

Bank Hapoalim B.M. v City of New York Dept. of Fin.
2021 NY Slip Op 32752(U)
December 21, 2021
Supreme Court, New York County
Docket Number: Index No. 154021/2021
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE BLUTH PART 14

Justice

-----X

BANK HAPOALIM B.M.,

Plaintiff,

- v -

THE CITY OF NEW YORK DEPARTMENT OF FINANCE,
SHERIF SOLIMAN, IN HIS CAPACITY AS THE
COMMISSIONER OF THE CITY OF NEW YORK
DEPARTMENT OF FINANCE,

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for

DISMISSAL

The motion to dismiss by defendants is granted.

Background

This declaratory judgment action concerns the extent to which plaintiff can carry over deductions from previous tax years. Plaintiff complains that the lookback periods for certain deductions differ for purposes of State and City tax liability computations and that that these periods should conform to one another. Plaintiff details its efforts to use its New York City net operating losses (“NOLs”) for the tax year ending December 31, 2008 in computing its Prior Net Operating Loss Conversion (“PNOLC”) subtractions for the tax years ending December 31, 2015 through December 31, 2017. Plaintiff claims that a New York City Administrative Code provision which contains a shorter lookback period than the one under the State Tax Law exceeds the authorization of the Enabling Act and the New York State Constitution.

Plaintiff explains that while computing its federal income tax liability, it deducted from its federal taxable income a portion of the NOLs that it had carried forward from the tax year ending on December 31, 2008. While computing its New York State liability, plaintiff contends it used PNOLC subtraction amounts that used the NOLs that plaintiff had reported to the State of New York for that same year (2008). Plaintiff alleges it did the same thing while computing its New York City taxes.

It contends that defendants audited plaintiff for the subject years (2015-2017) and it disallowed plaintiff's use of the New York City NOLs that plaintiff reported for the tax year ending on December 31, 2008 from plaintiff's computation of its PNOLC subtraction amounts. Defendants then assessed plaintiff an additional tax liability of more than \$6 million. Plaintiff claims that defendants were not permitted to reach this conclusion because the subject Administrative Code provision does not conform to the Model Local Law or to New York's Tax Law. Plaintiff alleges that defendants must permit plaintiff to use its 2008 NOLs in the calculation of its PNOLC subtraction amounts for the years at issue in this case because plaintiff is permitted to use the 2008 NOLs under the New York State Tax Law.

Defendants move to dismiss and claim that plaintiff is essentially arguing that a State law violates a State law. They insist that each relevant section of the City's Administrative Code mentioned by plaintiff was enacted directly by the New York State legislature in 2009 or in 2015. Defendants argue that the State enacted these provisions rather than New York City and therefore the enabling legislation relied upon by plaintiff is irrelevant.

Defendants argue that there isn't any tension between the State Franchise Tax and the City's Administrative Code. They claim that the case should be dismissed because plaintiff has not stated a valid cause of action, plaintiff failed to join a necessary party and failed to notify the

Attorney General. Defendants argue that the legislative body that enacted the statute is a necessary party to an action challenging a statute.

Defendants explain that NOLs happen when a taxpayer's deductions exceed its income in a given year and they may be carried over to subsequent years in order to reduce an entity's taxable income. Defendants observe that there is often a limit to how far back a taxpayer can go in order to use NOLs and admit that the "lookback period" differs for the City and State tax laws as a result of State-enacted reforms. They point out that after the legislature made changes, the lookback period under State law starts in 2001 while it starts in 2009 under City law.

Defendants maintain that the State repealed Article 32 of the Tax Law (the franchise tax on banking corporations, such as plaintiff) and made them subject to a new Article 9-A Franchise Tax on business corporations. The City's tax laws regarding banking corporations were also reformed. Defendants argue that following these changes, plaintiff (and other similar taxpayers) were subject to the City's new Subchapter 3-A Corporate Tax of 2015, which *inter alia* denied a deduction of any NOL sustained during a tax year prior to January 1, 2009.

Defendants argue that this distinction was deliberate and not merely an accident. They explain that State's tax scheme for NOL deductions for banks was created in 1997 to start in 2001 while the City's statutory scheme was passed in 2009 and became effective that same year. Defendants insist that if the City's scheme were to go back to 2001, it would create a new tax deduction, something that the legislature decided not to do. They claim there is no basis to find that the City and State lookback periods must conform to each other.

Defendants also argue that the enabling legislation relied upon by plaintiff is inapposite because it refers to local laws, while the lookback periods at issue here were both enacted by the State legislature.

In opposition to the motion to dismiss, plaintiff insists that its amended complaint states a valid cause of action and that the state is not a necessary party. Plaintiff maintains that during the relevant tax years at issue both the State and the City imposed a tax on plaintiff's entire net income. Plaintiff argues that defendants were not permitted to "decouple" the State's treatment of NOLs because the tax scheme was enacted by the City. Plaintiff maintains that the Court of Appeals has held that when the City enacts local laws to conform to changes in State tax laws, there must be conformity between the two statutory schemes.

It observes that municipalities, such as the City, have no inherent taxing powers and can only levy taxes after delegation from the State. Plaintiff claims that defendants have misstated its argument and that notwithstanding the State's enactment of the Administrative Code at issue here (Section 11-641[k-1]), defendants had to conform the Administrative Code to the State Tax Law.

In reply, defendants argue that plaintiff is asking this Court to ignore or amend the subject Administrative Code provision. They claim there is clear and unambiguous language from a State-enacted law that plaintiff simply does not want to follow.

Discussion

"A motion to dismiss a declaratory judgment action prior to the service of an answer presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration. However, upon a motion to dismiss for failure to state a cause of action, a court may reach the merits of a properly pleaded cause of action for a declaratory judgment where no questions of fact are presented [by the controversy]. Under such circumstances, the motion to dismiss the cause of action for failure to state a cause of action should be treated as one seeking a declaration in [the]

defendant's favor and treated accordingly” (*Mut. Aid Assn. of Paid Fire Dept. of City of Yonkers, New York, Inc. v City of Yonkers*, 2021 WL 5226140, *2, 199 AD3d 815 [2d Dept 2021] [internal quotations and citations omitted]).

The Court grants the motion to dismiss. The fact is that plaintiff admits in its memorandum of law in opposition that the subject Administrative Code provision was enacted by the state legislature (NYSCEF Doc. No. 17 at 11). Although plaintiff asks the Court to ignore that fact and require defendants to conform the Administrative Code’s lookback period to the State Tax Law’s period, plaintiff cited no basis for this Court to reach that conclusion. Moreover, the fact that there is no dispute that the Administrative Code section at issue was enacted by the State renders plaintiff’s arguments about a violation of the 1967 enabling legislation irrelevant.

The State legislature decided to enact laws with different lookback dates for State and City tax purposes regarding taxpayers such as plaintiff. The legislature was entitled to do so, just as it is entitled to provide for the imposition of city taxes (separate and apart from state taxes) in the first instance. In its opposition, plaintiff seems to suggest that defendants should have somehow *sua sponte* amended its enforcement of the subject Administrative Code provision so that it conforms to the State lookback date or simply ignored the provision. That, of course, is improper and plaintiff cites to no delegation from the State to permit defendants to do so.

Plaintiff’s claim that this discrepancy violates the State Constitution is similarly without merit. And defendants are correct that plaintiff should have joined the State and notified the Attorney General as required when a state-enacted provision’s constitutionality is challenged (*Gina P. v Stephen S.*, 33 AD3d 412, 415 [1st Dept 2006]).

Accordingly, it is hereby

ORDERED that the motion by defendants to dismiss is granted, the amended complaint is dismissed and the Clerk is directed to enter judgment accordingly along with costs and disbursements upon presentation of proper papers therefor; and it is further

DECLARED that plaintiff is not permitted to use its 2008 NOLs in computing its PNOLC subtraction amounts for Corporation Tax Purposes for the tax years ending from December 31, 2015 through December 31, 2017 for purposes of calculating its tax liability to the City of New York.



12/21/2021
DATE

ARLENE BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE