct. 391, 393, 68 L.Ed. 748 (1924). The classic definition of the jurisdiction was Mr. Justice Story's in DeLovio v. Boit, 7 Fed. Case No. 3776, pp. 418, 444 (C.C.D.Mass.1815), that it "comprehends all maritime contracts, torts, and injuries. The latter branch is necessarily bounded by locality; the former extends over all contracts (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations) which relate to the navigation, business or commerce of the sea." Mr. Justice Story used the broad term "locality" in his definition of the jurisdiction with respect to "torts, and injuries." Although the Supreme Court later defined locality as including only injuries suffered on navigable waters and not injuries on the land caused by a vessel, The Plymouth, 70 U.S. (3 Wall.) 20, 18 L.Ed. 125 (1866), the Court has acquiesced in Congress' overruling that holding by the Admiralty Extension Act, 46 U.S.C. s 740, which was applied without question in Gutierrez v. Waterman S. S. Corp., 373 U.S. 206, 83 S.Ct. 1185, 10 L.Ed.2d 297 (1963). See also United States v. Matson Navigation Co., 201 F.2d 610 (9 Cir. 1953), cited with approval in Victory Carriers, Inc. v. Law, 404 U.S. 202, 209 n. 9, 92 S.Ct. 418, 30 L.Ed.2d 383 (1971), in which the Court stated that "if denying federal remedies to longshoremen injured on land is intolerable, Congress has ample power under Arts. I and III of the Constitution to enact a suitable solution." Id. at 216, 92 ***57** S.Ct. 418, 427.[28] Most important of all are the statements in Nacirema, supra, 396 U.S. at 223, 90 S.Ct. at 354, that "There is much

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to be said for uniform treatment of longshoremen injured while loading or unloading a ship," and the suggestion that Congress be invited to do something about this, id. at 224, 90 S.Ct. 347. The Court would scarcely have suggested this if it had entertained doubt as to the constitutionality of a Congressional response.

[17] **[18]** We thus see no reason to question the power of Congress to expand the concept of a maritime tort to include injuries suffered by persons on structures adjoining navigable waters in the course of employment related to ships. If we were more doubtful on the point than we are, we would see no reason why the extension of coverage could not be predicated on the portion of the jurisdiction relating to maritime contracts, where there is no "locality" test. Contracts of employment relating to maritime matters are within that jurisdiction, Sheppard v. Taylor, 30 U.S. (5 Pet.) 675, 8 L.Ed. 269 (1831), and claims under LHWCA are by an employee engaged in "maritime employment" against an employer.

The petition to review in Dellaventura's case is dismissed as untimely and the petition in Scaffidi's case is dismissed on the ground that there no longer is a justiciable controversy between the employer and the employee. The petitions in Blundo's and Caputo's cases are denied on the merits.

LUMBARD, Circuit Judge (concurring and dissenting):

I agree that Pittston's petition seeking review of the award in Scaffidi's case should be dismissed as there is no justiciable controversy by reason of the insurance carrier's payment of the award. I also agree that Pittston's petition to review Dellaventura's case should be dismissed as untimely filed.

With respect to the denial of the petitions in the Blundo and Caputo cases, I respectfully dissent. As the relevant considerations have been so ably and extensively set forth here by Judge Friendly and also by Judge Winter in I.T.O. of Baltimore v. Benefits Review Board, U. S. Dep't of Labor and Adkins, 529 F.2d 1080 (4th Cir. 1975), no purpose would be served in any further protracted discussion. I agree with Judge Winter that "(t)he 1972 extension of coverage was intended only to remove inequities and anomalies arising when a person otherwise engaged in 'maritime employment' was injured on land," 529 F.2d at 1081, and with his additional statement that " . . . with respect to longshoremen or other persons engaged in longshoring operations, the Amendments extend only to those employees engaged in loading and unloading activities between the ship and the first (last) point of rest, including checkers 'directly involved in (such) loading or unloading functions,' " 529 F.2d at 1088.

It is more in keeping with the realities of maritime employment to draw the line at the first point of rest in discharging the cargo and at the last point of rest in loading a vessel. Moreover, such a rule is far easier to apply and avoids claims such as that put forward by Dellaventura that he is entitled to compensation for his injury while loading a consignee's truck with coffee bags which had been stored in a warehouse for 133 days after being removed from the ship CAMPECHE. This being so, it seems to me that the interpretation adopted by the Fourth Circuit is more consistent with what the Congress intended and with the language of the 1972 amendment.

Blundo, a checker employed by I.T.O., was injured while checking cargo being removed from a container. The container was located on a stringpiece of the 19th Street pier in Brooklyn, had been unloaded a few days before at a different pier and ***58** had been trucked through the streets to the 19th Street pier to be opened there by United States Customs before the container was stripped. What Blundo did was done well after the container had been left at the first point of rest.

Caputo's principal duties related to terminal labor. When injured he was working at the northeast marine terminal on the Brooklyn waterfront inside the truck of a consignee, while helping the consignee's truck driver load boxes of cheese which had been discharged from a vessel at least five days before. Thus in Caputo's case his activity occurred after the boxes of cheese had come to rest on the pier.

For these reasons I would grant the petition and set aside the awards in the cases of Blundo and Caputo.

Parallel Citations

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Footnotes

1 The Benefits Review Board was created by the 1972 Amendments to the LHWCA as an independent, "quasi-judicial" body within the Department of Labor. 33 U.S.C. s 921(b)(1); 20 C.F.R. s 801.103 (1975). Its three members are appointed by the Secretary of Labor, and it is "authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter," made by the administrative law judges who hear LHWCA claims

in the first instance. 33 U.S.C. ss 919(d), 921(b)(1) and (3) (as amended). Prior to the 1972 amendments, there was no administrative review procedure for LHWCA claims; cases were heard in the first instance by Deputy Commissioners and review was then had in the United States district courts. 33 U.S.C. s 921 (1970). Under the 1972 Amendments cases are heard by an administrative law judge whose decisions are reviewed by the BRB, and appeals lie to the court of appeals directly from final orders of the BRB. 33 U.S.C. s 921(c).

2 The significance of this definition is that liability for compensation is predicated on being an "employer," 33 U.S.C. s 904.

3 Formerly, if an employee was not expressly excluded, as, e. g., a crew member, his injury occurring upon the navigable waters was compensable under the Act so long as his employer had "any . . . employees . . . employed in maritime employment, in whole or in part . . . ." 33 U.S.C. s 902(4) (1970).

4 A "checker" checks the contents of a container carrying goods for several consignees against the bills of lading or other records.

5 The issue whether the BRB should be a respondent in court of appeals review of its awards under 33 U.S.C. s 921(c) was treated in McCord v. Benefits Review Board, 168 U.S.App.D.C. 302, 514 F.2d 198 (1975). There the BRB moved to dismiss the petition as to it. Petitioner did not oppose the motion and the court granted it, citing recent unreported decisions of the Ninth Circuit. The court reasoned that there was "sufficient adversity" between the claimant and the employer (or its insurance carrier) "to insure proper litigation without participation by the Board," that requiring the Board to participate "would parallel requiring the District Court to appear and defend its decision upon direct appeal" and that the presence of the second comma in 33 U.S.C. s 921(c) which reads:

A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of Title 28.

indicated an intention that the Board should not be a party to the appeal. There were pending motions to substitute the Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor (OWCP), as a respondent which were not before the court of appeals. In the I.T.O. case, supra, the Board moved to be dismissed as a respondent and to have the Director substituted; the court granted the first branch of the motion but denied the second, 529 F.2d at 1088-89.

With respect, we cannot subscribe to the view that Congress intended to create what to us would seem a novel form of review of federal administrative action in which no one representing the Government would be a party. See F.R.App.P. 15(a) ("In each case the agency shall be named respondent."). Prior to the 1972 Amendments judicial review took the form of a suit for an injunction in the district court against the deputy commissioner who made the order (former s 921(b)); in the absence of evidence of Congressional intent we find it hard to believe that, by providing internal review followed by an appeal to a court of appeals, Congress meant to oust the Government from further participation as of right. Appearance as an amicus may not be good enough, since it normally does not allow oral argument and never allows an appeal.

Neither the McCord nor the I.T.O. court discussed s 921a which provides:

Attorneys appointed by the Secretary shall represent the Secretary, the deputy commissioner, or the Board in any court proceedings under section 921 of this title or other provisions of this chapter except for proceedings in the Supreme Court of the United States.

The existence of sufficient adversity between private parties has not been thought to preclude the Government's right to be a party in many other sorts of review of federal administrative action. The second comma, especially in a sentence with an inappropriate first one, seems a slender reed; the "other parties" phrase means the other parties to the BRB review but does not rule out the BRB's being a party to review in the court of appeals. While Congress did not spell matters out with the same specificity as in 28 U.S.C. s 2348, we think it sufficiently indicated its intention that the BRB and other parties to the proceeding before the BRB should be parties to a review by a court of appeals under 33 U.S.C. s 921(c); if the BRB chooses to leave the defense of its order in a particular case to the prevailing private party, it is free to do so.

The administrative regulations do not specify which branch of the agency should be represented as respondent on appeal. 20 C.F.R. s 801.402 seems to contemplate that the BRB is the proper agency respondent in court of appeals review, since it provides that "except in proceedings in the Supreme Court" the representation of the BRB is provided by the Solicitor of Labor. Moreover, s 921a quoted above seems to contemplate that the BRB be represented in court of appeals review. However, 20 C.F.R. s 801.2(a)(10) defines "party" and "party in interest" to include the "Secretary or his designee . . . ." This would indicate that the Secretary of Labor shall determine what officer represents the agency in the court of appeals. The Government's position has been that the Director, OWCP is the proper respondent. The OWCP is an administrative, not a statutory, creation. See 20 C.F.R. ss 1.1 et seq., and s 701.203. And the Solicitor of Labor is authorized to appear and participate on behalf of the Director, OWCP as an interested party before the BRB. 20 C.F.R. s 702.333(b). However, in the section assigning to the OWCP the responsibility for administering various programs, including the LHWCA, the OWCP is given administrative authority "except (for) 921 as it applies to the Benefits Review Board . . . ." 20 C.F.R. s 1.2(d).

Trying to make sense out of these regulations, we think that while the Director, OWCP is a proper party before the ALJ or the BRB, see cases discussed in 3 Larson, Workmen's Compensation Laws s 83.19, at n. 49.1 (1976 ed.), the BRB is the proper agency respondent for review in the court of appeals, although the Solicitor of Labor could be designated to represent it. We deem it best

to defer resolution of this question to a case where decision on this point is essential; perhaps in the meanwhile the Department will tidy up its regulations.

6 In the only case construing the statutory provisions for mail notice to the parties of the Deputy Commissioner's decision under the old act, 33 U.S.C. s 919, the Deputy Commissioner's first order was apparently neither filed in his office nor mailed to the parties. The court held, in response to the employer's argument that a second, more generous award was barred by the first award, that the first order "did not take on the dignity of an effective award." American Mutual Liability Ins. Co. of Boston v. Lowe, 13 F.Supp. 906, 907 (D.N.J.), aff'd, 85 F.2d 625 (3 Cir. 1936). We believe this case to be wholly distinguishable particularly since both opinions rest primarily on the failure to file a signed order. 13 F.Supp. at 907 (citing Howard v. Monahan, 33 F.2d 220 (S.D.Tex.1929)).

7 Gange Lumber Co. was followed in Railway Express Agency v. Kennedy, 189 F.2d 801 (7 Cir.), cert. denied, 342 U.S. 830, 72 S.Ct. 54, 96 L.Ed. 628 (1951) (denying employer standing to challenge unemployment compensation payments to striking workers from federal fund). Cf. 2A Larson, Workmen's Compensation Law s 77.30 (1976 ed.) (damage action by employer against negligent third party for increased premiums would lie).

8 There is no proof that payment of this one award would affect the premiums of such a large employer as Pittston. Moreover, we are not told whether the arrangements between Pittston and its insurance carrier allow the latter to take advantage of an award made without Pittston's consent in determining Pittston's ratings and, if so, whether a reversal by us would change matters.

9 Jaabeck v. Theodore A. Crane's Sons Co., 238 N.Y. 314, 318, 144 N.E. 625 (1924), cited by the petitioner in its reply brief, is wholly inapposite. A state workmen's compensation board had entered an award against both the employer and its insurer, one of the questions determined by the board being that of the insurer's liability under the insurance contract. The Appellate Division affirmed the award as to the employer but reversed as to the insurer on the ground that the policy did not cover the risk. The employer appealed to the Court of Appeals, which reversed the Appellate Division with respect to the insurer, affirming in full the order of the State Industrial Board. The employer was clearly aggrieved by the order of the Appellate Division and the Court of Appeals gave effective relief by reinstating the order of the State Industrial Board.

10 An additional reason for this conclusion is that once the insurance carrier has paid, without preserving its right to recover the payment by taking an appeal, the case lacks the necessary quality of adversariness. We see no reason why a person in Scaffidi's position should bother to defend against a petition to review or why the BRB or the Director should spend the Government's resources in such a case, even though that was done here.

11 Nacirema Operating Co., Inc., supra, reversed the en banc decision of the Fourth Circuit in Marine Stevedoring Corp., supra. Four cases were before the court of appeals in the consolidated appeal; in only three cases were petitions for certiorari filed and granted. Those three cases involved employees injured on the pier as described above whom the Deputy Commissioner had ruled were not covered by the LHWCA. The district courts had affirmed the Deputy Commissioners' denial of awards, and were reversed by the Fourth Circuit. In the fourth case (the title case in the court of appeals), the employee, also on the pier, had been injured while lifting a cable off the stern bollard of a vessel when it suddenly straightened, catapulting him into a river where he drowned. The Deputy Commissioner had found that the employee was covered under the Act, his award was affirmed by the district court and by the court of appeals, and it was not before the Supreme Court in Nacirema. Mr. Justice Douglas noted in his dissent that "(i)t is incongruous . . . that in an accident on a pier over navigable waters coverage of the Act depends on where the body falls after the accident has happened." 396 U.S. at 225, 90 S.Ct. at 355.

12 We were told at argument that in the I.T.O. case the NAS tendered to the BRB a "Brandeis brief" intended to give the BRB some of the general information we have mentioned, outlining the division of labor in 45 ports in the United States; that the tender was rejected on the objection of the Solicitor on behalf of the Director, OWCP; but that the document was discussed at oral argument in the Fourth Circuit and has been referred to in other decisions of the BRB. We have not had even that much assistance.

13 If one or more of the other circuits seized of this problem should order such a remand, we would entertain a petition for rehearing to enable us to do the same.

14 In Davis v. Department of Labor, 317 U.S. 249, 256, 63 S.Ct. 225, 87 L.Ed. 246 (1942), the Court noted that with respect to the largely "factual questions" relating to whether an employee injured within the "twilight zone" of federal jurisdiction established by the Court should be compensated under state or federal law, "presumptive weight" should be given to the findings of the federal or state administrator of the respective program, and relied in part on s 920(a).

15 Our discussion of the Court's ambivalence with respect to deference is not to be read as dealing with two problems quite different from that here presented. One concerns an agency's exercise of power to formulate substantive rules, where the scope is wide, see, e. g., American Telephone & Telegraph Co. v. United States, 299 U.S. 232, 57 S.Ct. 170, 81 L.Ed. 142 (1936); Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607, 64 S.Ct. 1215, 88 L.Ed. 1488 (1944), and the rules once issued, even if only in the form of guidelines, are "entitled to great deference," Griggs v. Duke Power Co., 401 U.S. 424, 433-34, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405, 430-36, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). The other concerns an agency's construction of its own rules, see, e. g., Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-14, 65 S.Ct. 1215, 89 L.Ed. 1700

(1945); Udall v. Tallman, 380 U.S. 1, 16-17, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965); TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 n.10, 96 S.Ct. 2126, 2133, 48 L.Ed.2d 757 (1976).

16 See ILA Amicus brief at 5-6 n. 1. The definitions in the Bi-State Compact can be found at s 9806 of McKinney's Unconsolidated New York Laws and s 32:23-6 of N.J.S.A.

"Pier" shall include any wharf, pier, dock or quay.

"Other waterfront terminal" shall include any warehouse, depot or other terminal (other than a pier) which is located within one thousand yards of any pier in the Port of New York district and which is used for waterborne freight in whole or substantial part. . . .

"Longshoreman" shall mean a natural person, other than a hiring agent, who is employed for work at a pier or other waterfront terminal, either by a carrier of freight by water or by a stevedore

(a) physically to move waterborne freight on vessels berthed at piers, on piers or at other waterfront terminals, or

(b) to engage in direct and immediate checking of any such freight or of the custodial accounting therefor or in the recording or tabulation of the hours worked at piers or other waterfront terminals by natural persons employed by carriers of freight by water or stevedores . . . .

"Stevedore" shall mean a contractor (not including an employee) engaged for compensation pursuant to a contract or arrangement with a carrier of freight by water, in moving waterborne freight carried or consigned for carriage by such carrier on vessels of such carrier berthed at piers, on piers at which such vessels are berthed or at other waterfront terminals.

17 * * * the loading, unloading, moving or handling of cargo, ships stores, gear, etc., into, in, on, or out of any vessel on the navigable waters of the United States.

25 Fed Reg. 1566 (1960), 29 C.F.R. 9.3(i).

18 The argument, in fact, flounders on a number of points. The invitation issued in Nacirema was broadly phased:

There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. But even construing the Extension Act to amend the Longshoremen's Act would not effect this result, since longshoremen injured on a pier by pier-based equipment would still remain outside the Act. And construing the Longshoremen's Act to coincide with the limits of admiralty jurisdiction whatever they may be and however they may change simply replaces one line with another whose uncertain contours can only perpetuate on the landward side of the Jensen line, the same confusion that previously existed on the seaward side. While we have no doubt that Congress had the power to choose either of these paths in defining the coverage of its compensation remedy, the plain fact is that it chose instead the line in Jensen separating water from land at the edge of the pier. The invitation to move that line landward must be addressed to Congress, not to this Court.

396 U.S. at 223-24, 90 S.Ct. at 354. The Court contemplated at least two possibilities: an extension of the LHWCA to cover longshoremen injured on a pier "while loading or unloading a ship," or an extension to "coincide with the limits of admiralty jurisdiction." In the absence of clarifying legislative history, we would have no idea which set of evils referred to in Nacirema Congress was endeavoring to overcome.

19 In the Blundo case the petitioner, I.T.O. makes a halfhearted argument that Blundo was not injured on the navigable waters within the expanded definition because the 19th Street pier on which he was injured was not used for the loading or unloading of vessels. This argument flies in the face of the statute, which reads ". . . including any adjoining pier . . . or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." (Emphasis added.) It would seem that any pier next to the water is included within the situs definition. Accord, I.T.O. Corp. of Baltimore v. Adkins, supra, 529 F.2d at 1083-84. The testimony before the ALJ established that Blundo was injured at one of two "finger" piers which jutted into the water from the terminal. The entire terminal adjoined the water and was enclosed by a single gate. The finger pier at 21st Street was used for vessels; the finger pier at 19th Street was used to load and unload containers. Blundo was clearly on a "pier" and a "terminal" adjoining the water, a part of which was used for loading and unloading vessels. This is sufficient.

20 Judge Craven, dissenting from the panel opinion in I.T.O., advanced the argument, although he did not base his conclusion on it, that this phrasing might make the inquiry too narrow, since s 902(3) also includes "any harborworker," 529 F.2d at 1090 n. 3. He cited the statement in 1 Norris, The Law of Maritime Personal Injuries s 3 (3d ed. 1975), that the longshoreman is only "(f)irst in the catalogue of harbor workers." Arguably, however, Congress intended "harbor workers" to refer only to persons similar to those specifically described ("any harborworker including a ship repairman, shipbuilder, and shipbreaker") and not to persons concerned with the movement of cargo. But see Norris, supra, s 5. Like Judge Craven we find it unnecessary to decide the point.

21 As many admiralty cases have decided, in construing other doctrines of maritime law, a realistic view of the loading or unloading process recognizes that it does not stop as soon as the cargo first hits the pier on being removed from a vessel, nor does it begin only when the cargo stands on the pier next to the vessel on which it is about to be loaded. See Victory Carriers, Inc. v. Law, 404 U.S. 202, 214 at n. 14, 92 S.Ct. 418, 30 L.Ed.2d 383 (1971), rev'g on other grounds, Law v. Victory Carriers, Inc., 432 F.2d 376 (5 Cir. 1970). Frequently large gangs of longshoremen, dozens of men, are assigned different tasks in a continuous process which moves cargo off a vessel ultimately to a warehouse or storage area at the far end of the pier or terminal. Garrett v. Gutzeit, 491 F.2d 228 (4 Cir. 1974).

22 Joseph Leonard, Safety Director of the ILA, in speaking to the House Committee about the former coverage provisions, asked, "What do we do, cut ourselves in half?" Hearings on H.R. 247, H.R. 3505, H.R. 12006, and H.R. 15023 (Longshoremen's & Harbor Worker's Compensation Act Amendments of 1972), before the Select Subcomm. on Labor of the House Comm. on Educ. & Labor, 92d Cong., 2d Sess., 297.

23 Congress also expressed interest in extending federal coverage to as many longshoremen as possible to avoid the "disparity in benefits payable . . . for the same type of injury depending on . . . in which State the accident occurs." Senate Committee Report, supra, at 12.

24 We thus are not required to decide whether cargo should ever be regarded as "stored" so long as it remains on the pier in the custody of the stevedore employed by the vessel rather than being placed in a public warehouse. Dellaventura's case, where there was a delay of 133 days, might have demanded such a decision.

25 But see the statement of Representative Hicks of Massachusetts on the floor of the House. 118 Cong.Rec. 36387 (Oct. 14, 1972). And see House Hearings, supra note 22, at 288-89 (statement of Patrick Tobin, Internat'l Longshoremen's and Warehousemen's Union (ILWU)).

26 It is worth noting that the increased benefits provided by the Amendments followed recommendations of the National Commission on State Workmen's Compensation Laws (Sen.Rep., p. 4), and that Congress may well have expected that enactment of the Amendments would have an effect on state compensation laws. Hearings on S. 2318, S. 525, and S. 1547 (Longshoremen's & Harbor Worker's Compensation Act Amendments of 1972) before the Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare, 92d Cong., 2d Sess., at 74 (statement of James O'Brien, Ass't Dir. Soc'l Sec. Dep't, AFL-CIO), 149 (statement of Joseph Leonard, Safety Director, ILA).

27 They add that "a female secretary who works in a terminal warehouse should qualify as a LHCA harbor worker in exactly the same way that a female hairdresser in a cruise ship's beauty salon qualifies as a Jones Act seaman." Id. We do not find the analogy persuasive. Cruise ships encounter rough weather and may even sink; terminal warehouses don't. Cf. Mahrams v. American Export Isbrandtsen Lines, Inc., 475 F.2d 165 (2 Cir. 1973).

28 The Court has also sustained the Jones Act, which accords to seamen a remedy for injuries on land as well as on the sea, as an extension of the remedy of maintenance and cure. O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 40-41, 63 S.Ct. 488, 87 L.Ed. 596 (1943). If Sieracki retains any vitality, the constitutionality of the extension of coverage by the Amendments could be supported on this theory.

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14 Ohio App.3d 346
Court of Appeals of Ohio, First District, Hamilton County.

SWAFFORD et al., Appellants,
v.
NORWOOD BOARD OF EDUCATION et al., Appellees.

March 7, 1984.

Former nonteaching employees appealed from a decision of city civil service commission affirming school board's action in laying them off. The Common Pleas Court, Hamilton County, dismissed the appeal, and former employees appealed. The Court of Appeals, Palmer, P.J., held that the appeal from the commission decision was timely, even though filed five months after the commission entered its determination into its minutes.

Judgment reversed and cause remanded.

West Headnotes (4)

[1] **Administrative Law and Procedure**

Finality; ripeness

Appeal and Error

Necessity of formal judgment or order

In determining finality of a decision for purposes of appeal, a court speaks only through its journal and a public board, commission, or other deliberative body speaks through its minutes or its written record of resolutions, directives and actions; until such written record is made and approved, any acts are subject to all vagueness and uncertainty that characterize oral pronouncements and lack degree of finality necessary to form the predicate for further action or challenge. R.C. § 2505.07.

13 Cases that cite this headnote

[2] **Administrative Law and Procedure**

Time for Proceedings

In usual and customary case, entry of a resolution, order, or directive into official minute book of the public board or commission and its subsequent approval by such board or commission constitutes "the entry of other matter for review" within meaning of statute governing commencement of time for an appeal; such action, generally, commences running of the appeal period and prompt notice of the action to all interested parties is not statutorily required. R.C. § 2505.07.

9 Cases that cite this headnote

[3] **Appeal and Error**

Rendition or Entry of Judgment or Order

In case of any court of record, journalization of any final order, judgment, or decree commences running of time for perfecting an appeal. R.C. § 2505.07.

5 Cases that cite this headnote

[4] **Education**

Proceedings and review

Appeal by former nonteaching employees from decision of city civil service commission approving their layoff by school board, which appeal was filed within ten days after employees' counsel received a copy of the commission's minutes containing the determination, was timely, even though the determination had been entered into the minutes five months previous to the appeal and an oral decision had been announced three months before the determination had been entered into the minutes. R.C. § 2505.07.

Cases that cite this headnote

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****510 *Syllabus by the Court***

***346** In the usual and customary case, the entry of a resolution, order, or directive into the official minute book of a public board or commission and its subsequent approval by such board or commission constitutes "the entry of other matter ***347** for review" within the meaning of R.C. 2505.07 and, without more, commences the running of time for appeal.

Attorneys and Law Firms

Sandra Mendel, Columbus, for appellants.

Hartsock, Harris & Schneider and Paul R. Berninger, Cincinnati, for appellees Norwood Bd. of Educ., Norwood City School Dist. and David A. Query.

Robert G. Kelly, Cincinnati, for appellee Norwood Civil Service Com'n.

Opinion

PALMER, Presiding Judge.

The appellants are all former non-teaching employees of the appellee, Norwood Board of Education (hereinafter "board"), who were laid off as of June 30, 1981. Timely appeals to the Norwood Civil Service Commission (hereinafter "NCSC") were filed by all such appellants. After various preliminary matters, the NCSC scheduled and heard the matter on January 27, 1982, announcing orally a decision favorable to appellees at the conclusion of the hearing. This determination was not, however, entered into the minutes of the NCSC until April 28, 1982. The appellants ****511** first received a copy of these minutes, under circumstances hereinafter detailed, on September 29, 1982. An appeal was then filed by appellants with the Hamilton County Common Pleas Court pursuant to R.C. Chapter 2506 on October 5, 1982, and, in due course, the transcript of proceedings before the NCSC was certified to the court. Appellee board, meanwhile, filed a motion to dismiss the appeal predicated on three grounds: that the appeal was untimely, that the matter was not appealable under R.C. Chapter 2506, and that the appellees were guilty of laches. This motion was supported by a certified copy of the decision of the NCSC denying appellants' appeal, dated April 28, 1982. This motion to dismiss, together with that of the city of Norwood, [1] was opposed by appellants' motion and memoranda *contra*. This motion was buttressed by a variety of affidavits from appellants and their counsel, in which the former asserted that they had not received an evidentiary hearing before the NCSC in January 1982, nor received any notice of the April 1982 decision. In his affidavit, counsel for appellants stated that he had written the NCSC on April 7, 1982, asking for its ruling on the January hearing, and that two additional letters were written, one on August 11, 1982, by the affiant to the law director of the appellee city of Norwood demanding institution of a mandamus action to force a decision by the NCSC on the layoff appeals of appellants, and another, at his direction, to the NCSC. Counsel further stated that not until September 29, 1982, was a response received from NCSC setting forth the decision. Copies of these various letters were attached to the affidavits.

On December 30, 1982, the trial court journalized its entry [2] dismissing the appeal, stating:

"Pursuant to motions filed by the appellees and in consideration of the pleadings [*sic*] and oral argument, it is the determination of this Court that the ***348** appeal is untimely. This action is hereby dismissed."

"Appeal to this court followed with two assignments of error presented for review: that the trial court erred in dismissing the appeal on the basis of (1) untimeliness and (2) laches. We agree.

It is clear that the issue in this appeal lies in the meaning to be derived from R.C. 2505.07:

"After the journal entry of a final order, judgment, or decree has been approved by the court in writing and filed with the clerk for journalization, *or after the entry of other matter for review,* the period of time within which the appeal shall be perfected unless otherwise provided by law, is as follows:

" * * *

"(B) All other appeals shall be perfected within ten days." (Emphasis added.)

Appellees argue, in the alternative, that the ten days for appeal began to run when the NCSC announced its decision at the hearing on January 27, 1982, or, at the latest, when the action was entered into its minutes on April 28, 1982, either date exceeding by far the ten-day limitation for the appeal filed on October 5, 1982. The first of these contentions may be readily answered.

[1] As a court speaks only through its journal, *Schenley v. Kauth* (1953), 160 Ohio St. 109, 113 N.E.2d 625 [51 O.O. 30], a public board, commission, or other deliberative body speaks through its minutes or its written record of resolutions, directives, and action. Cf. *Grimes v. Cleveland* (C.P.1969), 17 Ohio Misc. 193, 195, 243 N.E.2d 777 [46 O.O.2d 279] ("The form of written entry of a decision of an administrative board should be the written minutes of its **512 meeting at which the decision was rendered."). Until such written record is made and approved, not only are the acts in question subject to all the vagueness and uncertainty that characterize oral pronouncements, but they lack the degree of finality necessary to form the predicate for further action or challenge. Indeed, that last consideration is clearly exemplified in the present case, where a review of the January 27, 1982 hearing before the NCSC reveals that, notwithstanding the apparent decision of the NCSC, not all matters were necessarily concluded at that hearing, and that with respect to certain contentions of counsel for the appellants (principally, that appellants had not had a merit hearing and that certain subpoenas had not been honored), the chairman of the NCSC responded, "We'll [*i.e.*, the NCSC] check into this." The record is totally silent as to what, if anything, this "check" produced. Moreover, the very language of the statute in question, referring to "the *entry* of other matter for review," R.C. 2505.07, seems conclusively to speak against any merely verbal pronouncements as to the dispositive event from which appeal time begins to run. One does not "enter" speech.

[2] Appellees' second argument, that appellants' appeal time began to run when the action of the board was entered into its minutes on April 28, 1982, is not so readily disposed of. We think it unarguable that in the usual and customary case, the entry of a resolution, order, or directive into the official minute book of a public board or commission and its subsequent approval by such board or commission would constitute "the entry of other matter for review" within the meaning of R.C. 2505.07 and would, without more, commence the running of time for appeal. While obviously the better practice would be to give prompt notice of such action to all interested parties, and, indeed, judicial notice may be taken that this is customarily done in well-conducted agencies, the statute does not require such notice since, doubtless, in the usual and customary case, the information is readily available to anyone *349 who desires to read it. Cf. *Grimes v. Cleveland, supra.*

[3] In the case, thus, of any *court of record,* the journalization of any final order, judgment, or decree indisputably commences the running of time for perfecting an appeal. Since there is no problem discovering such entries from readily available public records by those interested in the outcome of contested matters, no serious problem results by requiring such interested parties to look to their own interests in determining the outcome of proceedings. Similarly, in the case of final orders and adjudications of those boards, commissions, and agencies governed by R.C. 2506.01, there will perhaps seldom arise a problem of access to information necessary to provide a due process fundament to R.C. 2505.07(B). This will be true either because prompt written notice of the action will voluntarily be sent to interested parties, or a copy of the action will be posted or published in a fashion sufficient to give actual or constructive notice to parties, or the record of the action will be as readily available to parties inquiring therefor as would be the journal of a court of record in the clerk's office in the courthouse.

[4] In the instant case, however, there was absolutely no evidence before the court that any of these latter factors were present. Indeed, the record is undisputed that no written or other actual notice of the NCSC's order was received by appellants until September 29, 1982. As to any posting or publication of the order, the record is silent, although counsel for Norwood conceded during oral argument that he knew of no such practice by the NCSC. As to the ready availability to the public of the orders of the NCSC, the record is again silent,[3] although it does not appear to be disputed that the NCSC membership is part time and that its gatherings are relatively **513 infrequent. At the very least, some burden existed on the NCSC, in view of the appellants' above affidavits raising the issue of absence of notice, to adduce evidence in a fashion agreeable to Civ.R. 12(B) and 56(E), as to the *public availability* of the April 28, 1982 action, if it wished to negative the existence of any genuine issue of material fact.

It is apparent from what we have said that the facts in this appeal do *not* present the usual and customary case, and that it would be unconscionable in the instant case to dismiss the appellants from a judicial review of the merits of their case based on no more than appears in this record. In addition to what we have noted immediately above with respect to the apparently casual manner in which the instant commission treats its orders and directives, we emphasize the following additional factors which lead us to our conclusion. First, we note again the indeterminate conclusion of the January 27,

1982, hearing, where the transcript of proceedings confirms that counsel for the appellants was left with the distinct impression that his objections to the hearing procedure would be "checked into" by the NCSC. Without some evidentiary explication of this, one would conclude that it would not have been unreasonable for appellants to have anticipated some further, and perhaps favorable, action by the NCSC on their appeal.

Secondly, and perhaps most importantly, counsel for appellants wrote to the NCSC fully three weeks before the instant order was entered into the minute book pointing out that his procedural questions had not yet been answered nor any decision on them ***350** made, and asking when a decision would be made.[4] This letter was left unanswered either then, or after the April 28, 1982 entry of the instant order, and was not answered until after two more letters had been sent by appellants' counsel, the first to the law director of the appellee city of Norwood demanding institution of a mandamus action to require the NCSC to act on the appeals, and the second to the NCSC executive secretary requesting a copy of the decision that counsel had "been informed" had been made.

Under these circumstances, where appellants' counsel had every right to believe his appeals to the NCSC were still, at least to some degree, open and unresolved, the failure of the NCSC to respond to the April 7, 1982 letter, either then or directly after the April 28, 1982 entry of the order into the minutes, in effect slammed the public door on appellants' access to information. With nothing more than the record reveals to us,[5] it would be unreasonable to expect appellants to have done more on their own behalf than they did. The law will not require them, at their peril, to storm closed doors in order to discover official actions. Appellants acted on their appeal within ten days after the order was finally revealed to them. We hold that, under the peculiar circumstances of this case, R.C. 2505.07(B) required no more of them.

The assignments of error are well taken and granted. The judgment of the court of common pleas is reversed, and the matter ****514** is remanded to that court for further proceedings according to law.

Judgment reversed and cause remanded.

KEEFE and BLACK, JJ., concur.

Parallel Citations

471 N.E.2d 509, 21 Ed. Law Rep. 681, 14 O.B.R. 414

Footnotes

1 Appellee city of Norwood's separate motion to dismiss was limited to the question of the timeliness of the appeal.

2 There appears to have been a written opinion forwarded by the trial court to counsel, attached to the appellee board's brief, which gives the court's reasoning in somewhat greater detail. This opinion does not, however, appear to have been journalized and does not appear in the record certified to us. It forms, therefore, no part of the decision in this case.

3 Some reference was made during arguments to the minute book being kept in a secretary's desk. The record does not speak to the point, or to the degree to which access by the public could be had to such records.

4 The body of this letter, under date of April 7, 1982, is as follows:

"Dear Mr. Fitzpatrick:

"The Norwood Board of Education layoff cases have been pending before the Commission since May, 1981. These cases have still not been heard or a decision made by the Commission on the procedural questions raised. Such a long delay is intolerable. Please advise when we may expect a decision by the Commission on these pending matters.

"Thank you for your attention to this matter.

"Very truly yours,
Ronald H. Janetzke
Attorney at Law"

5 The material parts of the record consist of the transcript filed pursuant to R.C. 2506.02, supplemented by certain matters omitted therefrom, and by the affidavits supporting the memoranda previously referred to. Because of the preliminary stage at which the matter was arrested, *cf. In re Appeal of Sun Oil Co.* (C.P.1964), 200 N.E.2d 366, 95 Ohio Law Abs. 86, we do not know if appellants propose to further supplement the record as permitted by R.C. 2506.03. Such supplementation, had matters progressed to that stage, might conceivably have borne more proximately upon such issues as the availability of the NCSC's decisions to the public and to interested parties, matters about which we are presently left to conjecture.

1988 WL 69147
Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Sixth District, Lucas County.

LAPLANT ENTERPRISES, An Ohio General Partnership, Appellant,
v.
CITY OF TOLEDO, Appellee.

No. L-87-369. | June 30, 1988.

Appeal from Lucas County Common Pleas Court No. CV 87-0815.

DECISION AND JOURNAL ENTRY

***1** This case comes on appeal from a judgment of the Lucas County Court of Common Pleas dismissing appellant LaPlant Enterprises' administrative appeal and arises from the following facts.

Appellant applied for a special use permit pursuant to Toledo Municipal Code § 1167.01(b)(13) in October 1986. The purpose of the application was the expansion of a greenhouse in an area zoned R-1, single family residential district. [1] In reality, appellant had already partially constructed said greenhouse without obtaining a building permit and had been issued a stop-work order by the commissioner of inspection for the city of Toledo.

The Toledo City Plan Commission (hereinafter Commission) heard the matter on January 8, 1987, and recommended that the application be denied. The Commission further stated that the Toledo City Council should approve resolutions which would:

"2. Direct the Division of Building Inspection to require the owner/applicant to remove the 'second greenhouse' within 90 days at the owner-applicant's expense.

"3. Direct the Division of Building Inspection to require the owner/applicant to remove the parking from Thornapple Drive and to close the commercial drive that has been established on Thornapple Drive."

On January 21, 1987, the Zoning and Planning Committee of the Whole for the Toledo City Council (hereinafter Committee) heard testimony concerning the proposed special use permit and unanimously voted to disapprove that permit. However, they decided to obtain a legal opinion as to the appropriate manner in which to proceed before acting upon recommendations No. 2 and No. 3 of the Commission.

The Toledo City Council (hereinafter Council) met on January 27, 1987, and denied appellant's request for a special use permit, *i.e.*, by unanimous vote of the eight members present, Council refused to pass an ordinance which would permit LaPlant Enterprises to construct a sizeable addition to their greenhouse. The vote of Council and the minutes of the Committee hearing were reduced to writing on January 27, 1987.

Appellant received a copy of the legal opinion of the law department of the city of Toledo as requested by the Committee on March 1, 1987, and filed a notice of appeal on March 11, 1987, in the Lucas County Court of Common Pleas. [2] Upon motion of appellee, the city of Toledo, the trial court dismissed said appeal. From this judgment, LaPlant Enterprises filed a timely notice of appeal with this court and asserts as its assignments of error:

"I. IT WAS ERROR FOR THE TRIAL COURT TO DISMISS APPELLANT'S NOTICE OF APPEAL FROM A DECISION AND ORDER OF THE COUNCIL OF THE CITY OF TOLEDO, AS BEING UNTIMELY FILED, WHEN APPELLANT HAD FULL [*sic*] COMPLIED WITH THE REQUIREMENTS OF SECTION 2505.07 OF THE OHIO REVISED CODE.

"II. A DECISION BY THE CITY COUNCIL PLANNING AND ZONING COMMITTEE IN DENYING THE ISSUANCE OF A SPECIAL USE PERMIT IS AN ADMINISTRATIVE DECISION, SUBJECT TO APPEAL AND REVIEW BY A COMMON PLEAS COURT WITHIN SAID JURISDICTION, AND IT IS ERROR FOR A TRIAL COURT TO DISMISS SUCH APPEAL WITHOUT ANY ADDITIONAL FINDINGS."

Appellant's administrative appeal to the Lucas County Court of Common Pleas was dismissed by that court for unstated reasons. However, appellee's motion to dismiss was premised

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upon two bases: (1) The trial court lacked jurisdiction to hear this appeal; and (2) The action taken by Council was non-reviewable legislative action.

*2 R.C. 2505.07 governs the filing of an appeal under R.C. 2506.01 and provides, in pertinent part, that:

"After the journal entry of a final order, judgment, or decree has been approved by the court in writing and filed with the clerk for journalization, or after the entry of other matter for review, the period of time within which the appeal shall be perfected unless otherwise provided by law, is as follows:

"(B) All other appeals shall be perfected within ten days." [3]

The time requirements of R.C. 2505.07 are both mandatory and jurisdictional. R.C. 2505.04. See, also, *Richards v. Industrial Commission* (1955), 163 Ohio St. 439. Failure to timely file a notice of appeal under R.C. 2506 divests the trial court of jurisdiction over the appeal. *Roseman v. Reminderville* (1984), 14 Ohio App.3d 124, 126.

The time period for the perfection of an administrative appeal commences when the "matter for review" is reduced to record form and approved. *Swafford v. Norwood Board of Education* (1984), 14 Ohio App.3d 346, headnote; *Lakewood Homes v. Board of Adjustments* (1971), 25 Ohio App.2d 125, paragraph three of the syllabus; *Szymanski v. Toledo* (1969), 18 Ohio App.2d 11, 12. In the case *sub judice,* the minutes and vote of the Committee were reduced to record form on January 27, 1987, and Council's vote denying the special use permit was also recorded on that day. Therefore, the ten-day period in which appellant was required to file its notice of appeal commenced on January 27, 1987. Because appellant did not file its notice of appeal until March 11, 1987, it appears that the court below had no alternative but to dismiss the case at bar. However, appellant asserts that the decision of the Committee on January 21, 1987, as reduced to writing and recorded on January 27, 1987 and officially acted upon by Council is not a final appealable order. Appellant claims that R.C. 2505.02 mandates that an order is not final, and therefore not appealable, unless it "affects a substantial right in an action which in effect determines the action." This is a correct statement of the law. Nevertheless, appellant is incorrect in its application of that law.

LaPlant Enterprises contends that Council's denial of the special use permit did not affect a substantial right because appellant had already proceeded to build the greenhouse without ever obtaining a permit. Essentially, appellant's argument is based upon the following reasoning: the greenhouse was already in existence at the time of the denial of the special use permit. Thus, a mere denial of the permit does not affect any substantial right of LaPlant Enterprises. Therefore, until such time that appellee determines how to enforce the denial of the permit, *e.g.*, order the greenhouse demolished, the action is not determined. We find this rationale totally specious. The special use permit was denied, a substantial right of appellant was affected and the action was determined. Whether or not the building was erected at the time is irrelevant. The special use permit requested had not been granted and the facility constructed by LaPlant Enterprises could not be used for the purpose intended.

The denial of a special use permit in this instance can be likened to a declaratory judgment because it determines the rights and relationships of the parties. See R.C. 2721.02. See, also, *Garber v. Allstate* (Dec. 24, 1986), Montgomery App. No. 9868, unreported. A declaratory judgment is a final appealable order. R.C. 2721.08. Thus, the decision of Council on January 27, 1987 is a final appealable order.

*3 Appellant further urges that March 1, 1987 should be considered the date from which the time for the filing of his appeal should run. However, appellant admits that the city of Toledo has not acted upon the "legal opinion" that he received from the Toledo Law Department. Moreover, the record of the present case does not reveal that there has been any kind of administrative action pursuant to this legal opinion. If Council has not approved or disapproved of any recommended legal action against appellant, the opinion of the law department is not a final appealable order and appellant's notice of appeal was prematurely filed. *Szymanski, supra.* at 12. Therefore, the use of March 1, 1987 to satisfy the time requirement of R.C. 2505.07 is of no aid to appellant because the trial court could not obtain jurisdiction over the matter for review.

We conclude that the decision of the Toledo City Council on January 27, 1987, was a final appealable order. We further find that appellant failed to file timely a notice of appeal. For these reasons, the Lucas County Court of Common Pleas had no jurisdiction over the appeal and did not commit reversible error. Accordingly, appellant's first assignment of error is found not well-taken.

Because we hold that the court below had no jurisdiction to hear this appeal, we do not, and need not, determine whether the action taken by Council constituted a reviewable

administrative decision. *Id.* Hence, appellant's second assignment of error is found not well-taken.

Upon consideration whereof, we find that substantial justice has been done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Costs of this appeal assessed to appellant.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See also Supp.R. 4, amended 1/1/80.

CONNORS, HANDWORK, and GLASSER, JJ., concur.

Footnotes

1 Prior to the proposed "expansion," the original greenhouse had existed, as a non-conforming use, in this residential area for many years.

2 Appellant, as of the filing of this appeal, had an action requesting a declaratory judgment on the subject matter of the case *sub judice* pending in the Lucas County Court of Common Pleas.

3 As amended, effective March 17, 1987, R.C. 2505 07 now reads:
"§ 2505.07 Time for perfecting appeal.
"After the entry of a final order of an administrative officer, agency, board, department, tribunal, commission, or other instrumentality, the period of time within which the appeal shall be perfected unless otherwise provided by law, is thirty days."
Even though this amendment has no effect on the outcome of this cause of action, we note that appellant failed to fulfill the statutory thirty-day time limit in which an appeal could be filed.

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152 Ohio App.3d 304
Court of Appeals of Ohio,
Sixth District, Ottawa County.

POPSON, by and through his Father, Appellant,
v.
DANBURY LOCAL SCHOOLS BOARD
OF EDUCATION et al., Appellees.

No. OT–02–031. | Decided March 31, 2003.

Student appealed from order of the Court of Common Pleas, Ottawa County, No. 02–CVH–200, dismissing administrative appeal of one day in-school suspension. The Court of Appeals, Pietrykowski, J., held that letter from elementary school superintendent was not order of public body, and thus court lacked jurisdiction over administrative appeal.

Affirmed.

West Headnotes (1)

[1] **Education**

Review

Undated letter from elementary school superintendent informing parents that he had reviewed facts relating to student's suspension and affirmed one day in-school suspension of student was not final order of public board, and thus Court of Common Pleas lacked jurisdiction to review administrative appeal. R.C. §§ 2506.01, 3313.66(A, E).

4 Cases that cite this headnote

Attorneys and Law Firms

****686 *305** Frank W. Reinheimer, Port Clinton, for appellant.

Scott F. Serazin, Elyria, for appellees.

Opinion

PIETRYKOWSKI, Judge.

{¶ 1} This is an accelerated appeal from a judgment of the Ottawa County Court of Common Pleas that dismissed an administrative appeal filed by appellant, Benjamin Popson, by and through his father, John Popson. Appellant now challenges that judgment through a single assignment of error:

{¶ 2} "On motion by appellees, the Common Pleas Court of Ottawa County, Ohio, committed error in dismissing the appeal prior to the transcript of the hearing before the Superintendent being filed, to determine if the Superintendent was the Board of Education's 'Designee.' "

{¶ 3} On June 4, 2002, appellee, Halley Leffler, the principal of Danbury Elementary School, notified Benjamin Popson's parents that Benjamin was suspended from school for causing bodily harm to another student. Leffler ordered that Benjamin serve the suspension "in-school" on June 6, 2002. Benjamin's parents sought review of the in-school suspension by appellee, Martin R. Fanning, the local superintendent. In an undated letter, Fanning notified the Popsons as follows: "I have reviewed the facts that resulted in the assignment of a one day in-school suspension to your son Ben. I affirm the in-school suspension. He may serve the in- ****687** school suspension any day next week. Since there is no property right implicated and Ohio Revised Code 3313.66 does not speak to in-school suspensions there is no further appeal."

{¶ 4} On June 28, 2002, appellant filed a notice of appeal with the Ottawa County Court of Common Pleas pursuant to R.C. 2506.01. Appellants Leffler, Fanning, and the Danbury Local Schools Board of Education responded by filing ***306** a motion to dismiss, asserting that the common pleas court did not have jurisdiction to hear the appeal. On August 15, 2002, the trial court issued a decision and order granting the motion to dismiss. The court held that it did not have jurisdiction to review the appeal because a suspension of a student is not appealable until the board of education has entered an appropriate resolution on its minutes and that the opinion letter of Fanning did not constitute a final order within the meaning of R.C. 2506.01.

{¶ 5} In his appeal before this court, Popson asserts that the lower court erred in dismissing the appeal without first reviewing the transcript of administrative proceedings to

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determine whether Fanning was acting as a designee of the school board in his affirmance of Popson's in-school suspension.

{¶ 6} R.C. 3313.66(A) permits a principal of a public school to suspend a pupil from school for not more than ten days. R.C. 3313.66(E) then sets forth a pupil's right to appeal a suspension or expulsion. The statute reads: "A pupil or the pupil's parent * * * may appeal the pupil's * * * suspension by a superintendent, principal, assistant principal, or other administrator to the board of education or to its designee. The pupil or the pupil's parent * * * may be represented in all appeal proceedings and shall be granted a hearing before the board or its designee in order to be heard against the suspension * * *. At the request of the pupil or of the pupil's parent * * * the board or its designee may hold the hearing in executive session but shall act upon the suspension * * * only at a public meeting. The board, by a majority vote of its full membership or by the action of its designee, may affirm the order of suspension * * * reinstate the pupil, or otherwise reverse, vacate, or modify the order of suspension * * *. The board or its designee shall make a verbatim record of hearings held under this division. The decisions of the board or its designee may be appealed under Chapter 2506. of the Revised Code."

{¶ 7} Reading R.C. 2506.01 and R.C. 3313.66 together, a common pleas court can review only a "final order, adjudication, or decision" of a board of education or its designee. It is well established, however, that the time period for the perfection of an administrative appeal commences when the "matter for review" is reduced to record form and approved. *Swafford v. Norwood Bd. of Edn.* (1984), 14 Ohio App.3d 346, 348, 14 OBR 414, 471 N.E.2d 509; *LaPlant Enterprises v. Toledo* (June 30, 1988), Lucas App. No. L-87-369, 1988 WL 69147. Because a public board speaks only through its minutes, written record of resolutions, directives, or actions, action by a public board is not final until such a written record is made and approved. *Swafford*, supra, at 348, 14 OBR 414, 471 N.E.2d 509. This procedure is equally applicable to action by a board of education, whether the action is taken by the board as a whole or by its designee. See ***307** *Kipp v. Lorain Bd. of Edn.* (Nov. 22, 2000), Lorain App. No. 99CA007373, 2000 WL 1729485; *Cashdollar v. Bd. of Edn., Northridge High School* (1983), Licking App. No. CA 2951, 1983 WL 6527.

{¶ 8} In our view, the undated letter of Local Superintendent Fanning does not meet the requirements of a final order of a ****688** public board. It is undated, is on plain white paper without a letterhead, and does not appear to be an official record of anything. Absent a final order of a public body, a common pleas court does not have jurisdiction to review an administrative appeal. R.C. 2506.01. Accordingly, the trial court properly dismissed Popson's appeal for lack of jurisdiction, and the sole assignment of error is not well taken.

{¶ 9} On consideration whereof, the court finds that substantial justice has been done the party complaining, and the judgment of the Ottawa County Court of Common Pleas is affirmed. Court costs of this appeal are assessed to appellant.

Judgment affirmed.

RICHARD W. KNEPPER and ARLENE SINGER, JJ., concur.

Parallel Citations

787 N.E.2d 686, 175 Ed. Law Rep. 671, 2003 -Ohio- 1625

End of Document

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United States Code Annotated
Title 26. Internal Revenue Code (Refs & Annos)
Subtitle A. Income Taxes (Refs & Annos)
Chapter 1. Normal Taxes and Surtaxes (Refs & Annos)
Subchapter B. Computation of Taxable Income
Part VI. Itemized Deductions for Individuals and Corporations (Refs & Annos)

26 U.S.C.A. § 172

§ 172. Net operating loss deduction

Effective: November 6, 2009
Currentness

(a) Deduction allowed.--There shall be allowed as a deduction for the taxable year an amount equal to the aggregate of (1) the net operating loss carryovers to such year, plus (2) the net operating loss carrybacks to such year. For purposes of this subtitle, the term "net operating loss deduction" means the deduction allowed by this subsection.

(b) Net operating loss carrybacks and carryovers.--

(1) Years to which loss may be carried.--

(A) General rule.--Except as otherwise provided in this paragraph, a net operating loss for any taxable year--

(i) shall be a net operating loss carryback to each of the 2 taxable years preceding the taxable year of such loss, and

(ii) shall be a net operating loss carryover to each of the 20 taxable years following the taxable year of the loss.

(B) Special rules for REIT's.--

(i) In general.--A net operating loss for a REIT year shall not be a net operating loss carryback to any taxable year preceding the taxable year of such loss.

(ii) Special rule.--In the case of any net operating loss for a taxable year which is not a REIT year, such loss shall not be carried back to any taxable year which is a REIT year.

(iii) REIT year.--For purposes of this subparagraph, the term "REIT year" means any taxable year for which the provisions of part II of subchapter M (relating to real estate investment trusts) apply to the taxpayer.

(C) Specified liability losses.--In the case of a taxpayer which has a specified liability loss (as defined in subsection (f)) for a taxable year, such specified liability loss shall be a net operating loss carryback to each of the 10 taxable years preceding the taxable year of such loss.

(D) Bad debt losses of commercial banks.--In the case of any bank (as defined in section 585(a)(2)), the portion of the net operating loss for any taxable year beginning after December 31, 1986, and before January 1, 1994, which is attributable to the deduction allowed under section 166(a) shall be a net operating loss carryback to each of the 10 taxable years preceding the taxable year of the loss and a net operating loss carryover to each of the 5 taxable years following the taxable year of such loss.

(E) Excess interest loss.--

(i) In general.--If--

(I) there is a corporate equity reduction transaction, and

(II) an applicable corporation has a corporate equity reduction interest loss for any loss limitation year ending after August 2, 1989,

then the corporate equity reduction interest loss shall be a net operating loss carryback and carryover to the taxable years described in subparagraph (A), except that such loss shall not be carried back to a taxable year preceding the taxable year in which the corporate equity reduction transaction occurs.

(ii) Loss limitation year.--For purposes of clause (i) and subsection (h), the term "loss limitation year" means, with respect to any corporate equity reduction transaction, the taxable year in which such transaction occurs and each of the 2 succeeding taxable years.

(iii) Applicable corporation.--For purposes of clause (i), the term "applicable corporation" means--

(I) a C corporation which acquires stock, or the stock of which is acquired in a major stock acquisition,

(II) a C corporation making distributions with respect to, or redeeming, its stock in connection with an excess distribution, or

(III) a C corporation which is a successor of a corporation described in subclause (I) or (II).

(iv) Other definitions.--

For definitions of terms used in this subparagraph, see subsection (h).

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(F) Retention of 3-year carryback in certain cases.--

(i) In general.--Subparagraph (A)(i) shall be applied by substituting "3 taxable years" for "2 taxable years" with respect to the portion of the net operating loss for the taxable year which is an eligible loss with respect to the taxpayer.

(ii) Eligible loss.--For purposes of clause (i), the term "eligible loss" means--

(I) in the case of an individual, losses of property arising from fire, storm, shipwreck, or other casualty, or from theft,

(II) in the case of a taxpayer which is a small business, net operating losses attributable to federally declared disasters (as defined by subsection (h)(3)(C)(i)), and

(III) in the case of a taxpayer engaged in the trade or business of farming (as defined in section 263A(e)(4)), net operating losses attributable to such federally declared disasters.

Such term shall not include any farming loss (as defined in subsection (i)) or qualified disaster loss (as defined in subsection (j)).

(iii) Small business.--For purposes of this subparagraph, the term "small business" means a corporation or partnership which meets the gross receipts test of section 448(c) for the taxable year in which the loss arose (or, in the case of a sole proprietorship, which would meet such test if such proprietorship were a corporation).

(iv) Coordination with paragraph (2).--For purposes of applying paragraph (2), an eligible loss for any taxable year shall be treated in a manner similar to the manner in which a specified liability loss is treated.

(G) Farming losses.--In the case of a taxpayer which has a farming loss (as defined in subsection (i)) for a taxable year, such farming loss shall be a net operating loss carryback to each of the 5 taxable years preceding the taxable year of such loss.

(H) Carryback for 2008 or 2009 net operating losses.--

(i) In general.--In the case of an applicable net operating loss with respect to which the taxpayer has elected the application of this subparagraph--

(I) subparagraph (A)(i) shall be applied by substituting any whole number elected by the taxpayer which is more than 2 and less than 6 for "2",

(II) subparagraph (E)(ii) shall be applied by substituting the whole number which is one less than the whole number substituted under subclause (I) for "2", and

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(III) subparagraph (F) shall not apply.

(ii) Applicable net operating loss.--For purposes of this subparagraph, the term "applicable net operating loss" means the taxpayer's net operating loss for a taxable year ending after December 31, 2007, and beginning before January 1, 2010.

(iii) Election.--

(I) In general.--Any election under this subparagraph may be made only with respect to 1 taxable year.

(II) Procedure.--Any election under this subparagraph shall be made in such manner as may be prescribed by the Secretary, and shall be made by the due date (including extension of time) for filing the return for the taxpayer's last taxable year beginning in 2009. Any such election, once made, shall be irrevocable.

(iv) Limitation on amount of loss carryback to 5th preceding taxable year.--

(I) In general.--The amount of any net operating loss which may be carried back to the 5th taxable year preceding the taxable year of such loss under clause (i) shall not exceed 50 percent of the taxpayer's taxable income (computed without regard to the net operating loss for the loss year or any taxable year thereafter) for such preceding taxable year.

(II) Carrybacks and carryovers to other taxable years.--Appropriate adjustments in the application of the second sentence of paragraph (2) shall be made to take into account the limitation of subclause (I).

(III) Exception for 2008 elections by small businesses.--Subclause (I) shall not apply to any loss of an eligible small business with respect to any election made under this subparagraph as in effect on the day before the date of the enactment of the Worker, Homeownership, and Business Assistance Act of 2009.

(v) Special rules for small business.--

(I) In general.--In the case of an eligible small business which made or makes an election under this subparagraph as in effect on the day before the date of the enactment of the Worker, Homeownership, and Business Assistance Act of 2009, clause (iii)(I) shall be applied by substituting "2 taxable years" for "1 taxable year".

(II) Eligible small business.--For purposes of this subparagraph, the term "eligible small business" has the meaning given such term by subparagraph (F)(iii), except that in applying such subparagraph, section 448(c) shall be applied by substituting "$15,000,000" for "$5,000,000" each place it appears.

(I) Transmission property and pollution control investment.--

(i) In general.--At the election of the taxpayer for any taxable year ending after December 31, 2005, and before January 1, 2009, in the case of a net operating loss for a taxable year ending after December 31, 2002, and before January 1, 2006, there shall be a net operating loss carryback to each of the 5 taxable years preceding the taxable year of such loss to the extent that such loss does not exceed 20 percent of the sum of the electric transmission property capital expenditures and the pollution control facility capital expenditures of the taxpayer for the taxable year preceding the taxable year for which such election is made.

(ii) Limitations.--For purposes of this subsection--

(I) not more than one election may be made under clause (i) with respect to any net operating loss for a taxable year, and

(II) an election may not be made under clause (i) for more than 1 taxable year beginning in any calendar year.

(iii) Coordination with ordering rule.--For purposes of applying subsection (b)(2), the portion of any loss which is carried back 5 years by reason of clause (i) shall be treated in a manner similar to the manner in which a specified liability loss is treated.

(iv) Special rules relating to credit or refund.--In the case of the portion of the loss which is carried back 5 years by reason of clause (i)--

(I) an application under section 6411(a) with respect to such portion shall not fail to be treated as timely filed if filed within 24 months after the due date specified under such section, and

(II) references in sections 6501(h), 6511(d)(2)(A), and 6611(f)(1) to the taxable year in which such net operating loss arises or results in a net operating loss carryback shall be treated as references to the taxable year for which such election is made.

(v) Definitions.--For purposes of this subparagraph--

(I) Electric transmission property capital expenditures.--The term "electric transmission property capital expenditures" means any expenditure, chargeable to capital account, made by the taxpayer which is attributable to electric transmission property used by the taxpayer in the transmission at 69 or more kilovolts of electricity for sale. Such term shall not include any expenditure which may be refunded or the purpose of which may be modified at the option of the taxpayer so as to cease to be treated as an expenditure within the meaning of such term.

(II) Pollution control facility capital expenditures.--The term "pollution control facility capital expenditures" means any expenditure, chargeable to capital account, made by an electric utility company (as defined in section 2(3) of the Public Utility Holding Company Act[1] (15 U.S.C. 79b(3)), as in effect on the day before the date of the enactment of the Energy Tax Incentives Act of 2005) which is attributable to a facility which will qualify as a certified pollution control facility as determined under section 169(d)(1) by striking "before January 1, 1976," and

by substituting "an identifiable" for "a new identifiable". Such term shall not include any expenditure which may be refunded or the purpose of which may be modified at the option of the taxpayer so as to cease to be treated as an expenditure within the meaning of such term.

(J) Certain losses attributable federally declared disasters.[2]--In the case of a taxpayer who has a qualified disaster loss (as defined in subsection (j)), such loss shall be a net operating loss carryback to each of the 5 taxable years preceding the taxable year of such loss.

(2) Amount of carrybacks and carryovers.--The entire amount of the net operating loss for any taxable year (hereinafter in this section referred to as the "loss year") shall be carried to the earliest of the taxable years to which (by reason of paragraph (1)) such loss may be carried. The portion of such loss which shall be carried to each of the other taxable years shall be the excess, if any, of the amount of such loss over the sum of the taxable income for each of the prior taxable years to which such loss may be carried. For purposes of the preceding sentence, the taxable income for any such prior taxable year shall be computed--

(A) with the modifications specified in subsection (d) other than paragraphs (1), (4), and (5) thereof, and

(B) by determining the amount of the net operating loss deduction without regard to the net operating loss for the loss year or for any taxable year thereafter,

and the taxable income so computed shall not be considered to be less than zero.

(3) Election to waive carryback.--Any taxpayer entitled to a carryback period under paragraph (1) may elect to relinquish the entire carryback period with respect to a net operating loss for any taxable year. Such election shall be made in such manner as may be prescribed by the Secretary, and shall be made by the due date (including extensions of time) for filing the taxpayer's return for the taxable year of the net operating loss for which the election is to be in effect. Such election, once made for any taxable year, shall be irrevocable for such taxable year.

(c) Net operating loss defined.--For purposes of this section, the term "net operating loss" means the excess of the deductions allowed by this chapter over the gross income. Such excess shall be computed with the modifications specified in subsection (d).

(d) Modifications.--The modifications referred to in this section are as follows:

(1) Net operating loss deduction.--No net operating loss deduction shall be allowed.

(2) Capital gains and losses of taxpayers other than corporations.--In the case of a taxpayer other than a corporation--

(A) the amount deductible on account of losses from sales or exchanges of capital assets shall not exceed the amount includable on account of gains from sales or exchanges of capital assets; and

(B) the exclusion provided by section 1202 shall not be allowed.

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(3) Deduction for personal exemptions.--No deduction shall be allowed under section 151 (relating to personal exemptions). No deduction in lieu of any such deduction shall be allowed.

(4) Nonbusiness deductions of taxpayers other than corporations.--In the case of a taxpayer other than a corporation, the deductions allowable by this chapter which are not attributable to a taxpayer's trade or business shall be allowed only to the extent of the amount of the gross income not derived from such trade or business. For purposes of the preceding sentence--

(A) any gain or loss from the sale or other disposition of--

(i) property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 167, or

(ii) real property used in the trade or business,

shall be treated as attributable to the trade or business;

(B) the modifications specified in paragraphs (1), (2)(B), and (3) shall be taken into account;

(C) any deduction for casualty or theft losses allowable under paragraph (2) or (3) of section 165(c) shall be treated as attributable to the trade or business; and

(D) any deduction allowed under section 404 to the extent attributable to contributions which are made on behalf of an individual who is an employee within the meaning of section 401(c)(1) shall not be treated as attributable to the trade or business of such individual.

(5) Computation of deduction for dividends received, etc.--The deductions allowed by sections 243 (relating to dividends received by corporations), 244 (relating to dividends received on certain preferred stock of public utilities), and 245 (relating to dividends received from certain foreign corporations) shall be computed without regard to section 246(b) (relating to limitation on aggregate amount of deductions); and the deduction allowed by section 247 (relating to dividends paid on certain preferred stock of public utilities) shall be computed without regard to subsection (a)(1)(B) of such section.

(6) Modifications related to real estate investment trusts.--In the case of any taxable year for which part II of subchapter M (relating to real estate investment trusts) applies to the taxpayer--

(A) the net operating loss for such taxable year shall be computed by taking into account the adjustments described in section 857(b)(2) (other than the deduction for dividends paid described in section 857(b)(2)(B)); and

(B) where such taxable year is a "prior taxable year" referred to in paragraph (2) of subsection (b), the term "taxable income" in such paragraph shall mean "real estate investment trust taxable income" (as defined in section 857(b)(2)).

(7) Manufacturing deduction.--The deduction under section 199 shall not be allowed.

(e) Law applicable to computations.--In determining the amount of any net operating loss carryback or carryover to any taxable year, the necessary computations involving any other taxable year shall be made under the law applicable to such other taxable year.

(f) Rules relating to specified liability loss.--For purposes of this section--

(1) In general.--The term "specified liability loss" means the sum of the following amounts to the extent taken into account in computing the net operating loss for the taxable year:

(A) Any amount allowable as a deduction under section 162 or 165 which is attributable to--

(i) product liability, or

(ii) expenses incurred in the investigation or settlement of, or opposition to, claims against the taxpayer on account of product liability.

(B)(i) Any amount allowable as a deduction under this chapter (other than section 468(a)(1) or 468A(a)) which is in satisfaction of a liability under a Federal or State law requiring--

(I) the reclamation of land,

(II) the decommissioning of a nuclear power plant (or any unit thereof),

(III) the dismantlement of a drilling platform,

(IV) the remediation of environmental contamination, or

(V) a payment under any workers compensation act (within the meaning of section 461(h)(2)(C)(i)).

(ii) A liability shall be taken into account under this subparagraph only if--

(I) the act (or failure to act) giving rise to such liability occurs at least 3 years before the beginning of the taxable year, and

(II) the taxpayer used an accrual method of accounting throughout the period or periods during which such act (or failure to act) occurred.

(2) Limitation.--The amount of the specified liability loss for any taxable year shall not exceed the amount of the net operating loss for such taxable year.

(3) Special rule for nuclear powerplants.--Except as provided in regulations prescribed by the Secretary, that portion of a specified liability loss which is attributable to amounts incurred in the decommissioning of a nuclear powerplant (or any unit thereof) may, for purposes of subsection (b)(1)(C), be carried back to each of the taxable years during the period--

(A) beginning with the taxable year in which such plant (or unit thereof) was placed in service, and

(B) ending with the taxable year preceding the loss year.

(4) Product liability.--The term "product liability" means--

(A) liability of the taxpayer for damages on account of physical injury or emotional harm to individuals, or damage to or loss of the use of property, on account of any defect in any product which is manufactured, leased, or sold by the taxpayer, but only if

(B) such injury, harm, or damage arises after the taxpayer has completed or terminated operations with respect to, and has relinquished possession of, such product.

(5) Coordination with subsection (b)(2).--For purposes of applying subsection (b)(2), a specified liability loss for any taxable year shall be treated as a separate net operating loss for such taxable year to be taken into account after the remaining portion of the net operating loss for such taxable year.

(6) Election.--Any taxpayer entitled to a 10-year carryback under subsection (b)(1)(C) from any loss year may elect to have the carryback period with respect to such loss year determined without regard to subsection (b)(1)(C). Such election shall be made in such manner as may be prescribed by the Secretary and shall be made by the due date (including extensions of time) for filing the taxpayer's return for the taxable year of the net operating loss. Such election, once made for any taxable year, shall be irrevocable for that taxable year.

(g) Rules relating to bad debt losses of commercial banks.--For purposes of this section--

(1) Portion attributable to deduction for bad debts.--The portion of the net operating loss for any taxable year which is attributable to the deduction allowed under section 166(a) shall be the excess of--

(i) the net operating loss for such taxable year, over

(ii) the net operating loss for such taxable year determined without regard to the amount allowed as a deduction under section 166(a) for such taxable year.

(2) Coordination with subsection (b)(2).--For purposes of subsection (b)(2), the portion of a net operating loss for any taxable year which is attributable to the deduction allowed under section 166(a) shall be treated in a manner similar to the manner in which a specified liability loss is treated.

(h) Corporate equity reduction interest losses.--For purposes of this section--

(1) In general.--The term "corporate equity reduction interest loss" means, with respect to any loss limitation year, the excess (if any) of--

(A) the net operating loss for such taxable year, over

(B) the net operating loss for such taxable year determined without regard to any allocable interest deductions otherwise taken into account in computing such loss.

(2) Allocable interest deductions.--

(A) In general.--The term "allocable interest deductions" means deductions allowed under this chapter for interest on the portion of any indebtedness allocable to a corporate equity reduction transaction.

(B) Method of allocation.--Except as provided in regulations and subparagraph (E), indebtedness shall be allocated to a corporate equity reduction transaction in the manner prescribed under clause (ii) of section 263A(f)(2)(A) (without regard to clause (i) thereof).

(C) Allocable deductions not to exceed interest increases.--Allocable interest deductions for any loss limitation year shall not exceed the excess (if any) of--

(i) the amount allowable as a deduction for interest paid or accrued by the taxpayer during the loss limitation year, over

(ii) the average of such amounts for the 3 taxable years preceding the taxable year in which the corporate equity reduction transaction occurred.

(D) De minimis rule.--A taxpayer shall be treated as having no allocable interest deductions for any taxable year if the amount of such deductions (without regard to this subparagraph) is less than $1,000,000.

(E) Special rule for certain unforeseeable events.--If an unforeseeable extraordinary adverse event occurs during a loss limitation year but after the corporate equity reduction transaction--

(i) indebtedness shall be allocated in the manner described in subparagraph (B) to unreimbursed costs paid or incurred in connection with such event before being allocated to the corporate equity reduction transaction, and

(ii) the amount determined under subparagraph (C)(i) shall be reduced by the amount of interest on indebtedness described in clause (i).

(F) Transition rule.--If any of the 3 taxable years described in subparagraph (C)(ii) end on or before August 2, 1989, the taxpayer may substitute for the amount determined under such subparagraph an amount equal to the interest paid or accrued (determined on an annualized basis) during the taxpayer's taxable year which includes August 3, 1989, on indebtedness of the taxpayer outstanding on August 2, 1989.

(3) Corporate equity reduction transaction.--

(A) In general.--The term "corporate equity reduction transaction" means--

(i) a major stock acquisition, or

(ii) an excess distribution.

(B) Major stock acquisition.--

(i) In general.--The term "major stock acquisition" means the acquisition by a corporation pursuant to a plan of such corporation (or any group of persons acting in concert with such corporation) of stock in another corporation representing 50 percent or more (by vote or value) of the stock in such other corporation.

(ii) Exception.--The term "major stock acquisition" does not include a qualified stock purchase (within the meaning of section 338) to which an election under section 338 applies.

(C) Excess distribution.--The term "excess distribution" means the excess (if any) of--

(i) the aggregate distributions (including redemptions) made during a taxable year by a corporation with respect to its stock, over

(ii) the greater of--

(I) 150 percent of the average of such distributions during the 3 taxable years immediately preceding such taxable year, or

(II) 10 percent of the fair market value of the stock of such corporation as of the beginning of such taxable year.

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(D) Rules for applying subparagraph (B).--For purposes of subparagraph (B)--

(i) Plans to acquire stock.--All plans referred to in subparagraph (B) by any corporation (or group of persons acting in concert with such corporation) with respect to another corporation shall be treated as 1 plan.

(ii) Acquisitions during 24-month period.--All acquisitions during any 24-month period shall be treated as pursuant to 1 plan.

(E) Rules for applying subparagraph (C).--For purposes of subparagraph (C)--

(i) Certain preferred stock disregarded.--Stock described in section 1504(a)(4), and distributions (including redemptions) with respect to such stock, shall be disregarded.

(ii) Issuance of stock.--The amounts determined under clauses (i) and (ii)(I) of subparagraph (C) shall be reduced by the aggregate amount of stock issued by the corporation during the applicable period in exchange for money or property other than stock in the corporation.

(4) Other rules.--

(A) Ordering rule.--For purposes of paragraph (1), in determining the allocable interest deductions taken into account in computing the net operating loss for any taxable year, taxable income for such taxable year shall be treated as having been computed by taking allocable interest deductions into account after all other deductions.

(B) Coordination with subsection (b)(2).--For purposes of subsection (b)(2)--

(i) a corporate equity reduction interest loss shall be treated in a manner similar to the manner in which a specified liability loss is treated, and

(ii) in determining the net operating loss deduction for any prior taxable year referred to in the 3rd sentence of subsection (b)(2), the portion of any net operating loss which may not be carried to such taxable year under subsection (b)(1)(E) shall not be taken into account.

(C) Members of affiliated groups.--Except as provided by regulations, all members of an affiliated group filing a consolidated return under section 1501 shall be treated as 1 taxpayer for purposes of this subsection and subsection (b)(1)(E).

(5) Regulations.--The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subsection, including regulations--

(A) for applying this subsection to successor corporations and in cases where a taxpayer becomes, or ceases to be, a member of an affiliated group filing a consolidated return under section 1501,

(B) to prevent the avoidance of this subsection through related parties, pass-through entities, and intermediaries, and

(C) for applying this subsection where more than 1 corporation is involved in a corporate equity reduction transaction.

(i) Rules relating to farming losses.--For purposes of this section--

(1) In general.--The term "farming loss" means the lesser of--

(A) the amount which would be the net operating loss for the taxable year if only income and deductions attributable to farming businesses (as defined in section 263A(e)(4)) are taken into account, or

(B) the amount of the net operating loss for such taxable year.

Such term shall not include any qualified disaster loss (as defined in subsection (j)).

(2) Coordination with subsection (b)(2).--For purposes of applying subsection (b)(2), a farming loss for any taxable year shall be treated in a manner similar to the manner in which a specified liability loss is treated.

(3) Election.--Any taxpayer entitled to a 5-year carryback under subsection (b)(1)(G) from any loss year may elect to have the carryback period with respect to such loss year determined without regard to subsection (b)(1)(G). Such election shall be made in such manner as may be prescribed by the Secretary and shall be made by the due date (including extensions of time) for filing the taxpayer's return for the taxable year of the net operating loss. Such election, once made for any taxable year, shall be irrevocable for such taxable year.

(j) Rules relating to qualified disaster losses.--For purposes of this section--

(1) In general.--The term "qualified disaster loss" means the lesser of--

(A) the sum of--

(i) the losses allowable under section 165 for the taxable year--

(I) attributable to a federally declared disaster (as defined in section 165(h)(3)(C)(i)) occurring before January 1, 2010, and

(II) occurring in a disaster area (as defined in section 165(h)(3)(C)(ii)), and

(ii) the deduction for the taxable year for qualified disaster expenses which is allowable under section 198A(a) or which would be so allowable if not otherwise treated as an expense, or

(B) the net operating loss for such taxable year.

(2) Coordination with subsection (b)(2).--For purposes of applying subsection (b)(2), a qualified disaster loss for any taxable year shall be treated in a manner similar to the manner in which a specified liability loss is treated.

(3) Election.--Any taxpayer entitled to a 5-year carryback under subsection (b)(1)(J) from any loss year may elect to have the carryback period with respect to such loss year determined without regard to subsection (b)(1)(J). Such election shall be made in such manner as may be prescribed by the Secretary and shall be made by the due date (including extensions of time) for filing the taxpayer's return for the taxable year of the net operating loss. Such election, once made for any taxable year, shall be irrevocable for such taxable year.

(4) Exclusion.--The term "qualified disaster loss" shall not include any loss with respect to any property described in section 1400N(p)(3).

(k) Cross references.--

(1) For treatment of net operating loss carryovers in certain corporate acquisitions, see section 381.

(2) For special limitation on net operating loss carryovers in case of a corporate change of ownership, see section 382.

CREDIT(S)

(Aug. 16, 1954, c. 736, 68A Stat. 63; Sept. 2, 1958, Pub.L. 85-866, Title I, §§ 14(a), (b), 64(b), Title II, § 203(a), (b), 72 Stat. 1611, 1656, 1678; Sept. 27, 1962, Pub.L. 87-710, § 1, 76 Stat. 648; Oct. 10, 1962, Pub.L. 87-792, § 7(f), 76 Stat. 829; Oct. 11, 1962, Pub.L. 87-794, Title III, § 317(b), 76 Stat. 889; Feb. 26, 1964, Pub.L. 88-272, Title II, §§ 210(a), (b), 234(b)(5), 78 Stat. 47, 48, 115; Dec. 27, 1967, Pub.L. 90-225, § 3(a), 81 Stat. 732; Dec. 30, 1969, Pub.L. 91-172, Title IV, § 431(b), 83 Stat. 619; Jan. 12, 1971, Pub.L. 91-677, § 2(a) to (c), 84 Stat. 2061; Oct. 4, 1976, Pub.L. 94-455, Title VIII, § 806(a) to (c), Title X, § 1052(c)(3), Title XVI, § 1606(b), (c), Title XIX, §§ 1901(a)(29), 1906(b)(13)(A), Title XXI, § 2126, 90 Stat. 1598, 1648, 1755, 1756, 1769, 1834, 1920; May 23, 1977, Pub.L. 95-30, Title I, § 102(b)(2), 91 Stat. 137; Nov. 6, 1978, Pub.L. 95-600, Title III, § 371(a), (b), Title VI, § 601(b)(1), Title VII, §§ 701(d)(1), 703(p)(1), 92 Stat. 2859, 2896, 2900, 2943; Apr. 1, 1980, Pub.L. 96-222, Title I, §§ 103(a)(15), 106(a)(1), (6), (7), 94 Stat. 214, 221; Dec. 24, 1980, Pub.L. 96-595, § 1(a), 94 Stat. 3464; Aug. 13, 1981, Pub.L. 97-34, Title II, § 207(a), 95 Stat. 225; Oct. 19, 1982, Pub.L. 97-354, § 5(a)(22), 96 Stat. 1694; Oct. 25, 1982, Pub.L. 97-362, Title I, § 102(a) to (c), 96 Stat. 1727, 1728; July 18, 1984, Pub.L. 98-369, Title I, §§ 91(d), 177(c), Title IV, § 491(d)(5), Title VII, § 722(a)(4), 98 Stat. 606, 710, 849, 973; Oct. 22, 1986, Pub.L. 99-514, Title I, § 104(b)(4), Title III, § 301(b)(3), Title IX, §§ 901(d)(4)(B), 903(a), (b), Title XIII, § 1303(b)(1), (2), Title XVIII, § 1899A(6), 100 Stat. 2105, 2217, 2380, 2383, 2658, 2958; Nov. 10, 1988, Pub.L. 100-647, Title I, §§ 1003(a)(1), 1009(c), 102 Stat. 3382, 3449; Dec. 19, 1989, Pub.L. 101-239, Title VII, § 7211(a), (b), 103 Stat. 2342, 2343; Nov. 5, 1990, Pub.L. 101-508, Title XI, §§ 11324(a), 11701(d), 11704(a)(2), 11811(a), (b)(1), (2)(A), (3), (4), 104 Stat. 1388-465, 1388-507, 1388-518, 1388-530; Aug. 10, 1993, Pub.L. 103-66, Title XIII, § 13113(d)(1), 107 Stat. 429; Aug. 20, 1996, Pub.L. 104-188, Title I, §§ 1702(h)(2), (16),

1704(t)(5), (30), 110 Stat. 1873, 1874, 1887, 1889; Aug. 5, 1997, Pub.L. 105-34, Title X, § 1082(a), (b), 111 Stat. 950; Oct. 21, 1998, Pub.L. 105-277, Div. J, Title II, § 2013(a) to (c), Title III, § 3004(a), Title IV, §§ 4003(h), 4004(a), 112 Stat. 2681-902, 2681-903, 2681-905, 2681-910; Mar. 9, 2002, Pub.L. 107-147, Title I, § 102(a), (b), Title IV, § 417(8), 116 Stat. 25, 56; Oct. 4, 2004, Pub.L. 108-311, Title IV, § 403(b)(1), 118 Stat. 1187; Aug. 8, 2005, Pub.L. 109-58, Title XIII, § 1311, 119 Stat. 1009; Dec. 21, 2005, Pub.L. 109-135, Title IV, §§ 402(f), 403(a)(17), 119 Stat. 2611, 2619; Oct. 3, 2008, Pub.L. 110-343, Div. C, Title VII, §§ 706(a)(2)(D)(v), (vi), 708(a), (b), (d), 122 Stat. 3922, 3924; Feb. 17, 2009, Pub.L. 111-5, Div. B, Title I, § 1211(a), (b), 123 Stat. 335; Nov. 6, 2009, Pub.L. 111-92, § 13(a), 123 Stat. 2992.)

Notes of Decisions (277)

Footnotes

1 So in original. Probably should be followed by "of 1935".

2 So in original. Probably should read "Certain losses attributable to federally declared disasters."

26 U.S.C.A. § 172, 26 USCA § 172

Current through P.L. 113-200 approved 12-4-2014

End of Document

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United States Code Annotated
Title 26. Internal Revenue Code (Refs & Annos)
Subtitle A. Income Taxes (Refs & Annos)
Chapter 1. Normal Taxes and Surtaxes (Refs & Annos)
Subchapter C. Corporate Distributions and Adjustments (Refs & Annos)
Part V. Carryovers

26 U.S.C.A. § 381

§ 381. Carryovers in certain corporate acquisitions

Effective: August 20, 1996
Currentness

(a) General rule.--In the case of the acquisition of assets of a corporation by another corporation--

(1) in a distribution to such other corporation to which section 332 (relating to liquidations of subsidiaries) applies; or

(2) in a transfer to which section 361 (relating to nonrecognition of gain or loss to corporations) applies, but only if the transfer is in connection with a reorganization described in subparagraph (A), (C), (D), (F), or (G) of section 368(a)(1),

the acquiring corporation shall succeed to and take into account, as of the close of the day of distribution or transfer, the items described in subsection (c) of the distributor or transferor corporation, subject to the conditions and limitations specified in subsections (b) and (c). For purposes of the preceding sentence, a reorganization shall be treated as meeting the requirements of subparagraph (D) or (G) of section 368(a)(1) only if the requirements of subparagraphs (A) and (B) of section 354(b)(1) are met.

(b) Operating rules.--Except in the case of an acquisition in connection with a reorganization described in subparagraph (F) of section 368(a)(1)--

(1) The taxable year of the distributor or transferor corporation shall end on the date of distribution or transfer.

(2) For purposes of this section, the date of distribution or transfer shall be the day on which the distribution or transfer is completed; except that, under regulations prescribed by the Secretary, the date when substantially all of the property has been distributed or transferred may be used if the distributor or transferor corporation ceases all operations, other than liquidating activities, after such date.

(3) The corporation acquiring property in a distribution or transfer described in subsection (a) shall not be entitled to carry back a net operating loss or a net capital loss for a taxable year ending after the date of distribution or transfer to a taxable year of the distributor or transferor corporation.

(c) Items of the distributor or transferor corporation.--The items referred to in subsection (a) are:

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(1) Net operating loss carryovers.--The net operating loss carryovers determined under section 172, subject to the following conditions and limitations:

(A) The taxable year of the acquiring corporation to which the net operating loss carryovers of the distributor or transferor corporation are first carried shall be the first taxable year ending after the date of distribution or transfer.

(B) In determining the net operating loss deduction, the portion of such deduction attributable to the net operating loss carryovers of the distributor or transferor corporation to the first taxable year of the acquiring corporation ending after the date of distribution or transfer shall be limited to an amount which bears the same ratio to the taxable income (determined without regard to a net operating loss deduction) of the acquiring corporation in such taxable year as the number of days in the taxable year after the date of distribution or transfer bears to the total number of days in the taxable year.

(C) For the purpose of determining the amount of the net operating loss carryovers under section 172(b)(2), a net operating loss for a taxable year (hereinafter in this subparagraph referred to as the "loss year") of a distributor or transferor corporation which ends on or before the end of a loss year of the acquiring corporation shall be considered to be a net operating loss for a year prior to such loss year of the acquiring corporation. For the same purpose, the taxable income for a "prior taxable year" (as the term is used in section 172(b)(2)) shall be computed as provided in such section; except that, if the date of distribution or transfer is on a day other than the last day of a taxable year of the acquiring corporation--

(i) such taxable year shall (for the purpose of this subparagraph only) be considered to be 2 taxable years (hereinafter in this subparagraph referred to as the "pre-acquisition part year" and the "post-acquisition part year");

(ii) the pre-acquisition part year shall begin on the same day as such taxable year begins and shall end on the date of distribution or transfer;

(iii) the post-acquisition part year shall begin on the day following the date of distribution or transfer and shall end on the same day as the end of such taxable year;

(iv) the taxable income for such taxable year (computed with the modifications specified in section 172(b)(2)(A) but without a net operating loss deduction) shall be divided between the pre-acquisition part year and the post-acquisition part year in proportion to the number of days in each;

(v) the net operating loss deduction for the pre-acquisition part year shall be determined as provided in section 172(b)(2)(B), but without regard to a net operating loss year of the distributor or transferor corporation; and

(vi) the net operating loss deduction for the post-acquisition part year shall be determined as provided in section 172(b)(2)(B).

(2) Earnings and profits.--In the case of a distribution or transfer described in subsection (a)--

(A) the earnings and profits or deficit in earnings and profits, as the case may be, of the distributor or transferor corporation shall, subject to subparagraph (B), be deemed to have been received or incurred by the acquiring corporation as of the close of the date of the distribution or transfer; and

(B) a deficit in earnings and profits of the distributor, transferor, or acquiring corporation shall be used only to offset earnings and profits accumulated after the date of transfer. For this purpose, the earnings and profits for the taxable year of the acquiring corporation in which the distribution or transfer occurs shall be deemed to have been accumulated after such distribution or transfer in an amount which bears the same ratio to the undistributed earnings and profits of the acquiring corporation for such taxable year (computed without regard to any earnings and profits received from the distributor or transferor corporation, as described in subparagraph (A) of this paragraph) as the number of days in the taxable year after the date of distribution or transfer bears to the total number of days in the taxable year.

(3) Capital loss carryover.--The capital loss carryover determined under section 1212, subject to the following conditions and limitations:

(A) The taxable year of the acquiring corporation to which the capital loss carryover of the distributor or transferor corporation is first carried shall be the first taxable year ending after the date of distribution or transfer.

(B) The capital loss carryover shall be a short-term capital loss in the taxable year determined under subparagraph (A) but shall be limited to an amount which bears the same ratio to the capital gain net income (determined without regard to a short-term capital loss attributable to capital loss carryover), if any, of the acquiring corporation in such taxable year as the number of days in the taxable year after the date of distribution or transfer bears to the total number of days in the taxable year.

(C) For purposes of determining the amount of such capital loss carryover to taxable years following the taxable year determined under subparagraph (A), the capital gain net income in the taxable year determined under subparagraph (A) shall be considered to be an amount equal to the amount determined under subparagraph (B).

(4) Method of accounting.--The acquiring corporation shall use the method of accounting used by the distributor or transferor corporation on the date of distribution or transfer unless different methods were used by several distributor or transferor corporations or by a distributor or transferor corporation and the acquiring corporation. If different methods were used, the acquiring corporation shall use the method or combination of methods of computing taxable income adopted pursuant to regulations prescribed by the Secretary.

(5) Inventories.--In any case in which inventories are received by the acquiring corporation, such inventories shall be taken by such corporation (in determining its income) on the same basis on which such inventories were taken by the distributor or transferor corporation, unless different methods were used by several distributor or transferor corporations or by a distributor or transferor corporation and the acquiring corporation. If different methods were used, the acquiring corporation shall use the method or combination of methods of taking inventory adopted pursuant to regulations prescribed by the Secretary.

(6) Method of computing depreciation allowance.--The acquiring corporation shall be treated as the distributor or transferor corporation for purposes of computing the depreciation allowance under sections 167 and 168 on property acquired in a

distribution or transfer with respect to so much of the basis in the hands of the acquiring corporation as does not exceed the adjusted basis in the hands of the distributor or transferor corporation.

[**(7) Repealed.** June 15, 1955, c. 143, § 2(1), 69 Stat. 134]

(8) Installment method.--If the acquiring corporation acquires installment obligations (the income from which the distributor or transferor corporation reports on the installment basis under section 453) the acquiring corporation shall, for purposes of section 453, be treated as if it were the distributor or transferor corporation.

(9) Amortization of bond discount or premium.--If the acquiring corporation assumes liability for bonds of the distributor or transferor corporation issued at a discount or premium, the acquiring corporation shall be treated as the distributor or transferor corporation after the date of distribution or transfer for purposes of determining the amount of amortization allowable or includible with respect to such discount or premium.

(10) Treatment of certain mining development and exploration expenses of distributor or transferor corporation.--The acquiring corporation shall be entitled to deduct, as if it were the distributor or transferor corporation, expenses deferred under section 616 (relating to certain development expenditures) if the distributor or transferor corporation has so elected.

(11) Contributions to pension plans, employees' annuity plans, and stock bonus and profit-sharing plans.--The acquiring corporation shall be considered to be the distributor or transferor corporation after the date of distribution or transfer for the purpose of determining the amounts deductible under section 404 with respect to pension plans, employees' annuity plans, and stock bonus and profit-sharing plans.

(12) Recovery of tax benefit items.--If the acquiring corporation is entitled to the recovery of any amounts previously deducted by (or allowable as credits to) the distributor or transferor corporation, the acquiring corporation shall succeed to the treatment under section 111 which would apply to such amounts in the hands of the distributor or transferor corporation.

(13) Involuntary conversions under section 1033.--The acquiring corporation shall be treated as the distributor or transferor corporation after the date of distribution or transfer for purposes of applying section 1033.

(14) Dividend carryover to personal holding company.--The dividend carryover (described in section 564) to taxable years ending after the date of distribution or transfer.

[**(15) Repealed.** Pub.L. 101-508, Title XI, § 11801(c)(10)(A), Nov. 5, 1990, 104 Stat. 1388-526]

(16) Certain obligations of distributor or transferor corporation.--If the acquiring corporation--

(A) assumes an obligation of the distributor or transferor corporation which, after the date of the distribution or transfer, gives rise to a liability, and

(B) such liability, if paid or accrued by the distributor or transferor corporation, would have been deductible in computing its taxable income,

the acquiring corporation shall be entitled to deduct such items when paid or accrued, as the case may be, as if such corporation were the distributor or transferor corporation. A corporation which would have been an acquiring corporation under this section if the date of distribution or transfer had occurred on or after the effective date of the provisions of this subchapter applicable to a liquidation or reorganization, as the case may be, shall be entitled, even though the date of distribution or transfer occurred before such effective date, to apply this paragraph with respect to amounts paid or accrued in taxable years beginning after December 31, 1953, on account of such obligations of the distributor or transferor corporation. This paragraph shall not apply if such obligations are reflected in the amount of stock, securities, or property transferred by the acquiring corporation to the transferor corporation for the property of the transferor corporation.

(17) Deficiency dividend of personal holding company.--If the acquiring corporation pays a deficiency dividend (as defined in section 547(d)) with respect to the distributor or transferor corporation, such distributor or transferor corporation shall, with respect to such payments, be entitled to the deficiency dividend deduction provided in section 547.

(18) Percentage depletion on extraction of ores or minerals from the waste or residue of prior mining.--The acquiring corporation shall be considered to be the distributor or transferor corporation for the purpose of determining the applicability of section 613(c)(3) (relating to extraction of ores or minerals from the ground).

(19) Charitable contributions in excess of prior years' limitations.--Contributions made in the taxable year ending on the date of distribution or transfer and the 4 prior taxable years by the distributor or transferor corporation in excess of the amount deductible under section 170(b) (2) for such taxable years shall be deductible by the acquiring corporation for its taxable years which begin after the date of distribution or transfer, subject to the limitations imposed in section 170(b)(2). In applying the preceding sentence, each taxable year of the distributor or transferor corporation beginning on or before the date of distribution or transfer shall be treated as a prior taxable year with reference to the acquiring corporation's taxable years beginning after such date.

[**(20) Repealed.** Pub.L. 94-455, Title XIX, § 1901(a) (54), Oct. 4, 1976, 90 Stat. 1773]

[**(21) Repealed.** Pub.L. 94-455, Title XIX, § 1901(b) (16), Oct. 4, 1976, 90 Stat. 1796]

(22) Successor insurance company.--If the acquiring corporation is an insurance company taxable under subchapter L, there shall be taken into account (to the extent proper to carry out the purposes of this section and of subchapter L, and under such regulations as may be prescribed by the Secretary) the items required to be taken into account for purposes of subchapter L in respect of the distributor or transferor corporation.

(23) Deficiency dividend of regulated investment company or real estate investment trust.--If the acquiring corporation pays a deficiency dividend (as defined in section 860(f)) with respect to the distributor or transferor corporation, such distributor or transferor corporation shall, with respect to such payments, be entitled to the deficiency dividend deduction provided in section 860.

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(24) Credit under section 38.--The acquiring corporation shall take into account (to the extent proper to carry out the purposes of this section and section 38, and under such regulations as may be prescribed by the Secretary) the items required to be taken into account for purposes of section 38 in respect of the distributor or transferor corporation.

(25) Credit under section 53.--The acquiring corporation shall take into account (to the extent proper to carry out the purposes of this section and section 53, and under such regulations as may be prescribed by the Secretary) the items required to be taken into account for purposes of section 53 in respect of the distributor or transferor corporation.

(26) Enterprise zone provisions.--The acquiring corporation shall take into account (to the extent proper to carry out the purposes of this section and subchapter U, and under such regulations as may be prescribed by the Secretary) the items required to be taken into account for purposes of subchapter U in respect of the distributor or transferor corporation.

(d) Operations loss carrybacks and carryovers of life insurance companies.--

For application of this part to operations loss carrybacks and carryovers of life insurance companies, see section 810.

CREDIT(S)

(Aug. 16, 1954, c. 736, 68A Stat. 124; June 15, 1955, c. 143, § 2(1), 69 Stat. 134; Jan. 28, 1956, c. 15, § 1, 70 Stat. 7; Sept. 2, 1958, Pub.L. 85-866, Title I, § 29(c), 72 Stat. 1628; June 25, 1959, Pub.L. 86-69, § 3(c), 73 Stat. 139; Oct. 16, 1962, Pub.L. 87-834, § 2(d), 76 Stat. 971; Feb. 26, 1964, Pub.L. 88-272, Title II, §§ 209(d)(2), 225(i)(3), 78 Stat. 46, 92; Jan. 2, 1968, Pub.L. 90-240, § 5(d), 81 Stat. 778; Dec. 30, 1969, Pub.L. 91-172, Title V, §§ 504(c)(2), 512(c), 521(f), 83 Stat. 633, 639, 654; Dec. 10, 1971, Pub.L. 92-178, Title VI, § 601(c)(3), 85 Stat. 557; Oct. 4, 1976, Pub.L. 94-455, Title XVI, § 1601(e), Title XIX, §§ 1901(a)(54), (b)(16), (17), (21)(B), (33)(N), 1906(b)(13)(A), 90 Stat. 1746, 1773, 1796, 1797, 1802, 1834; May 23, 1977, Pub.L. 95-30, Title II, § 202(d)(3)(A), 91 Stat. 148; Nov. 6, 1978, Pub.L. 95-600, Title III, § 362(d)(2), 92 Stat. 2851; Apr. 2, 1980, Pub.L. 96-223, Title II, § 232(b)(2)(B), 94 Stat. 276; Oct. 19, 1980, Pub.L. 96-471, § 2(b)(2), 94 Stat. 2253; Dec. 24, 1980, Pub.L. 96-589, § 4(g), 94 Stat. 3404; Aug. 13, 1981, Pub.L. 97-34, Title II, §§ 208, 221(b)(1)(B), Title III, § 331(d)(1)(B), 95 Stat. 226, 246, 294; Sept. 3, 1982, Pub.L. 97-248, Title II, § 224(c)(7), 96 Stat. 489; Jan. 12, 1983, Pub.L. 97-448, Title I, §§ 102(h)(3), 103(g)(2)(F), 96 Stat. 2372, 2379; July 18, 1984, Pub.L. 98-369, Title II, § 211(b)(4), Title IV, § 474(r)(11), 98 Stat. 754, 841; Oct. 22, 1986, Pub.L. 99-514, Title II, § 231(d)(3)(F), Title IV, § 411(b)(2)(C)(iii), Title VII, § 701(e)(1), Title XVIII, § 1812(a)(3), 100 Stat. 2179, 2227, 2342, 2833; Dec. 22, 1987, Pub.L. 100-203, Title X, § 10202(c)(3), 101 Stat. 1330-392; Nov. 10, 1988, Pub.L. 100-647, Title I, § 1002(a)(13), 102 Stat. 3355; Dec. 19, 1989, Pub.L. 101-239, Title VII, § 7841(d)(10), 103 Stat. 2428; Nov. 5, 1990, Pub.L. 101-508, Title XI, §§ 11801(c)(10)(A), 11812(b)(6), 104 Stat. 1388-535, 1388-536; Aug. 10, 1993, Pub.L. 103-66, Title XIII, § 13302(e), 107 Stat. 556; Aug. 20, 1996, Pub.L. 104-188, Title I, § 1704(t)(26), 110 Stat. 1888.)

Notes of Decisions (36)

26 U.S.C.A. § 381, 26 USCA § 381
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United States Code Annotated
Title 26. Internal Revenue Code (Refs & Annos)
Subtitle A. Income Taxes (Refs & Annos)
Chapter 1. Normal Taxes and Surtaxes (Refs & Annos)
Subchapter C. Corporate Distributions and Adjustments (Refs & Annos)
Part V. Carryovers

26 U.S.C.A. § 382

§ 382. Limitation on net operating loss carryforwards and certain built-in losses following ownership change

Effective: February 17, 2009
Currentness

(a) General rule.--The amount of the taxable income of any new loss corporation for any post-change year which may be offset by pre-change losses shall not exceed the section 382 limitation for such year.

(b) Section 382 limitation.--For purposes of this section--

(1) In general.--Except as otherwise provided in this section, the section 382 limitation for any post-change year is an amount equal to--

(A) the value of the old loss corporation, multiplied by

(B) the long-term tax-exempt rate.

(2) Carryforward of unused limitation.--If the section 382 limitation for any post-change year exceeds the taxable income of the new loss corporation for such year which was offset by pre-change losses, the section 382 limitation for the next post-change year shall be increased by the amount of such excess.

(3) Special rule for post-change year which includes change date.--In the case of any post-change year which includes the change date--

(A) Limitation does not apply to taxable income before change.--Subsection (a) shall not apply to the portion of the taxable income for such year which is allocable to the period in such year on or before the change date. Except as provided in subsection (h)(5) and in regulations, taxable income shall be allocated ratably to each day in the year.

(B) Limitation for period after change.--For purposes of applying the limitation of subsection (a) to the remainder of the taxable income for such year, the section 382 limitation shall be an amount which bears the same ratio to such limitation (determined without regard to this paragraph) as--

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(i) the number of days in such year after the change date, bears to

(ii) the total number of days in such year.

(c) Carryforwards disallowed if continuity of business requirements not met.--

(1) In general.--Except as provided in paragraph (2), if the new loss corporation does not continue the business enterprise of the old loss corporation at all times during the 2-year period beginning on the change date, the section 382 limitation for any post-change year shall be zero.

(2) Exception for certain gains.--The section 382 limitation for any post-change year shall not be less than the sum of--

(A) any increase in such limitation under--

(i) subsection (h)(1)(A) for recognized built-in gains for such year, and

(ii) subsection (h)(1)(C) for gain recognized by reason of an election under section 338, plus

(B) any increase in such limitation under subsection (b)(2) for amounts described in subparagraph (A) which are carried forward to such year.

(d) Pre-change loss and post-change year.--For purposes of this section--

(1) Pre-change loss.--The term "pre-change loss" means--

(A) any net operating loss carryforward of the old loss corporation to the taxable year ending with the ownership change or in which the change date occurs, and

(B) the net operating loss of the old loss corporation for the taxable year in which the ownership change occurs to the extent such loss is allocable to the period in such year on or before the change date.

Except as provided in subsection (h)(5) and in regulations, the net operating loss shall, for purposes of subparagraph (B), be allocated ratably to each day in the year.

(2) Post-change year.--The term "post-change year" means any taxable year ending after the change date.

(e) Value of old loss corporation.--For purposes of this section--

(1) In general.--Except as otherwise provided in this subsection, the value of the old loss corporation is the value of the stock of such corporation (including any stock described in section 1504(a)(4)) immediately before the ownership change.

(2) Special rule in the case of redemption or other corporate contraction.--If a redemption or other corporate contraction occurs in connection with an ownership change, the value under paragraph (1) shall be determined after taking such redemption or other corporate contraction into account.

(3) Treatment of foreign corporations.--Except as otherwise provided in regulations, in determining the value of any old loss corporation which is a foreign corporation, there shall be taken into account only items treated as connected with the conduct of a trade or business in the United States.

(f) Long-term tax-exempt rate.--For purposes of this section--

(1) In general.--The long-term tax-exempt rate shall be the highest of the adjusted Federal long-term rates in effect for any month in the 3-calendar-month period ending with the calendar month in which the change date occurs.

(2) Adjusted Federal long-term rate.--For purposes of paragraph (1), the term "adjusted Federal long-term rate" means the Federal long-term rate determined under section 1274(d), except that--

(A) paragraphs (2) and (3) thereof shall not apply, and

(B) such rate shall be properly adjusted for differences between rates on long-term taxable and tax-exempt obligations.

(g) Ownership change.--For purposes of this section--

(1) In general.--There is an ownership change if, immediately after any owner shift involving a 5-percent shareholder or any equity structure shift--

(A) the percentage of the stock of the loss corporation owned by 1 or more 5-percent shareholders has increased by more than 50 percentage points, over

(B) the lowest percentage of stock of the loss corporation (or any predecessor corporation) owned by such shareholders at any time during the testing period.

(2) Owner shift involving 5-percent shareholder.--There is an owner shift involving a 5-percent shareholder if--

(A) there is any change in the respective ownership of stock of a corporation, and

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(B) such change affects the percentage of stock of such corporation owned by any person who is a 5-percent shareholder before or after such change.

(3) Equity structure shift defined.--

(A) In general.--The term "equity structure shift" means any reorganization (within the meaning of section 368). Such term shall not include--

(i) any reorganization described in subparagraph (D) or (G) of section 368(a)(1) unless the requirements of section 354(b)(1) are met, and

(ii) any reorganization described in subparagraph (F) of section 368(a)(1).

(B) Taxable reorganization-type transactions, etc.--To the extent provided in regulations, the term "equity structure shift" includes taxable reorganization-type transactions, public offerings, and similar transactions.

(4) Special rules for application of subsection.--

(A) Treatment of less than 5-percent shareholders.--Except as provided in subparagraphs (B)(i) and (C), in determining whether an ownership change has occurred, all stock owned by shareholders of a corporation who are not 5-percent shareholders of such corporation shall be treated as stock owned by 1 5-percent shareholder of such corporation.

(B) Coordination with equity structure shifts.--For purposes of determining whether an equity structure shift (or subsequent transaction) is an ownership change--

(i) Less than 5-percent shareholders.--Subparagraph (A) shall be applied separately with respect to each group of shareholders (immediately before such equity structure shift) of each corporation which was a party to the reorganization involved in such equity structure shift.

(ii) Acquisitions of stock.--Unless a different proportion is established, acquisitions of stock after such equity structure shift shall be treated as being made proportionately from all shareholders immediately before such acquisition.

(C) Coordination with other owner shifts.--Except as provided in regulations, rules similar to the rules of subparagraph (B) shall apply in determining whether there has been an owner shift involving a 5-percent shareholder and whether such shift (or subsequent transaction) results in an ownership change.

(D) Treatment of worthless stock.--If any stock held by a 50-percent shareholder is treated by such shareholder as becoming worthless during any taxable year of such shareholder and such stock is held by such shareholder as of the close of such taxable year, for purposes of determining whether an ownership change occurs after the close of such taxable year, such shareholder--

(i) shall be treated as having acquired such stock on the 1st day of his 1st succeeding taxable year, and

(ii) shall not be treated as having owned such stock during any prior period.

For purposes of the preceding sentence, the term "50-percent shareholder" means any person owning 50 percent or more of the stock of the corporation at any time during the 3-year period ending on the last day of the taxable year with respect to which the stock was so treated.

(h) Special rules for built-in gains and losses and section 338 gains.--For purposes of this section--

(1) In general.--

(A) Net unrealized built-in gain.--

(i) In general.--If the old loss corporation has a net unrealized built-in gain, the section 382 limitation for any recognition period taxable year shall be increased by the recognized built-in gains for such taxable year.

(ii) Limitation.--The increase under clause (i) for any recognition period taxable year shall not exceed--

(I) the net unrealized built-in gain, reduced by

(II) recognized built-in gains for prior years ending in the recognition period.

(B) Net unrealized built-in loss.--

(i) In general.--If the old loss corporation has a net unrealized built-in loss, the recognized built-in loss for any recognition period taxable year shall be subject to limitation under this section in the same manner as if such loss were a pre-change loss.

(ii) Limitation.--Clause (i) shall apply to recognized built-in losses for any recognition period taxable year only to the extent such losses do not exceed--

(I) the net unrealized built-in loss, reduced by

(II) recognized built-in losses for prior taxable years ending in the recognition period.

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(C) Special rules for certain section 338 gains.--If an election under section 338 is made in connection with an ownership change and the net unrealized built-in gain is zero by reason of paragraph (3)(B), then, with respect to such change, the section 382 limitation for the post-change year in which gain is recognized by reason of such election shall be increased by the lesser of--

(i) the recognized built-in gains by reason of such election, or

(ii) the net unrealized built-in gain (determined without regard to paragraph (3)(B)).

(2) Recognized built-in gain and loss.--

(A) Recognized built-in gain.--The term "recognized built-in gain" means any gain recognized during the recognition period on the disposition of any asset to the extent the new loss corporation establishes that--

(i) such asset was held by the old loss corporation immediately before the change date, and

(ii) such gain does not exceed the excess of--

(I) the fair market value of such asset on the change date, over

(II) the adjusted basis of such asset on such date.

(B) Recognized built-in loss.--The term "recognized built-in loss" means any loss recognized during the recognition period on the disposition of any asset except to the extent the new loss corporation establishes that--

(i) such asset was not held by the old loss corporation immediately before the change date, or

(ii) such loss exceeds the excess of--

(I) the adjusted basis of such asset on the change date, over

(II) the fair market value of such asset on such date.

Such term includes any amount allowable as depreciation, amortization, or depletion for any period within the recognition period except to the extent the new loss corporation establishes that the amount so allowable is not attributable to the excess described in clause (ii).

(3) Net unrealized built-in gain and loss defined.--

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(A) Net unrealized built-in gain and loss.--

(i) In general.--The terms "net unrealized built-in gain" and "net unrealized built-in loss" mean, with respect to any old loss corporation, the amount by which--

(I) the fair market value of the assets of such corporation immediately before an ownership change is more or less, respectively, than

(II) the aggregate adjusted basis of such assets at such time.

(ii) Special rule for redemptions or other corporate contractions.--If a redemption or other corporate contraction occurs in connection with an ownership change, to the extent provided in regulations, determinations under clause (i) shall be made after taking such redemption or other corporate contraction into account.

(B) Threshold requirement.--

(i) In general.--If the amount of the net unrealized built-in gain or net unrealized built-in loss (determined without regard to this subparagraph) of any old loss corporation is not greater than the lesser of--

(I) 15 percent of the amount determined for purposes of subparagraph (A)(i)(I), or

(II) $10,000,000,

the net unrealized built-in gain or net unrealized built-in loss shall be zero.

(ii) Cash and cash items not taken into account.--In computing any net unrealized built-in gain or net unrealized built-in loss under clause (i), except as provided in regulations, there shall not be taken into account--

(I) any cash or cash item, or

(II) any marketable security which has a value which does not substantially differ from adjusted basis.

(4) Disallowed loss allowed as a carryforward.--If a deduction for any portion of a recognized built-in loss is disallowed for any post-change year, such portion--

(A) shall be carried forward to subsequent taxable years under rules similar to the rules for the carrying forward of net operating losses (or to the extent the amount so disallowed is attributable to capital losses, under rules similar to the rules for the carrying forward of net capital losses), but

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(B) shall be subject to limitation under this section in the same manner as a pre-change loss.

(5) Special rules for post-change year which includes change date.--For purposes of subsection (b)(3)--

(A) in applying subparagraph (A) thereof, taxable income shall be computed without regard to recognized built-in gains to the extent such gains increased the section 382 limitation for the year (or recognized built-in losses to the extent such losses are treated as pre-change losses), and gain described in paragraph (1)(C), for the year, and

(B) in applying subparagraph (B) thereof, the section 382 limitation shall be computed without regard to recognized built-in gains, and gain described in paragraph (1)(C), for the year.

(6) Treatment of certain built-in items.--

(A) Income items.--Any item of income which is properly taken into account during the recognition period but which is attributable to periods before the change date shall be treated as a recognized built-in gain for the taxable year in which it is properly taken into account.

(B) Deduction items.--Any amount which is allowable as a deduction during the recognition period (determined without regard to any carryover) but which is attributable to periods before the change date shall be treated as a recognized built-in loss for the taxable year for which it is allowable as a deduction.

(C) Adjustments.--The amount of the net unrealized built-in gain or loss shall be properly adjusted for amounts which would be treated as recognized built-in gains or losses under this paragraph if such amounts were properly taken into account (or allowable as a deduction) during the recognition period.

(7) Recognition period, etc.--

(A) Recognition period.--The term "recognition period" means, with respect to any ownership change, the 5-year period beginning on the change date.

(B) Recognition period taxable year.--The term "recognition period taxable year" means any taxable year any portion of which is in the recognition period.

(8) Determination of fair market value in certain cases.--If 80 percent or more in value of the stock of a corporation is acquired in 1 transaction (or in a series of related transactions during any 12-month period), for purposes of determining the net unrealized built-in loss, the fair market value of the assets of such corporation shall not exceed the grossed up amount paid for such stock properly adjusted for indebtedness of the corporation and other relevant items.

(9) Tax-free exchanges or transfers.--The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subsection where property held on the change date was acquired (or is subsequently transferred) in a transaction where gain or loss is not recognized (in whole or in part).

(i) Testing period.--For purposes of this section--

(1) 3-year period.--Except as otherwise provided in this section, the testing period is the 3-year period ending on the day of any owner shift involving a 5-percent shareholder or equity structure shift.

(2) Shorter period where there has been recent ownership change.--If there has been an ownership change under this section, the testing period for determining whether a 2nd ownership change has occurred shall not begin before the 1st day following the change date for such earlier ownership change.

(3) Shorter period where all losses arise after 3-year period begins.--The testing period shall not begin before the earlier of the 1st day of the 1st taxable year from which there is a carryforward of a loss or of an excess credit to the 1st post-change year or the taxable year in which the transaction being tested occurs. Except as provided in regulations, this paragraph shall not apply to any loss corporation which has a net unrealized built-in loss (determined after application of subsection (h)(3)(B)).

(j) Change date.--For purposes of this section, the change date is--

(1) in the case where the last component of an ownership change is an owner shift involving a 5-percent shareholder, the date on which such shift occurs, and

(2) in the case where the last component of an ownership change is an equity structure shift, the date of the reorganization.

(k) Definitions and special rules.--For purposes of this section--

(1) Loss corporation.--The term "loss corporation" means a corporation entitled to use a net operating loss carryover or having a net operating loss for the taxable year in which the ownership change occurs. Except to the extent provided in regulations, such term includes any corporation with a net unrealized built-in loss.

(2) Old loss corporation.--The term "old loss corporation" means any corporation--

(A) with respect to which there is an ownership change, and

(B) which (before the ownership change) was a loss corporation.

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(3) New loss corporation.--The term "new loss corporation" means a corporation which (after an ownership change) is a loss corporation. Nothing in this section shall be treated as implying that the same corporation may not be both the old loss corporation and the new loss corporation.

(4) Taxable income.--Taxable income shall be computed with the modifications set forth in section 172(d).

(5) Value.--The term "value" means fair market value.

(6) Rules relating to stock.--

(A) Preferred stock.--Except as provided in regulations and subsection (e), the term "stock" means stock other than stock described in section 1504(a)(4).

(B) Treatment of certain rights, etc.--The Secretary shall prescribe such regulations as may be necessary--

(i) to treat warrants, options, contracts to acquire stock, convertible debt interests, and other similar interests as stock, and

(ii) to treat stock as not stock.

(C) Determinations on basis of value.--Determinations of the percentage of stock of any corporation held by any person shall be made on the basis of value.

(7) 5-percent shareholder.--The term "5-percent shareholder" means any person holding 5 percent or more of the stock of the corporation at any time during the testing period.

(l) Certain additional operating rules.--For purposes of this section--

(1) Certain capital contributions not taken into account.--

(A) In general.--Any capital contribution received by an old loss corporation as part of a plan a principal purpose of which is to avoid or increase any limitation under this section shall not be taken into account for purposes of this section.

(B) Certain contributions treated as part of plan.--For purposes of subparagraph (A), any capital contribution made during the 2-year period ending on the change date shall, except as provided in regulations, be treated as part of a plan described in subparagraph (A).

(2) Ordering rules for application of section.--

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(A) Coordination with section 172(b) carryover rules.--In the case of any pre-change loss for any taxable year (hereinafter in this subparagraph referred to as the "loss year") subject to limitation under this section, for purposes of determining under the 2nd sentence of section 172(b)(2) the amount of such loss which may be carried to any taxable year, taxable income for any taxable year shall be treated as not greater than--

(i) the section 382 limitation for such taxable year, reduced by

(ii) the unused pre-change losses for taxable years preceding the loss year.

Similar rules shall apply in the case of any credit or loss subject to limitation under section 383.

(B) Ordering rule for losses carried from same taxable year.--In any case in which--

(i) a pre-change loss of a loss corporation for any taxable year is subject to a section 382 limitation, and

(ii) a net operating loss of such corporation from such taxable year is not subject to such limitation,

taxable income shall be treated as having been offset first by the loss subject to such limitation.

(3) Operating rules relating to ownership of stock.--

(A) Constructive ownership.--Section 318 (relating to constructive ownership of stock) shall apply in determining ownership of stock, except that--

(i) paragraphs (1) and (5)(B) of section 318(a) shall not apply and an individual and all members of his family described in paragraph (1) of section 318(a) shall be treated as 1 individual for purposes of applying this section,

(ii) paragraph (2) of section 318(a) shall be applied--

(I) without regard to the 50-percent limitation contained in subparagraph (C) thereof, and

(II) except as provided in regulations, by treating stock attributed thereunder as no longer being held by the entity from which attributed,

(iii) paragraph (3) of section 318(a) shall be applied only to the extent provided in regulations,

(iv) except to the extent provided in regulations, an option to acquire stock shall be treated as exercised if such exercise results in an ownership change, and

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(v) in attributing stock from an entity under paragraph (2) of section 318(a), there shall not be taken into account--

(I) in the case of attribution from a corporation, stock which is not treated as stock for purposes of this section, or

(II) in the case of attribution from another entity, an interest in such entity similar to stock described in subclause (I).

A rule similar to the rule of clause (iv) shall apply in the case of any contingent purchase, warrant, convertible debt, put, stock subject to a risk of forfeiture, contract to acquire stock, or similar interests.

(B) Stock acquired by reason of death, gift, divorce, separation, etc.--If--

(i) the basis of any stock in the hands of any person is determined--

(I) under section 1014 (relating to property acquired from a decedent),

(II) section 1015 (relating to property acquired by a gift or transfer in trust), or

(III) section 1041(b)(2) (relating to transfers of property between spouses or incident to divorce),

(ii) stock is received by any person in satisfaction of a right to receive a pecuniary bequest, or

(iii) stock is acquired by a person pursuant to any divorce or separation instrument (within the meaning of section 71(b)(2)),

such person shall be treated as owning such stock during the period such stock was owned by the person from whom it was acquired.

(C) Certain changes in percentage ownership which are attributable to fluctuations in value not taken into account.--Except as provided in regulations, any change in proportionate ownership which is attributable solely to fluctuations in the relative fair market values of different classes of stock shall not be taken into account.

(4) Reduction in value where substantial nonbusiness assets.--

(A) In general.--If, immediately after an ownership change, the new loss corporation has substantial nonbusiness assets, the value of the old loss corporation shall be reduced by the excess (if any) of--

(i) the fair market value of the nonbusiness assets of the old loss corporation, over

(ii) the nonbusiness asset share of indebtedness for which such corporation is liable.

(B) Corporation having substantial nonbusiness assets.--For purposes of subparagraph (A)--

(i) In general.--The old loss corporation shall be treated as having substantial nonbusiness assets if at least # of the value of the total assets of such corporation consists of nonbusiness assets.

(ii) Exception for certain investment entities.--A regulated investment company to which part I of subchapter M applies, a real estate investment trust to which part II of subchapter M applies, or a REMIC to which part IV of subchapter M applies, shall not be treated as a new loss corporation having substantial nonbusiness assets.

(C) Nonbusiness assets.--For purposes of this paragraph, the term "nonbusiness assets" means assets held for investment.

(D) Nonbusiness asset share.--For purposes of this paragraph, the nonbusiness asset share of the indebtedness of the corporation is an amount which bears the same ratio to such indebtedness as--

(i) the fair market value of the nonbusiness assets of the corporation, bears to

(ii) the fair market value of all assets of such corporation.

(E) Treatment of subsidiaries.--For purposes of this paragraph, stock and securities in any subsidiary corporation shall be disregarded and the parent corporation shall be deemed to own its ratable share of the subsidiary's assets. For purposes of the preceding sentence, a corporation shall be treated as a subsidiary if the parent owns 50 percent or more of the combined voting power of all classes of stock entitled to vote, and 50 percent or more of the total value of shares of all classes of stock.

(5) Title 11 or similar case.--

(A) In general.--Subsection (a) shall not apply to any ownership change if--

(i) the old loss corporation is (immediately before such ownership change) under the jurisdiction of the court in a Title 11 or similar case, and

(ii) the shareholders and creditors of the old loss corporation (determined immediately before such ownership change) own (after such ownership change and as a result of being shareholders or creditors immediately before such change) stock of the new loss corporation (or stock of a controlling corporation if also in bankruptcy) which meets the requirements of section 1504(a)(2) (determined by substituting "50 percent" for "80 percent" each place it appears).

(B) Reduction for interest payments to creditors becoming shareholders.--In any case to which subparagraph (A) applies, the pre-change losses and excess credits (within the meaning of section 383(a)(2)) which may be carried to a post-

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change year shall be computed as if no deduction was allowable under this chapter for the interest paid or accrued by the old loss corporation on indebtedness which was converted into stock pursuant to Title 11 or similar case during--

(i) any taxable year ending during the 3-year period preceding the taxable year in which the ownership change occurs, and

(ii) the period of the taxable year in which the ownership change occurs on or before the change date.

(C) Coordination with section 108.--In applying section 108(e)(8) to any case to which subparagraph (A) applies, there shall not be taken into account any indebtedness for interest described in subparagraph (B).

(D) Section 382 limitation zero if another change within 2 years.--If, during the 2-year period immediately following an ownership change to which this paragraph applies, an ownership change of the new loss corporation occurs, this paragraph shall not apply and the section 382 limitation with respect to the 2nd ownership change for any post-change year ending after the change date of the 2nd ownership change shall be zero.

(E) Only certain stock taken into account.--For purposes of subparagraph (A)(ii), stock transferred to a creditor shall be taken into account only to the extent such stock is transferred in satisfaction of indebtedness and only if such indebtedness--

(i) was held by the creditor at least 18 months before the date of the filing of the Title 11 or similar case, or

(ii) arose in the ordinary course of the trade or business of the old loss corporation and is held by the person who at all times held the beneficial interest in such indebtedness.

(F) Special rule for certain financial institutions.--

(i) In general.--In the case of any ownership change to which this subparagraph applies, this paragraph shall be applied--

(I) by substituting "1504(a)(2)(B)" for "1504(a)(2)" and "20 percent" for "50 percent" in subparagraph (A)(ii), and

(II) without regard to subparagraphs (B) and (C).

(ii) Special rule for depositors.--For purposes of applying this paragraph to an ownership change to which this subparagraph applies--

(I) a depositor in the old loss corporation shall be treated as a stockholder in such loss corporation immediately before the change,

(II) deposits which, after the change, become deposits of the new loss corporation shall be treated as stock of the new loss corporation, and

(III) the fair market value of the outstanding stock of the new loss corporation shall include the amount of deposits in the new loss corporation immediately after the change.

(iii) Changes to which subparagraph applies.--This subparagraph shall apply to--

(I) an equity structure shift which is a reorganization described in section 368(a)(3)(D)(ii) (as modified by section 368(a)(3)(D)(iv)), or

(II) any other equity structure shift (or transaction to which section 351 applies) which occurs as an integral part of a transaction involving a change to which subclause (I) applies.

This subparagraph shall not apply to any equity structure shift or transaction occurring on or after May 10, 1989.

(G) Title 11 or similar case.--For purposes of this paragraph, the term "Title 11 or similar case" has the meaning given such term by section 368(a)(3)(A).

(H) Election not to have paragraph apply.--A new loss corporation may elect, subject to such terms and conditions as the Secretary may prescribe, not to have the provisions of this paragraph apply.

(6) Special rule for insolvency transactions.--If paragraph (5) does not apply to any reorganization described in subparagraph (G) of section 368(a)(1) or any exchange of debt for stock in a Title 11 or similar case (as defined in section 368(a)(3)(A)), the value under subsection (e) shall reflect the increase (if any) in value of the old loss corporation resulting from any surrender or cancellation of creditors' claims in the transaction.

(7) Coordination with alternative minimum tax.--The Secretary shall by regulation provide for the application of this section to the alternative tax net operating loss deduction under section 56(d).

(8) Predecessor and successor entities.--Except as provided in regulations, any entity and any predecessor or successor entities of such entity shall be treated as 1 entity.

(m) Regulations.--The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this section and section 383, including (but not limited to) regulations--

(1) providing for the application of this section and section 383 where an ownership change with respect to the old loss corporation is followed by an ownership change with respect to the new loss corporation, and

(2) providing for the application of this section and section 383 in the case of a short taxable year,

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(3) providing for such adjustments to the application of this section and section 383 as is necessary to prevent the avoidance of the purposes of this section and section 383, including the avoidance of such purposes through the use of related persons, pass-thru entities, or other intermediaries,

(4) providing for the application of subsection (g)(4) where there is only 1 corporation involved, and

(5) providing, in the case of any group of corporations described in section 1563(a) (determined by substituting "50 percent" for "80 percent" each place it appears and determined without regard to paragraph (4) thereof), appropriate adjustments to value, built-in gain or loss, and other items so that items are not omitted or taken into account more than once.

(n) Special rule for certain ownership changes.--

(1) In general.--The limitation contained in subsection (a) shall not apply in the case of an ownership change which is pursuant to a restructuring plan of a taxpayer which--

(A) is required under a loan agreement or a commitment for a line of credit entered into with the Department of the Treasury under the Emergency Economic Stabilization Act of 2008, and

(B) is intended to result in a rationalization of the costs, capitalization, and capacity with respect to the manufacturing workforce of, and suppliers to, the taxpayer and its subsidiaries.

(2) Subsequent acquisitions.--Paragraph (1) shall not apply in the case of any subsequent ownership change unless such ownership change is described in such paragraph.

(3) Limitation based on control in corporation.--

(A) In general.--Paragraph (1) shall not apply in the case of any ownership change if, immediately after such ownership change, any person (other than a voluntary employees' beneficiary association under section 501(c)(9)) owns stock of the new loss corporation possessing 50 percent or more of the total combined voting power of all classes of stock entitled to vote, or of the total value of the stock of such corporation.

(B) Treatment of related persons.--

(i) In general.--Related persons shall be treated as a single person for purposes of this paragraph.

(ii) Related persons.--For purposes of clause (i), a person shall be treated as related to another person if--

(I) such person bears a relationship to such other person described in section 267(b) or 707(b), or

(II) such persons are members of a group of persons acting in concert.

CREDIT(S)

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Notes of Decisions (23)

26 U.S.C.A. § 382, 26 USCA § 382
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