Net Operating Losses and Combined Groups

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Tax: Corporation Business Tax

P.L. 2018, c. 48, and P.L. 2018, c. 131, (and subsequently amended by P.L. 2020, c. 118, and P.L. 2023, c. 96) collectively mandate combined reporting for privilege periods ending on and after July 31, 2019 (beginning on and after August 1, 2018, if a full 12-month privilege period of the managerial member begins August 1, 2018, and ends July 31, 2019). In addition, the laws changed the net operating loss and net operating loss carryover regime from pre-allocation to post allocation for privilege periods ending on and after July 31, 2019. P.L. 2023, c. 96, changed to the New Jersey Corporation Business Tax rules related to the dividend exclusion and the historic ordering of the net operating loss deduction, dividend exclusion, and international banking facility deduction. This Technical Bulletin explains various aspects of prior net operating loss conversion carryovers (PNOLs), post-allocation net operating losses, and net operating loss carryovers **in a combined group context** pursuant to N.J.S.A. 54:10A-4.6. (See TB-94(R), *General Information on the New Net Operating Loss Regime for Tax Years Ending on and After July 31, 2019,* for details on the general changes to net operating losses and net operating loss carryovers.)

For New Jersey purposes, the income starting point is Line 28 of federal Form 1120 (or the corresponding line of any other federal corporate return filed), which is taxable income before net operating loss deductions and special deductions (N.J.S.A. 54:10A-4(k)). New Jersey has its own statutorily created net operating loss calculations. See N.J.S.A. 54:10A-4(k)(6); N.J.S.A. 54:10A-4(u); N.J.S.A. 54:10A-4(v); and N.J.S.A. 54:10A-4.6.h. In order to claim New Jersey net operating losses and net operating loss carryover deductions, a taxpayer must have filed a New Jersey Corporation Business Tax return in the applicable privilege periods. For New Jersey combined returns, there are specific rules governing current year combined group post-allocation net operating losses, prior net operating loss conversion carryovers (PNOLs), and combined group post-allocation net operating loss carryovers. All combined groups must determine entire net income, current year combined group net operating losses, prior net operating loss carryovers, combined group post-allocation net operating loss carryovers, tax credits, and other tax attributes in accordance with N.J.S.A. 54:10A-4.6. For more information, see N.J.A.C. 18:7-5.21 and N.J.A.C. 18:7-21.1 through 21.29.

Prior Net Operating Loss Conversion Carryovers (PNOLs) and Post-Allocation Net Operating Losses (NOLs) in a Combined Return Context. N.J.S.A. 54:10A-4.6, as amended by P.L. 2020, c. 118 and P.L. 2023, c. 96, states in part:

g. A prior net operating loss conversion carryover incurred by a member of a combined group shall be deducted from the entire net income or loss allocated to this State pursuant to section 19 of P.L.2018, c.48 (C.54:10A-4.7) as follows:

(1) For privilege periods ending before July 31, 2023, a prior net operating loss conversion carryover deduction shall be allowed to offset only the entire net income allocated to this State of the corporation that created the prior net operating loss; the prior net operating loss conversion carryover cannot be shared with other members of the combined group. For privilege periods ending on and after July 31, 2023, the remaining balance of prior net operating loss conversion carryover deductions of the members of the combined group shall be pooled together and shall be allowed to offset the entire net income allocated to this State of either: the combined group for which the corporation is a member; or the corporation that created the prior net operating loss conversion carryover, provided that the corporation departs the combined group before the corporation's respective prior net operating loss conversion carryover has been completely used.

(2) The prior net operating loss conversion carryover deduction computed under subsection (u) of section 4 of P.L.1945, c.162 (C.54:10A-4) shall be applied against the entire net income allocated

to this State before the net operating loss carryover computed under subsection h. of this section.

(3) For privilege periods ending before July 31, 2023, the director shall provide regulations establishing rules on how each such corporation shall apply its prior net operating loss conversion carryover against its share of entire net income allocated as if filing on a separate entity basis. **For privilege periods ending on and after July 31, 2023, the director shall provide regulations establishing rules on pooling members' prior net operating loss conversion carryovers and tracing members' prior net operating loss conversion carryovers in the event a member departs the combined group before the member's prior net operating loss conversion carryovers are completely used.**

(4) For privilege periods ending before the members of a combined group pool their prior net operating loss conversion carryovers for usage by the combined group, a member of the combined group may sell prior net operating loss conversion carryover to other members of the combined group, if otherwise applicable and allowable under section 2 of P.L.1997, c.334 (C.54:10A-4.2) and section 1 of P.L.1997, c.334 (C.34:1B-7.42a); provided, however, such sale of prior net operating loss conversion carryover must be made at arm's length price at the same rate as though the sale was to an unrelated taxpayer.

h. A net operating loss carryover incurred by a combined group or by a member of the combined group shall be deducted from entire net income or loss allocated to this State pursuant to section 19 of P.L.2018, c.48 (C.54:10A-4.7) as follows:

(1)(a) For privilege periods beginning on or after the first day of the initial privilege period for which a combined unitary tax return is required under this section and sections 19, 20, and 23 of P.L.2018, c.48 (C.54:10A-4.7, C.54:10A-4.8, and C.54:10A-4.11), but ending before July 31, 2023, if the computation of a combined group's entire net income allocated to this State results in a net operating loss, a taxable member of such group may carry over the net operating loss allocated to this State, as calculated under this section and sections 19 and 23 of P.L.2018, c.48 (C.54:10A-4.7 and C.54:10A-4.11), and shall be deductible from entire net income derived from the unitary business in a future privilege period to the extent that the carryover and deduction is otherwise consistent with subsection (v) of section 4 of P.L.1945, c.162 (C.54:10A-4).

(b) For privilege periods ending on and after July 31, 2023, if the computation of a combined group's entire net income allocated to this State results in a net operating loss, a combined group may carry over the net operating loss allocated to this State, as calculated under this section and sections 19 and 23 of P.L.2018, c.48 (C.54:10A-4.7 and C.54:10A-4.11), and shall be deductible from entire net income derived from the unitary business in a future privilege period to the extent that the carryover and deduction is otherwise consistent with subsection (v) of section 4 of P.L.1945, c.162 (C.54:10A-4).

(2)(a) Where a taxable member of a combined group has a net operating loss carryover derived from a loss incurred by a combined group in a privilege period beginning on or after the first day of the initial privilege period for which a combined unitary tax return is required under this section and sections 19, 20, and 23 of P.L.2018, c.48 (C.54:10A-4.7, C.54:10A-4.8, and C.54:10A-4.11), but ending before July 31, 2023, then the taxable member may share the net operating loss carryover with other taxable members of the combined group if such other taxable members were members of the combined group in the privilege period that the loss was incurred. Any amount of net operating loss carryover that is deducted by another taxable member of the combined group shall reduce the amount of net operating loss carryover that may be carried over by the taxable member that originally incurred the loss.

(b) Where a combined group has a net operating loss carryover derived from a loss incurred by the combined group in a privilege period ending on or after July 31, 2023, then the combined group may use the net operating loss carryover. Any amount of net operating loss carryover that is deducted by the combined group shall reduce the amount of net operating loss carryover that may be carried over by the combined group.

(3) Where a taxable member of a combined group has a net operating loss carryover derived from a loss incurred in a privilege period during which the taxable member was not a member of such combined group, the carryover shall remain available to be deducted by that taxable member or other group members that, in the year the loss was incurred, were part of the same combined group as such taxable member. Such carryover shall not be deductible by any other members of the combined group for privilege periods ending before July 31, 2023. For privilege periods ending on and after July 31, 2023, such carryover may (a) be pooled with the combined group net operating loss carryover for use by the combined group or (b) be used by the taxable member that generated the carryover for that member's activities that are independent of the unitary business of the combined group; provided, however, **the combined group and the members of the combined group shall use tracing protocols for all net operating loss carryovers, as may be prescribed by regulations promulgated by the director.**

(4) A net operating loss carryover or, for privilege periods ending on and after July 31, 2023, a combined group net operating loss carryover, shall not include any net operating loss incurred during any privilege period beginning prior to the first day of the initial privilege period for which a combined unitary tax return is required under this section and sections 19 and 23 of P.L.2018, c.48 (C.54:10A-4.7 and C.54:10A-4.11).

(5) Where a taxable member of a combined group has a net operating loss carryover derived from a loss incurred by a combined group in a privilege period beginning on or after the first day of the initial privilege period for which a combined unitary tax return is required under this section and sections 19, 20, and 23 of P.L.2018, c.48 (C.54:10A-4.7, C.54:10A-4.8, and C.54:10A-4.11), and the taxable member departs the combined group and continues to be a taxpayer for the purposes of the Corporation Business Tax Act (1945), P.L.1945, c.162 (C.54:10A-1 et seq.), the taxable member shall be entitled to take its respective portion of the combined group net operating loss carryover and the combined group shall not be entitled to use such portion of the net operating loss carryover.

(6) For privilege periods ending on and after July 31, 2023, each taxable member of a combined group shall track that member's proportionate share of any combined group net operating loss carryovers used.

…

m To the extent consistent with the Corporation Business Tax Act (1945), P.L.1945, c.162 (C.54:10A-1 et seq.), the federal rules and regulations governing consolidated return net operating losses and net operating loss carryovers shall apply to the New Jersey net operating loss carryover provisions under subsection h. of this section as though the combined group filed a federal consolidated return, regardless of how the members of the combined group filed for federal purposes. [*emphasis added*]

Taxable Net Income is defined in <u>N.J.S.A.</u> 54:10A-4(w), as amended by P.L. 2023, c. 96 (effective for privilege periods ending on and after July 31, 2023), states that: "'Taxable net income' means entire net income allocated to this State as calculated pursuant to sections 6 through 8 of P.L.1945, c.162 (C.54:10A-6 through 54 :10A-8) as modified by subtracting any prior net operating loss conversion carryforward calculated pursuant to subsection (u) of this section, and any net operating loss calculated pursuant to subsection (v) of this section; provided, however, for privilege periods ending on and after July 31, 2023, when subtracting any net operating losses calculated pursuant to subsection (v) of this section or the combined group net operating losses calculated pursuant to subsection h. of section 18 of P.L.2018, c.48 (C.54:10A-4.6), the limitation set forth in paragraph (2) of subsection (a) of Internal Revenue Code Section 172 (26 U.S.C. s.172(a)(2)) shall apply, except that August 1, 2023 is substituted for the reference to January 1, 2018 in subparagraph (A) of paragraph (2) of subsection a. of Internal Revenue Code Section 172 (26 U.S.C. s.172), and July 31, 2023 is substituted for the reference to December 31, 2017 in subparagraph (B) of paragraph (2) of subsection (a) of Internal Revenue Code Section 172 (26 U.S.C. s.172). **For privilege periods ending on and after July 31, 2023, for a combined group, before**

subtracting the prior net operating loss conversion carryforwards and subtracting the net operating losses of the combined group when computing the total taxable net income, the combined group shall first add together the allocated entire net income from the unitary business of the combined group and the portion of allocated entire net income of members with activities independent of the group, and then subtract the prior net operating loss conversion carryforwards and then the net operating losses." [*emphasis added*]

Prior Net Operating Loss Conversion Carryovers (PNOLs) and Combined Groups

For tax years ending *prior* to July 31, 2019, net operating losses were calculated on a pre-allocation basis pursuant to N.J.S.A. 54:10A-4(k)(6). For tax years ending *on and after* July 31, 2019, any unused unexpired net operating loss carryovers that were calculated pursuant to N.J.S.A. 54:10A-4(k)(6) must be converted to allocated prior net operating loss conversion carryovers (PNOLs). PNOLs are then used to reduce the allocated entire net income of the taxpayer.

Note: In order to have New Jersey net operating losses and net operating loss carryovers converted to PNOLs, a taxpayer must have filed a New Jersey Corporation Business Tax return in the applicable privilege periods. (See TB-94(R), *General Information on the New Net Operating Loss Regime for Tax Years Ending on and After July 31, 2019*.)

PNOLs cannot be used to increase a current year loss. If the total combined group amount of the allocated entire net income before the PNOLs and NOLs as reported on the combined group's tax return is negative (i.e., a loss) for the group privilege period, the members of the combined group cannot use the PNOLs.

For periods ending before July 31, 2023 – If the total combined group amount of the allocated entire net income before the PNOLs and NOLs as reported on the New Jersey combined return was positive (i.e., income), a member could use their own PNOLs to offset their portion of the group's allocated entire net income. Members were not permitted to share PNOLs pursuant to N.J.S.A. 54:10A-4.6. The member was required to apply its own PNOLs before it could apply a combined group post-allocation net operating loss conversion carryover. However, if the member's portion of allocated entire net income was still more than zero after subtracting the PNOLs, the member could then subtract their portion of the combined group's post-allocation net operating loss carryovers. N.J.S.A. 54:10A-4.6.g applies to all combined group filing methods.

For periods ending on and after July 31, 2023 – The remaining balance of the unused unexpired PNOLs of the group members are pooled to be used by the combined group against the group's allocated entire net income. If the total combined group amount of the allocated entire net income before the PNOLs and NOLs as reported on the New Jersey combined return is positive (i.e., income), the group can use the PNOLs to offset the group's allocated entire net income. The combined group must apply the PNOLs before applying a combined group post-allocation net operating loss conversion carryover. However, if the group's allocated entire net income is still greater than zero after subtracting the PNOLs, the group can then subtract the combined group's post-allocation net operating loss carryovers. Since the PNOLs are pooled, combined group members are no longer permitted to buy and sell PNOLs to each other. The combined group and the members of the combined group are required to keep track of all PNOLs and NOLs of the members and the combined group pursuant to N.J.S.A. 54:10A-4.6.g(3) and N.J.S.A. 54:10A-4.6.h(3).

Combined Group Post-Allocation Net Operating Losses/Loss Carryovers

For tax years ending on and after July 31, 2019, N.J.S.A. 54:10A-4.6.h mandates New Jersey combined group net operating loss deductions and New Jersey combined group net operating loss carryovers be calculated on a post-allocation basis.

If the total combined group amount reported on the allocated entire net income before the PNOLs and NOLs on the New Jersey return is negative (i.e., a loss), that amount is the combined group's post-allocation net operating loss that is carried over by the combined group and its taxable members. For privilege periods ending on and after July 31, 2023, the post-allocation net operating losses/loss carryovers are applied on a group level (i.e., pooled). These losses can be carried over for a maximum of 20 privilege periods following the year the loss was generated. If a taxable member leaves the combined group, they are entitled to their respective share of the combined group post-allocation net operating loss in addition to their post-allocation net operating losses that were not from the combined group, this amount becomes their carryover for subsequent periods. The combined group cannot use the portion of the net operating loss carryovers of a member that left the group.

Note: For privilege periods ending *before* July 31, 2023, combined group net operating losses and combined group net operating loss carryovers could not offset a member's income from activities that were independent of the unitary business of the combined group. Conversely, net operating losses and net operating loss carryovers generated by a member's activities that were independent of the combined group generally could not offset the combined group entire net income. However, for privilege periods ending on and after July 31, 2023, this is no longer true. PNOLs and NOLs are pooled and applied on a group level.

For privilege periods beginning on and after January 1, 2020 – The provisions of the Internal Revenue Code, the Federal rules, limitations, and restrictions governing Federal net operating losses and Federal net operating loss carryovers with regard, but not limited to mergers, acquisitions, reorganizations, spin-offs, split-offs, dissolution, bankruptcy, or any form of cessation of a business, or any other provision that limits or reduces Federal net operating losses and Federal net operating loss carryovers, apply to New Jersey net operating loss carryovers pursuant to N.J.S.A. 54:10A-4(v) and the New Jersey net operating loss carryover provisions of N.J.S.A. 54:10A-4.6.h. The federal rules and regulations governing Federal consolidated return net operating losses and net operating loss carryovers apply to New Jersey net operating loss carryover provisions at N.J.S.A. 54:10A-4.6.h as though the combined group filed a federal consolidated return regardless of how the members of the combined group filed for federal purposes to the extent consistent with the Corporation Business Tax Act. See also N.J.S.A. 54:10A-4.5.c and N.J.S.A. 54:10A-4.6.m.

For information on PNOLs and NOLs with certain mergers or acquisitions, see TB-102(R), *Net Operating Losses (NOLs) and Post Allocation Net Operating Losses (PNOLs) with Certain Mergers & Acquisitions*.

For periods ending before July 31, 2023 – Combined group net operating losses and combined group net operating loss carryovers could not be used to offset a member's income from activities that were independent of the unitary business of the combined group. Net operating losses and net operating loss carryovers generated by a member's activities that were independent of the combined group generally could not be used to offset the combined group entire net income.

For privilege periods ending on and after July 31, 2023 – The dividend exclusion and international banking facility deduction are subtractions that occur before determining if a taxpayer has a net operating loss that can be carried over for use in a future privilege period. The PNOL and NOL carryover deductions are subtracted after deducting the current year dividend exclusions and international banking facility deduction but only if allocated entire net income is greater than zero. The combined group must add together the allocated entire net income from the unitary business of the combined group and the portion of allocated entire net income of members with activities independent of the group and then subtract the prior net operating loss conversion carryforwards and then the net operating losses. The combined group and the members of the combined group are required to keep track of all PNOLs and NOLs of the members and the combined group pursuant to N.J.S.A. 54:10A-4.6.g(3) and N.J.S.A. 54:10A-4.6.h(3).

In the context of a combined return, the 80% deduction limitation in I.R.C. s. 172(a)(2) applies at the combined group level. When the combined group uses the NOLs (of the members or the group) generated in privilege periods beginning after July 31, 2023, these NOLs can only be deducted up to 80%

of the remaining allocated entire net income after first deducting the PNOLs and pre-August 1, 2023 NOLs. The Form 500U has been revised to take this into account beginning in Tax Year 2023. The 80% deduction limitation does not apply to PNOLs or NOLs generated in periods beginning before August 1, 2023. A combined group with allocated entire net income can deduct up to 100% of the PNOLs (to reduce the allocated entire net income) but the PNOLs deducted cannot exceed the allocated entire net income. If there is still allocated entire net income after deducting the PNOLs, the combined group can deduct up to 100% of the pre-August 1, 2023, NOL carryovers (to reduce the allocated entire net income) but the pre-August 1, 2023, NOLs cannot exceed allocated entire net income. NOLs and PNOLs cannot be used to create or increase a current year loss.

Sharing vs. Pooling of Net Operating Losses

For Privilege Periods *Ending Before July 31, 2023*, Sharing Combined Group Post-Allocation Net Operating Losses/Loss Carryovers

For privilege periods ending before July 31, 2023, taxable members could *only* share the combined group post-allocation net operating losses with other taxable members that were part of the same combined group in the period in which the loss was generated. The taxable member that shared the loss must reduce the member's respective portion of the combined group post-allocation net operating loss by the amount that was shared. If a non-taxable member became a taxable member of the combined group, then the other taxable members could share their respective portion of the combined group post-allocation net operating loss carryovers with that new taxable member. If a taxable member left the combined group, the taxable member took its portion of the combined group post-allocation net operating loss carryovers for its own use outside the combined group, and the combined group was not allowed to use that portion of the combined group post-allocation net operating loss carryovers.

When a new taxpayer joins an established combined group, the new member brings with them any separate post-allocation net operating loss carryovers that they have from previously filed New Jersey Corporation Business Tax returns. For privilege periods ending before July 31, 2023, these carryovers could only be used by the new member and could not be shared with other members of the combined group pursuant to N.J.S.A. 54:10A-4.6.h(3). Additionally, the preexisting members could not share any combined group post-allocation net operating loss carryovers that were generated in privilege periods prior to the new member joining the group. However, if the combined group's allocated entire net income was positive for the year (any privilege periods ending before July 31, 2023), the new member can use its separate post-allocation net operating loss carryover (that it brought with it) against its portion of the combined group allocated entire net income. If the member had income from separate activities that were reported on Schedule X, the member used its separate post-allocation net operating loss carryovers to offset that income.

Previously, combined group post-allocation net operating loss carryovers could only be shared with members that were part of the same combined New Jersey return when the losses were generated. Thus, if multiple members joined a new combined group and they have combined group post-allocation net operating loss carryovers that were generated when they were both part of another combined group that filed a New Jersey combined return, they could share those losses with each other but not the other taxable members of the new combined group.

Note: The members of the combined group must keep accurate books and records to prevent the double use and/or inadvertent sharing of post-allocation net operating loss carryovers.

This has changed for privilege periods ending on or after July 31, 2023, see below for more information.

For Privilege Periods *Ending on and After July 31, 2023*, Pooling Combined Group and Member Post-Allocation Net Operating Losses/Loss Carryovers

The combined group post-allocation net operating losses and the net operating loss carryovers of the taxable members of the combined group are pooled together with the combined group net operating loss carryover for use by the combined group or by the taxable member that generated the net operating loss carryover for such member's activities that are independent of the unitary business of the combined group.

When a new taxpayer joins an established combined group that is filing New Jersey combined returns, the new member's post-allocation net operating loss carryovers are pooled with the combined group's post-allocation net operating loss carryovers.

The taxable members of the combined group must track their proportionate share of the combined group net operating loss carryovers used. If the taxable member departs the combined group and continues to be a taxpayer for the purposes of the Corporation Business Tax Act, the taxable member is entitled to take its respective portion of the combined group net operating loss carryover. The combined group cannot use such portion of the net operating loss carryover.

The combined group must add the allocated entire net income from the unitary business of the combined group and the portion of allocated entire net income of members with activities independent of the group. Information on deducting PNOLs and NOLs and the 80% NOL deduction limitation for privilege periods ending on and after July 31, 2023, can be found in the *Combined Group Post-Allocation Net Operating Losses/Loss Carryovers* section, above.

Calculation of NOLs in Relation to the Combined Group Filing Method Used

Affiliated Group Basis Combined Returns and Post-Allocation Net Operating Losses/Loss Carryovers for Privilege Periods Ending on and After July 31, 2023

For New Jersey affiliated group basis combined returns, the managerial member makes the election to include all of the larger affiliated group of corporations under common ownership, regardless of whether the members are unitary. This is an election to deem all of the activities as one single business. As such, **all** of the activities, income, and tax attributes of the affiliated group members are included in the combined group and Schedule X is inapplicable. In years that the affiliated group basis combined return is filed, there would be the pool for PNOLs and the pool for post-allocation net operating losses and post-allocation net operating loss carryovers.

A non-U.S. corporation that is incorporated or formed in a foreign nation with a **comprehensive tax treaty** with the United States that is a member of an New Jersey affiliated group combined return does not include in entire net income any item of income or loss excluded or exempted from federal taxable income under the terms of the treaty and no other deduction, exclusion, or elimination is permitted for such income and loss items. This also means that the receipts attributable to such excluded items are excluded from the allocation factor. Thus, the affiliated group's combined group net operating loss/loss carryover would not include excluded losses or excluded expenses. See N.J.S.A. 54:10A-4(k)(18) and N.J.S.A. 54:10A-4.6.b.

A non-U.S. corporation **that filed a federal return** that is a member of a New Jersey affiliated group combined return generally only includes in entire net income the member's effectively connected income or loss reported for federal purposes, as modified by the provisions of the Corporation Business Tax Act. The member and the combined group will also take into account only items of expense and allocation factor receipts attributable to such income, and not the items attributable to income that are excluded from entire net income. This means that income that is not included in entire net income and the receipts and expenses attributable to excluded income are excluded from entire net income, and the receipts are excluded from the allocation factor. Thus, the affiliated group's combined group net operating loss/loss carryover would not include excluded losses or excluded expenses. See N.J.S.A. 54:10A-4(k)(18) and N.J.S.A. 54:10A-4.6.b.

Water's Edge Combined Group Post-Allocation Net Operating Losses/Loss Carryovers and Members that are Non-U.S. Corporations. A non-U.S. corporation that is incorporated or formed in a foreign nation with a **comprehensive tax treaty** with the United States that is a member of a New Jersey water's-edge group combined return does not include in entire net income any item of income or loss excluded or exempted from federal taxable income under the terms of the treaty, and no other deduction, exclusion, or elimination will be permitted for such income and loss items. This also means that the receipts attributable to such excluded items are excluded from the allocation factor. Thus, the water's-edge group's combined group net operating loss/loss carryover would not include excluded losses or excluded expenses. See N.J.S.A. 54:10A-4(k)(18) and N.J.S.A. 54:10A-4.6.b.

A non-U.S. corporation **that filed a federal return** and that is a member of a New Jersey water's-edge group combined return generally only includes in entire net income the member's effectively connected income or loss reported for federal purposes, as modified by the provisions of the Corporation Business Tax Act. The member and the combined group will also take into account only items of expense and allocation factor receipts attributable to such income, and not the items attributable to income that are excluded from entire net income. This means that income that is not included in entire net income and the receipts and expenses attributable to excluded income are excluded from entire net income and the receipts are excluded from the allocation factor. Thus, the water's-edge group's combined group net operating loss/loss carryover would not include excluded losses or excluded expenses. See N.J.S.A. 54:10A-4(k)(18) and N.J.S.A. 54:10A-4.6.b.

A non-U.S. corporation that **did not file a federal return** and that is a member of a New Jersey water's-edge group combined return generally only includes in entire net income its non-treaty protected U.S. source income or loss of what otherwise would be effectively connected income or loss if the member had been conducting a business effectively connected to the United States, as modified by the provisions of the Corporation Business Tax Act. The member and the combined group will also take into account only items of expense and allocation factor receipts attributable to such income, and not the items attributable to income that are excluded from entire net income. This means that income that is not included in entire net income and the receipts and expenses attributable to excluded income are excluded from entire net income and the receipts are excluded from the allocation factor. Thus, the water's-edge group's combined group net operating loss/loss carryover would not include excluded losses or excluded expenses. See N.J.S.A. 54:10A-4(k)(18) and N.J.S.A. 54:10A-4.6.b.

World-Wide Combined Group Post-Allocation Net Operating Losses/Loss Carryovers and Members that are Non-U.S. Corporations. When making a world-wide group election, the combined group must include all members and all of the income, attributes, and allocation factors of all of the worldwide business entities that are members of the unitary combined group, regardless of whether such members filed a federal tax return or whether such members filed a federal consolidated return(s). The combined group includes all of the income and attributes of such members without regard to any exemption or exclusion from federal taxable income under the terms of a tax treaty. The members that are non-U.S. corporations are treated the same as U.S. corporations and allowed any federal deductions that are allowed under the Corporation Business Tax Act. Thus, world-wide losses and expenses are includable even if they were not included for federal purposes or they had been protected by treaty. Therefore, the combined group net operating loss/loss carryover would be based on world-wide losses. See N.J.S.A. 54:10A-4(kk) and N.J.S.A. 54:10A-4.11.

Water's Edge and World-Wide Basis Combined Groups with Members That Have Activities Independent of the Combined Group

If a member has activities that are independent of the activities of the combined group, the member is considered a partially included member of the group. If the partially included member's separate business activities are part of another combined group's activities, the member reports those activities with that group. However, if the partially included member has activities that are not related to **any** combined group activities, the member will use Schedule X to report the separate portion of its business operations.

Schedule X is used in lieu of filing a separate return to calculate the New Jersey taxable income from the separate activity that must be reported on Schedule A of the CBT-100U.

For privilege periods ending *before* July 31, 2023, if a partially included member had an allocated entire net loss on the Schedule X, this loss became the member's post-allocation net operating loss from its activities. This was a separate net operating loss consistent with N.J.S.A. 54:10A-4(v) and was required to be used as if it was a separate return loss. The member could not share these separate post-allocation net operating losses. The member's separate business activity post-allocation net operating loss carryovers can only be used by the member to offset its separate business activity allocated entire net income after the member uses its PNOLs. These separate post-allocation net operating losses and post-allocation net operating loss carryovers could only be claimed and/or used on Schedule X while the member was part of the combined group.

If a partially included member had allocated entire net income on Schedule X, the member could use their PNOLs to offset the separate activity income. If the member's Schedule X allocated entire net income was still greater than zero after subtracting its PNOLs, the member could then subtracts its separate business activity post-allocation net operating loss carryovers from their separate business activity allocated entire net income.

The member must keep accurate books and records to prevent the double use of the same PNOLs.

For privilege periods ending on and after July 31, 2023, the combined group post-allocation net operating losses and the net operating loss carryovers of the taxable members of the combined group are pooled together with the combined group net operating loss carryover for use by the entire combined group, but may also be used by the taxable member that generated the net operating loss carryovers independent of the combined group. The combined group adds together the allocated entire net income from the unitary business of the combined group and the portion of allocated entire net income of members with activities independent of the group, then subtracts the PNOLs and NOLs accordingly. Information on deducting PNOLs and NOLs and the 80% NOL deduction limitation for privilege periods ending on and after July 31, 2023, can be found in the Combined Group Post-Allocation Net Operating Losses/Loss Carryovers section, above.

Net Operating Loss Adjustments

N.J.S.A. 54:49-6 clarified the Director's ability to make adjustments to net operating losses for closed years beginning with net operating losses generated in privilege periods ending on or after July 31, 2022, but limited the ability to make adjustments to 10 years after the return was filed.

More Information

For more information see N.J.A.C. 18:7-5.14; N.J.A.C. 18:7-5.21; N.J.A.C. 18:7-21.10; N.J.A.C. 18:7-21.11; and N.J.A.C. 18:7-21.27.

For more information see TB-111, *Changes to the Dividend Exclusion and the Historic Ordering of Net Operating Losses, the Dividend Exclusion, and the International Banking Facility Deduction.*

The Division of Taxation is in the process of updating the regulations addressing the topics covered by this Technical Bulletin.

Note: A Technical Bulletin is an informational document that provides guidance on a topic of interest to taxpayers and may describe recent changes to the relevant laws, regulations, and/or Division policies. It is accurate as of the date issued. However, taxpayers should be aware that subsequent changes to the applicable laws, regulations, and/or the Division's interpretation thereof may affect the accuracy of a Technical Bulletin. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.

Revision Information: This Technical Bulletin was revised on October 11, 2023, to include the changes affecting net operating loss deductions as a result of the enactment of P.L. 2023, c.96.