

## *New York – Foreign corporation licensee fee assessed at higher rate, out-of-state law held not to apply*

January 14, 2014

### ***In brief***

An administrative law judge (ALJ) concluded that a foreign corporation was properly assessed the New York corporation license fee at the higher rate because, per its articles of incorporation, its shares had no par value. The ALJ declined to apply statutory provisions from the state of incorporation that deemed the corporation's shares to have a \$1 par value. Foreign corporations often are unaware of this fee and this case shows the state's desire to assess outstanding liabilities on audit – even though repeal of the tax may be considered in upcoming deliberations regarding tax reform in the state. [*Frog design, inc.*, New York Division of Tax Appeals, Administrative Law Judge Unit, DTA No. 824375, November 27, 2013]

### ***In detail***

#### ***Background***

New York State Law imposes a license fee on every foreign corporation for the privilege of exercising its corporate franchise or carrying on business in the state. The license fee is imposed at one-twentieth of one percent of the corporation's issued par value capital stock employed within the state and five cents on each share of its capital stock without par value employed within the state.

#### ***Facts***

Frog design, inc. (FDI) was incorporated as a California corporation. FDI's Articles of Incorporation did not state a par value for its common stock. For

the years ending December 31, 2000 through March 31, 2008 (years at issue), FDI did not pay the license fee. Following an audit, the Division of Taxation determined that FDI was subject to the license fee at the higher rate for shares of capital stock without par value and issued an assessment.

#### ***New York relies on plain language of the law, assesses license fee based on no par value as provided in Taxpayer's Articles of Incorporation***

California law provides that for the purpose of any statute or regulation imposing any tax or fee based on capitalization of a corporation, all authorized shares of a corporation are deemed to have a par value of \$1

per share. Therefore, FDI argued that its stock had a par value of \$1 per share pursuant to California law and that it should be assessed at the lower rate. The ALJ rejected FDI's claim and stated that FDI "must operate under the laws of New York" and "it is untenable for the Division to first apply laws outside of its jurisdiction before it relied on the plain language of New York law." The ALJ noted that FDI's Articles of Incorporation did not state a par value for the stock. Accordingly, based on the plain language of the New York statute, FDI was subject to tax at the higher rate.

#### ***License fee internally consistent***

FDI argued that the license fee imposed runs afoul of

Commerce Clause requirements of internal consistency. FDI reasoned it would be subject to multiple taxation if every state in which it conducted business imposed an identical tax. The ALJ rejected FDI's argument, stating that FDI was taxed solely on the portion of capital stock it employed within New York. The ALJ further explained that no other jurisdiction can impose tax on these activities conducted solely within New York; as such the license fee as applied is internally consistent.

***Taxpayer fails to demonstrate the license fee is discriminatory under the Commerce Clause***

FDI argued that New York's license fee is discriminatory under the Commerce Clause. FDI claimed that the license fee under the law does not provide for a deduction for changes to its capital share whereas the organization law provides such a deduction for domestic corporations. Therefore, by providing a deduction for domestic corporations while at the same time providing no deduction for foreign corporation, the New York Tax Law is favoring in-state corporations over foreign corporations. The ALJ disagreed noting that FDI's change to

its capital share was made in 1998, before it was assessed the license fee.

***The takeaway***

The license fee on foreign corporations is often overlooked, and this case shows that the state is still assessing taxpayers for outstanding liabilities. The tax itself does not generate a lot of revenue for the state, which is why it is potentially subject to repeal in any proposed tax reform. However, compounded with penalties and interest, the assessments could be significant.

***Let's talk***

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