No. 242A23 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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NORTH CAROLINA DEPARTMENT OF REVENUE, Petitioner-appellee, v. PHILIP MORRIS USA, INC., Respondent-appellant.	)	From Wake County

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BRIEF FOR APPELLEE
DEPARTMENT OF REVENUE

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ISSUE PRESENTED

1. Did the Business Court correctly hold that the Office of Administrative Hearings lacks jurisdiction to decide constitutional challenges to the State's tax statutes?

INTRODUCTION

This case concerns the constitutionality of a tax statute enacted by our General Assembly. Whether that statute is constitutional, however, is not what this appeal is about. This appeal is rather about which tribunal has jurisdiction to decide that question in the first instance.

The General Assembly has spoken on this issue. One of its statutes provides that the Office of Administrative Hearings lacks jurisdiction to rule on "the constitutionality of a [tax] statute." N.C. Gen. § 105-241.17(3). The statute instead provides that only the Business Court has jurisdiction to resolve constitutional challenges to tax statutes.

Below, however, OAH failed to abide by this limit on its jurisdiction. It first wrongly read this limit to allow it to rule on as-applied constitutional challenges, which contest whether a tax statute can be constitutionally applied to a particular taxpayer. OAH then incorrectly held that taxpayer Philip Morris USA, Inc. had asserted an as-applied challenge to one of the

State's tax statutes, giving OAH jurisdiction over the challenge. And OAH finally granted relief to Philip Morris on the supposed as-applied challenge.

Because OAH exceeded its jurisdiction, the Department of Revenue sought review of OAH's decision in Business Court. The Business Court agreed with the Department that OAH had acted beyond its authority when it ruled on Philip Morris's constitutional challenge. The Court first held that only the Business Court has jurisdiction to rule on all constitutional challenges to tax statutes, including as-applied challenges. In the alternative, the Court also held that even if OAH could rule on as-applied challenges, OAH would lack jurisdiction here. It would do so because Philip Morris's constitutional challenge was really a facial attack on the provision at issue, which would, if successful, effectively preclude its application to any taxpayer to which it applied. The Business Court thus reversed OAH. It also remanded this case back to OAH, with instructions for OAH to dismiss this case for lack of subject-matter jurisdiction, so that Philip Morris could refile its constitutional challenge in Business Court.

Philip Morris, however, chose not to seek a ruling on the merits of its constitutional arguments by filing a new lawsuit in Business Court. Philip

Morris instead chose to file this appeal and seek this Court's review of the Business Court's jurisdictional holding.

The Business Court should be affirmed. Like that Court correctly held, only the Business Court has jurisdiction to rule on constitutional challenges to tax statutes, no matter whether they are facial or as-applied. And like it also held, even if OAH can resolve as-applied challenges, OAH would lack jurisdiction here because Philip Morris has brought a facial challenge.

Because the Business Court did not reach the merits of Philip Morris's constitutional challenge, moreover, the challenge's merits are not preserved and thus are not properly before this Court. The merits, like the Business Court also correctly held, are a question for another day.

The Department thus respectfully requests that this Court affirm the Business Court's holding that OAH lacked jurisdiction below.

STATEMENT OF THE CASE

In late 2020, Philip Morris petitioned for a contested case in OAH. In its petition, Philip Morris claimed that the franchise tax imposed on it under section 105-122 of the General Statues was unconstitutional. (R pp 60-133) OAH awarded summary judgment to Philip Morris and held that the tax imposed under the statute was unconstitutional. (R pp 21-35)

The Department then petitioned for judicial review. (R pp 3-35) The case was assigned to the Business Court. (R p 41) The Business Court held that OAH lacked jurisdiction to resolve the constitutional challenge raised by Philip Morris and thus reversed OAH's decision. (R pp 494-518)

Philip Morris then timely appealed the Business Court's decision to this Court. (R pp 519-521)

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

This Court has appellate jurisdiction over final judgments issued by the Business Court. *See* N.C. Gen. Stat. § 7A-27(a)(2). Because the Business Court issued a final judgment that granted the Department's petition, this Court has appellate jurisdiction over Philip Morris's appeal.

STATEMENT OF THE FACTS

A. Philip Morris pays franchise tax to the State because it does business in North Carolina.

Philip Morris is a corporation owned by Altria Group, Inc. that is headquartered in Virginia. (R p 495) Because Philip Morris does business in

North Carolina, (R p 495), it annually pays franchise tax to the State. *See* N.C. Gen. Stat. §§ 105-114, 105-122 (2012).[1]

Under section 105-122 of the General Statutes, a corporation must generally pay a franchise tax each year that amounts to 0.0015 of the value of its capital base that has been apportioned to North Carolina. *Id.* §§ 105-122(b), (c1), (d). Thus, to determine how much franchise tax a corporation owes, the corporation's capital base must be calculated.

The statute provides that a corporation's capital base includes its "capital stock, surplus, and undivided profits." *Id.* § 105-122(b). In other words, it includes the equity invested in the corporation and any profits that have not been distributed as dividends. Relevant here, the statute also provides that a corporation must include in its capital base "indebtedness owed" to a parent, subsidiary, or affiliate corporation. *Id.* Stated differently, funds that are loaned (or effectively loaned) to the corporation from other

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[1] Because 2012, 2013, and 2014 are the tax years at issue in this case, all citations to section 105-122 (unless otherwise noted) are citations to the version of the statute that was in effect for 2012. The General Assembly made minor amendments to the statute in 2013. *See* Act of Aug. 23, 2013, S.L. No. 2013-414, secs. 1(c) & 2(a), 2013 N.C. Sess. Laws 1817, 1818-19, 1821. Those amendments have no bearing on the issues in this case.

members of its corporate affiliated group must be included in its capital base.

The final sentence of subsection (b) of the statute further provides that if two corporations that respectively issue and receive a loan both pay North Carolina franchise tax, then the lender corporation can deduct the amount of the loan from its own capital base, so long as the loan has been included in the capital base of the borrower corporation. *Id.* This final sentence does not, however, allow for deductions when loans are made to affiliates that do not conduct business in North Carolina and thus pay no franchise tax. *Id.*[2]

North Carolina's franchise tax, as noted, is not always imposed on the entire value of the capital base. Rather, it is only imposed on the part of the base that has been apportioned to this state under a statutory formula. *Id.* §§ 105-122(c1), (d). If a corporation believes that the statute "subjects a greater portion" of its capital base to taxation "than is attributable to its business" in North Carolina, then the corporation can request that the Department use an alternate method of apportionment. *Id.* § 105-122(c1)(2).

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[2] A similar provision remains codified in the current version of section 105-122. *See* N.C. Gen. Stat. § 105-122(b)(2a) (2024).

From 2012 to 2014, Philip Morris routinely lent to and borrowed from other affiliates within the Altria Group. (R p 496) Under the statute, Philip Morris was therefore required to include the amount that it borrowed as part of its capital base. (R p 496) And the statute also would have allowed Philip Morris to deduct any loans that it made to its affiliates from its capital base, but only if those affiliates did business in North Carolina, paid franchise tax, and included the loans in their capital base. (R p 496)

B. Philip Morris argues that a statutory denial of a franchise-tax deduction is unconstitutional after an audit reveals that Philip Morris underpaid its franchise tax.

In 2016, the Department audited Philip Morris's tax returns from 2012, 2013, and 2014. (R p 496) The audit showed that Philip Morris had not paid enough franchise tax for each of these years because it had understated the value of its capital base. (R pp 496-97)

After Philip Morris requested review of the proposed assessment, the Department issued a notice of final determination reconfirming its finding that Philip Morris had not paid enough franchise tax. (R pp 75-81, 497) The notice concluded that Philip Morris owed $344,994 in additional franchise tax, penalties, and interest. (R pp 75, 497)

Following this determination, Philip Morris filed a contested case petition in OAH to challenge the tax assessment. (R pp 60-133) In OAH, Philip Morris claimed that North Carolina's imposition of franchise tax on Philip Morris was unconstitutional due to the State's statutory rules for calculating the capital base of taxpayer corporations. Philip Morris asserted that those statutory rules offended the dormant Commerce Clause because they did not allow taxpayers to deduct funds loaned to affiliates from their capital base if the funds were loaned to affiliates that do not do business in North Carolina and thus pay no franchise tax. (R pp 199-209)

Philip Morris also maintained that OAH had jurisdiction to resolve its constitutional challenge. Section 105-241.17 of the General Statutes provides that OAH lacks jurisdiction in contested cases when "the sole issue [in a contested case] is the constitutionality of a [tax] statute." N.C. Gen. Stat. § 105-241.17(3). Philip Morris maintained that, notwithstanding this statute, OAH had jurisdiction because Philip Morris was only raising an as-applied, rather than facial, constitutional challenge to the franchise-tax statute. (R pp 199, 251-55) A facial challenge asserts "that no constitutional applications of [a] statute exist," while an as-applied challenge contests "whether [a] statute can be constitutionally applied to a particular" person. *State v.*

Packingham, 368 N.C. 380, 383, 777 S.E.2d 738, 743 (2015), *rev'd on other grounds sub. nom. Packingham v. North Carolina*, 582 U.S. 98, 109 (2017).

In response, the Department argued that OAH lacked jurisdiction to resolve the constitutional challenge. Given OAH's lack of jurisdiction, the Department asserted that OAH should dismiss Philip Morris's case, so that Philip Morris could assert its constitutional challenge by filing a lawsuit in Business Court, like section 105-241.17 requires. (R pp 215-24)

C. OAH holds that it has jurisdiction to resolve Philip Morris's constitutional challenge and that the statutory denial of a deduction is unconstitutional as applied to Philip Morris.

OAH, acting thorough the Honorable Linda F. Nelson, ruled in favor of Philip Morris on its constitutional challenge. (R pp 21-35)

In so doing, OAH first held that it had subject-matter jurisdiction over Philip Morris's constitutional challenge. (R pp 24-25) OAH read section 105-241.17 to distinguish between facial and as-applied challenges and to grant OAH jurisdiction over as-applied challenges. It did so, the tribunal reasoned, because the statute allows OAH to decide issues concerning "the application of a statute." R pp 25, 28; N.C. Gen. Stat. § 105-241.17(3).

OAH then assessed whether Philip Morris had asserted a facial or an as-applied challenge. (R pp 28-31) OAH observed that Philip Morris had not

been able to identify any situation where the statutory denial of a deduction for loans to out-of-state affiliates "could be applied constitutionally, if a court found it was unconstitutional as applied" to Philip Morris. (R p 29 n.6) OAH thus held that "a facial challenge" against the statute would be successful if one were made in Business Court. (R p 29 n.6)

OAH nonetheless also held that Philip Morris had only raised an as-applied challenge. That was so, OAH held, because Philip Morris had only specifically sought relief "as applied to" itself, not anyone else. (R p 31)

OAH then went on to hold that the denial of deductions for loans to out-of-state affiliates in section 105-122(b) offended the dormant Commerce Clause. (R pp 31-33) It thus ordered the Department not to apply "the second half of the final sentence of [s]ection 105-122(b)" to Philip Morris when calculating its franchise tax. (R p 33) The second half of this final sentence denies a deduction for affiliate lending when loans are made to affiliates that do not do business in North Carolina and thus pay no franchise tax. N.C. Gen. Stat. § 105-122(b).

The Department then timely petitioned for judicial review of OAH's decision in Business Court. (R pp 3-19, 41-42)

D. The Business Court reverses OAH's decision, holding that OAH lacked jurisdiction.

In Business Court, the Honorable Julianna T. Earp reversed OAH, concluding that OAH lacked jurisdiction to resolve Philip Morris's constitutional challenge. (R pp 494-518)

At the outset of the proceedings, the Business Court ordered that briefing on the issues in the case be bifurcated. Under the Court's order, briefing and a decision on whether OAH had jurisdiction over Philip Morris's constitutional challenge would precede any "briefing and a decision on the merits." (R p 290)

After receiving briefing and hearing argument on the jurisdictional issue alone, the Business Court held that OAH lacked jurisdiction over Philip Morris's constitutional challenge. (R pp 494-518)

The Court first agreed with the Department that section 105-241.17 denies OAH jurisdiction over all constitutional challenges to tax statutes, both facial and as-applied. (R p 504) The Court held that section 105-241.17's text made this point clear: It provided, after all, that only the Business Court could rule when "the sole issue is a tax statute's constitutionality." (R p 503) The Court also held that OAH had misconstrued the reference in section

105-241.17 to resolving disputes concerning the "application of a statute." (R p 504) That text, the Court explained, only allowed OAH to decide "misapplication challenges," not "constitutional ones." (R p 504)

The Court, in the alternative, also agreed with the Department that Philip Morris's challenge was facial, not as-applied. (R pp 514-16) It held that the challenge was facial because, like OAH had also observed, the denial of the deduction at issue could not be validly applied "to any corporation" if Philip Morris's arguments were accepted. (R p 515 n.13) The Court further held that Philip Morris's "decision to request a remedy limited only to itself [did] not transform a facial challenge into an as-applied one." (R p 515)

After holding that OAH lacked jurisdiction, the Business Court did not address the merits of Philip Morris's constitutional challenge. Because briefing and argument had been limited to the jurisdictional issue under the Court's bifurcation order, the Court "did not express an opinion" on Philip Morris's challenge. (R pp 500, 516 n.14) Instead, it left that issue "for another day." (R p 516 n.14)

The Business Court then remanded this case to OAH and instructed it to dismiss Philip Morris's petition for a contested case for lack of subject-matter jurisdiction. (R p 516) Had the Business Court's decision not been

appealed, a dismissal in OAH would have allowed Philip Morris to obtain a ruling on the merits of its challenge by filing a new lawsuit in Business Court. *See* N.C. Gen. Stat. § 105-241.17. Instead of filing a new lawsuit, however, Philip Morris decided to appeal and challenge the Business Court's jurisdictional holding in this Court. (R pp 519-21)

SUMMARY OF THE ARGUMENT

Below, the Business Court correctly held that OAH lacked subject-matter jurisdiction under section 105-241.17 to resolve Philip Morris's constitutional challenge to one of the General Assembly's tax statutes. The Court did so for two reasons.

First, the Business Court correctly held that OAH lacked jurisdiction because section 105-241.17 does not allow OAH to resolve constitutional challenges to tax statutes, no matter whether challenges are facial or as-applied. The text of the statute makes this point clear. The text repeatedly states that the "constitutionality of [tax] statute[s]" should be resolved in Business Court, not in OAH. N.C. Gen. Stat. § 105-241.17(3); *see also id.* § 7A-45.4(b)(1).

OAH's power to resolve disputes about "the application of a [tax] statute" does not reach as-applied constitutional challenges, moreover. *Id.*

§ 105-241.17(3). That is so because the statute's text treats cases where only "constitutionality" is at issue and cases where "application" is at issue as *distinct* classes of cases. *Id.* The text's reference to application disputes thus refers to *non-constitutional* disputes about the application of statutes. *Id.* OAH accordingly cannot decide as-applied constitutional challenges.

Philip Morris tries to show otherwise, but fails to do so. Its principal argument is that section 105-241.17's direction that cases concerning the "constitutionality of [tax] statute[s]" be decided in Business Court must refer to facial challenges only. *Id.* That is so, it reasons, because only facial challenges dispute the constitutionality of statutes. But it is mistaken on this point. This Court, for instance, has recognized that as-applied challenges are a kind of challenge to the constitutionality of statutes.

Philip Morris also argues that this Court cannot accept the arguments of the Department on this point, because the Department supposedly waived them by not raising them before OAH. But arguments about subject-matter jurisdiction cannot be waived, of course. Philip Morris fails to cite any authority that holds the contrary.

Second, the Business Court also correctly held that even if OAH had jurisdiction to resolve as-applied challenges, it would lack jurisdiction here

because Philip Morris's challenge is facial. When the arguments made to support an as-applied challenge implicate a statute's facial validity, then a request for as-applied relief is really facial in nature. That is the case here. If Philip Morris's arguments about the validity of the statute's denial of a deduction for out-of-state lending were accepted, then that denial could not be enforced against any taxpayer to which the denial applied.

As a final matter, even if OAH correctly exercised jurisdiction below, the merits of Philip Morris's constitutional challenge would not be properly before this Court. Below, the Business Court did not hear argument or rule on the merits. The merits have accordingly not been preserved for appellate review. Thus, regardless of how this Court resolves the jurisdictional issues before it, the Business Court is the proper forum for Philip Morris to seek a ruling on the merits.

For all these reasons, the Business Court's decision should be affirmed.

ARGUMENT

Standard of Review

This appeal concerns subject-matter jurisdiction. Whether subject-matter jurisdiction is present is an issue that is reviewed de novo. *See, e.g.*, *Wing v. Goldman Sachs Tr. Co.*, 382 N.C. 288, 297, 876 S.E.2d 390, 398 (2022).

Discussion of Law

Below, for multiple reasons, the Business Court correctly held that OAH lacked jurisdiction to resolve Philip Morris's constitutional challenge. Because the merits of that challenge were not preserved, moreover, they are also not properly on appeal.

I. The Business Court Correctly Held That OAH Lacks Jurisdiction to Resolve All Constitutional Challenges to Tax Statutes.

To begin, the Business Court correctly held that section 105-241.17 denies OAH jurisdiction to resolve both facial and as-applied challenges. Philip Morris fails to show otherwise, and it also fails to show that the Department waived its arguments about this jurisdictional issue.

A. Section 105-241.17 deprives OAH of jurisdiction to resolve both facial and as-applied constitutional challenges.

Section 105-241.17 denies OAH jurisdiction to resolve *all* constitutional challenges to tax statutes. This conclusion flows from the statute's text, from its first sentence to its last. *See, e.g.*, *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990) (providing that "plain meaning" controls when statute "is clear and unambiguous").

The first sentence of section 105-241.17 specifies that constitutional challenges to tax statutes should be heard in Superior Court, not OAH. It

provides that a "taxpayer who claims that a tax statute is unconstitutional may bring a civil action in the Superior Court of Wake County to determine the taxpayer's liability." N.C. Gen. Stat. § 105-241.17.

Notably, in referencing constitutionality, this text makes no distinction between the two different kinds of constitutional challenges to statutes. Like this Court has explained, a party can "argue[ ] that [a statute] is unconstitutional both on its face and as applied." *Packingham*, 368 N.C. at 383, 777 S.E.2d at 743. A "facial challenge maintains that no constitutional applications of [a] statute exist." *Id*. In contrast, an as-applied challenge "contests whether [a] statute can be constitutionally applied to a particular" person. *Id.*

Because the first sentence of section 105-241.17 does not distinguish between the two ways that a taxpayer can "argue[ ] that [a statute] is unconstitutional," it necessarily refers to both. *Id.* After all, when statutes state "the general, there [is] no need to specify the particular." *Sea-Land Serv., Inc. v. R.V. D'Alfonso Co.*, 727 F.2d 1, 2 (1st Cir. 1984).[3]

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[3] *See also Stephenson v. Bartlett*, 358 N.C. 219, 227, 595 S.E.2d 112, 118 (2004) (noting that broad wording that refers to challenges to redistricting statutes, without any express limitation, covers "any challenges" to those statutes, not just certain subset of those challenges); *In re Couch*, 258 N.C.

Indeed, given this principle, when our legislature has chosen to limit its rules for litigating constitutional challenges to the particular, and not the general, it has done so. One of its other statutes, for example, provides that certain constitutional challenges to non-tax statutes have to be resolved by a three-judge panel appointed by the Chief Justice. There, however, that statute expressly specifies that it only applies to "*facial* challenge[s]." N.C. Gen. Stat. § 1-267.1(a) (emphasis added).

No similar limitation, however, is present in section 105-241.17. Its "general" reference, *Sea-Land*, 727 F.2d at 2, to "claims that a tax statute is unconstitutional" thus refers to both facial and as-applied claims, requiring both to be resolved "in the Superior Court of Wake County," not in OAH. N.C. Gen. Stat. § 105-241.17.

This conclusion is bolstered by the following sentences of section 105-241.17, which specify the steps that a taxpayer must take when filing a lawsuit that challenges the constitutionality of a tax statute. Its second sentence provides that in "filing an action under this section, a taxpayer must follow the procedures for a mandatory business case set forth in" section 7A-45.4 of

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345, 346, 128 S.E.2d 409, 411 (1962) (noting that statutory references to "the whole includes all the parts").

the General Statutes. *Id.* That statute, in turn, states that "a civil action under [section 105-241.17] containing a constitutional challenge to a tax statute . . . shall be designated as mandatory complex business case." *Id.* § 7A-45.4(b)(1). This provision, in referencing "a constitutional challenge to a tax statute," again draws no distinction between the two ways that taxpayers can "argue[ ] that [a statute] is unconstitutional." *Packingham*, 368 N.C. at 383, 777 S.E.2d at 743. This provision, thus, provides further confirmation that all kinds of "constitutional challenge[s] to . . . tax statute[s]" must be resolved in Superior Court, specifically in Business Court. N.C. Gen. Stat. § 7A-45.4(b)(1).

Additional confirmation of this point is provided in the final clauses of section 105-241.17. They list additional steps that a taxpayer must take before "filing a civil action" in Business Court that challenges the constitutionality of a tax statute. *Id.* § 105-241.17. Before filing such an action, the taxpayer must have first "commenced a contested case at [OAH]." *Id.* § 105-241.17(2). And OAH must also have "dismissed the contested case petition for lack of jurisdiction because the sole issue is the constitutionality of a statute and not the application of a statute." *Id.* § 105-241.17(3).

This final part of the statute makes several points clear.

First, by referring to OAH's "jurisdiction," it makes clear that OAH lacks jurisdiction to hear the constitutional challenges that the statute governs. *Id.* The "General Assembly's use of the word 'jurisdiction'" in a statute, of course, "demonstrates that it intended for [the statute] to impose a jurisdictional rule." *Tillett v. Town of Kill Devil Hills*, 257 N.C. App. 223, 224, 809 S.E.2d 145, 147 (2017) (Dietz, J.).

Second, by referring to "the constitutionality of a statute" without distinguishing between facial or as-applied challenges, N.C. Gen. Stat. § 105-241.17(3), the final part of the statute once again shows that OAH lacks jurisdiction to hear *all* kinds of "constitutional challenge[s] to . . . tax statute[s]." *Packingham*, 368 N.C. at 383, 777 S.E.2d at 743.

Third, by referring to "the application of a statute" as being a matter distinct from "the constitutionality of a statute," the third sentence makes it clear that OAH's power to resolve disputes concerning the Department's "application of a statute" does not reach constitutional issues. N.C. Gen. Stat. § 105-241.17(3). This Court has recognized that when two terms are placed in "close juxtaposition" to each other, this drafting choice indicates that the legislature "intended to make a distinction" between the two terms.

Prendergast v. Prendergast, 146 N.C. 225, 226, 59 S.E. 692, 692 (1907). Thus, here, the legislature intended to draw a distinction between cases where only constitutional issues remain and cases involving other issues, showing that OAH's power to resolve disputes about the "application of a statute" does not reach constitutional disputes. N.C. Gen. Stat. § 105-241.17(3).

This distinction drawn by the statute, moreover, is consistent with those drawn by the other statutes that govern OAH's jurisdiction. The Administrative Procedure Act, for instance, grants Superior Courts the power to decide if agencies have acted in "violation of constitutional provisions," but gives OAH no similar power. *Compare id.* § 150B-51(b)(1), *with id.* §§ 150B-23, 150B-33.[4]

Thus, the text of section 105-241.17 shows that OAH lacks jurisdiction to resolve *all* constitutional challenges to tax statutes, both facial and as-applied.

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[4] *See also Meads v. N.C. Dep't of Agric. (In re N.C. Pesticide Bd. File Nos. IR94-128, IR94-151, IR94-155)*, 349 N.C. 656, 670, 509 S.E.2d 165, 174 (1998) (explaining that "well-settled rule" is "that a statute's constitutionality shall be determined by the judiciary, not an administrative board"); *Craven Cnty. Bd. of Educ. v. Boyles*, 343 N.C. 87, 89, 468 S.E.2d 50, 51 (1996) (describing OAH's dismissal of constitutional claim based on "lack of subject matter jurisdiction").

B. Philip Morris fails to show that the Business Court erred in construing section 105-241.17 to bar OAH from resolving as-applied challenges to statutes.

Philip Morris nonetheless maintains that the Business Court erred when it held that section 105-241.17 denies OAH jurisdiction to decide as-applied challenges to tax statutes. Br. at 19-41. Philip Morris instead asserts that the statute only deprives OAH of jurisdiction to resolve facial claims, allowing it to resolve as-applied claims. None of the arguments that Philip Morris advances, however, support its reading of the statute.

Philip Morris's principal argument is that when the statute commands that cases must be dismissed for "lack of jurisdiction" when "the sole issue is the constitutionality of a statute," it refers to facial claims alone. N.C. Gen. Stat. § 105-241.17(3). That reading is correct, Philip Morris maintains, because the only kind of lawsuit that supposedly challenges the constitutionality *of a statute* is a facial challenge. Br. at 20-22, 26, 28-30.

Philip Morris is mistaken. Just like facial challenges, as-applied challenges also contest the constitutionality of statutes—like their name suggests, they dispute the constitutionality of *statutes* as applied to a particular set of circumstances. A preeminent legal dictionary, for example, defines the term "as-applied challenge" to mean a claim that "a *statute* is

unconstitutional on the facts of a particular case." *Challenge*, *Black's Law Dictionary* (11th ed. 2019) (emphasis added). Echoing this definition, this Court has also recognized that as-applied challenges are challenges to statutes, in that these challenges assert that a "*statute* can[not] be constitutionally applied to a particular" person. *Packingham*, 368 N.C. at 383, 777 S.E.2d at 743. And this Court has also noted that another provision that creates procedural rules that govern any "action challenging the validity of any *act* of the General Assembly" regarding redistricting reaches any such challenges, necessarily including as-applied challenges. N.C. Gen. Stat. § 1-267.1(a) (emphasis added); *Stephenson*, 358 N.C. at 227, 595 S.E.2d at 118.

Philip Morris is thus wrong that the phrase "the constitutionality of a statute" in section 105-241.17 refers to facial claims alone. N.C. Gen. Stat. § 105-241.17(3). Because it instead refers to both facial and as-applied claims, it deprives OAH of "jurisdiction" over both kinds of claims. *Id.*

Philip Morris next argues that the phrase "the application of a statute" in section 105-241.17 refers to as-applied *constitutional* challenges. Br. at 22 (quoting N.C. Gen. Stat. § 105-241.17(3)). Philip Morris argues that this phrase must be read in this manner for two reasons. *Id.* at 22-25.

First, Philip Morris argues the phrase "application of a statute" must refer to as-applied constitutional challenges because reading it to refer to non-constitutional disputes about the proper application of statutes would create "surplusage." *Id.* at 23. It reasons that other statutes already grant authority to OAH "to interpret tax statutes," so supposedly section 105-241.17 "must do something more." *Id.* at 24.

But reading "application of a statute" to refer to non-constitutional disputes creates no surplusage. Section 105-241.17 does not duplicate any other grant of authority to OAH to resolve disputes about statutory interpretation. Rather than grant authority, section 105-241.17 clarifies what is *beyond* the boundaries of OAH's authority. In doing so, the statute makes clear that disputes about "the constitutionality of a statute" are outside OAH's authority and must be resolved in Business Court. N.C. Gen. Stat. § 105-241.17(3). And it then juxtaposes this lack of authority against other authority that is already within OAH's jurisdiction—that is, the power to resolve disputes about the mere "application of a statute." *Id.* This reference to what is already within OAH's authority does not create surplusage. The same powers, after all, are often referenced in multiple statutes without creating surplusage. *Compare id.* § 1-277(a) (providing that appeals may be

taken when they affect a "substantial right"), *with id.* § 7A-27(b) (clarifying further how appeals that affect a "substantial right" may be taken).

Second, Philip Morris claims that the phrase "application of a statute" must refer to as-applied constitutional challenges because section 105-241.17 "focus[es] on constitutional challenges." Br. at 25. The statute, true enough, does indeed focus on constitutional challenges. But it does not treat cases where only "the constitutionality of a statute" is at issue as *encompassing* those cases where "the application of a statute" is at issue. N.C. Gen. Stat. § 105-241.17(3). It rather *juxtaposes* these kinds of cases as being distinct from each other. *See supra* pp 20-21. Thus, the provision's focus on resolving which tribunals may decide lawsuits that challenge "statute[s] as unconstitutional" hardly supports reading its reference to cases about "the application of a statute" to refer to as-applied constitutional challenges. N.C. Gen. Stat. § 105-241.17.

Philip Morris next points to legislative history. Br. at 30-33. Philip Morris specifically relies on a memorandum written by legislative legal staff entitled "2007 Finance Law Changes," which discusses section 105-241.17. Br. at 30 (citing R pp 381-89).

This Court, however, has cautioned against discerning "legislative intent" from sources like "memorand[a] . . . written by . . . attorney[s] who drafted" legislation. *Elec. Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 295 (1991). It has declined to consider sources like these because, unlike statutory text, these sources are "not enacted into law." *Id.* at 657, 403 S.E.2d at 295. Here, too, the memorandum that Philip Morris cites was also not enacted into law.

Relying on this memorandum, moreover, would be especially inappropriate. That is so because it does not accurately report what section 105-241.17 actually says. The statute, as noted, provides that OAH lacks jurisdiction to determine "the constitutionality of a statute." N.C. Gen. Stat. § 105-241.17(3). The memorandum, however, states that OAH lacks jurisdiction to determine "the constitutionality of a statute *on its face*," adding three words that appear nowhere in the enacted text. (R p 388 (emphasis added)) Because these three extra words "were not enacted into law," they cannot show what the meaning is of the words that actually were. *Electric Supply*, 328 N.C. at 657, 403 S.E.2d at 295.

Philip Morris finally maintains that this Court should adopt its reading of section 105-241.17 because that reading is supposedly "consistent with

prior administrative practice." Br. at 33. Philip Morris is correct, of course, that this Court has endorsed agency readings of statutes that are "fully consistent with . . . long-standing administrative practice." *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 263, 794 S.E.2d 785, 795 (2016).

Here, however, there is no consistent agency practice that shows that section 105-241.17 grants OAH authority to resolve as-applied constitutional challenges to statutes. Before the statute's enactment, for instance, it was commonly understood that administrative bodies lacked "jurisdiction to make a determination regarding the constitutionality of [a] tax," including with respect to its "*application*." *Cent. Tel. Co. v. Tolson*, 174 N.C. App. 554, 559, 621 S.E.2d 186, 190 (2005) (emphasis added); *see also supra* p 21. Since the statute's enactment in 2007, moreover, the view that "OAH has no jurisdiction to resolve constitutional issues" has remained widespread. *Kane v. N.C. Tchrs. & State Emps. Comprehensive Major Med. Plan*, 229 N.C. App. 386, 392, 747 S.E.2d 420, 424 (2013).

Take, for example, the challenge to a tax statute that was resolved in *Kimberely Rice Kaestner 1992 Trust v. North Carolina Department of Revenue*. 371 N.C. 133, 814 S.E.2d 43 (2018). In that case, a taxpayer filed a contested case in OAH, alleging that the "application" of a tax statute to the taxpayer

was unconstitutional. Record on Appeal at 9, *Kimberely Rice Kaestner 1992 Tr. v. N.C. Dep't of Revenue*, 248 N.C. App. 212, 789 S.E.2d 645 (2016) (No. COA15-896). Given the limits on OAH's jurisdiction, the Department moved to dismiss, and OAH granted its motion, holding that OAH did not possess "jurisdiction over constitutional claims." *Id.* at 14. Consistent with section 105-241.17, the taxpayer then filed a lawsuit in Business Court challenging the tax's constitutionality. 371 N.C. at 135-36, 814 S.E.2d at 45-46. The Business Court (and later this Court and the U.S. Supreme Court) ultimately granted the taxpayer relief on its "as-applied challenge to the constitutionality of [the] statute." *Id.* at 138, 814 S.E.2d at 47, *aff'd* 139 S. Ct. 2213 (2019).

Despite Philip Morris's claims to the contrary, therefore, neither OAH nor the Department has consistently viewed OAH as having jurisdiction to resolve as-applied challenges to tax statutes. There is thus no "long-standing administrative practice" on this issue to guide this Court. *Midrex*, 369 N.C. at 263, 794 S.E.2d at 795.[5]

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[5] In support of its claim that OAH may rule on constitutional matters, Philip Morris cites an OAH regulation that provides that administrative law judges should adopt "conclusions of law based on," among other sources of law, "applicable constitutional principles." Br. at 34 (emphasis removed) (quoting 26 N.C. Admin. Code 03.0127(c)). But regulations, of course, cannot override precedent and statutes that show that some constitutional

Philip Morris relatedly argues that this Court has "tacit[ly] approv[ed]" OAH's resolution of as-applied challenges to tax statutes. Br. at 36-37. It points to two appeals that arose out of contested cases where OAH took the position that it had authority to rule on as-applied constitutional challenges. *See id.* at 36-40 (discussing *Quad Graphics v. N.C. Dep't of Revenue*, 383 N.C. 356, 881 S.E.2d 810 (2022) & *N.C. Dep't of Revenue v. Graybar Elec. Co.*, 373 N.C. 382, 838 S.E.2d 627 (2020) (per curiam)).

These decisions, however, provide no endorsement, tacit or otherwise, of OAH's authority to resolve as-applied claims. In these cases, neither the parties or nor this Court raised the issue of whether OAH had erred by construing its jurisdiction beyond what section 105-241.17 allows. Like Philip Morris acknowledges, in one case, this Court observed "without comment" that OAH had opined on constitutional issues. *Id.* at 38 (discussing *Quad Graphics*). In the other, this Court said nothing on this issue at all, merely affirming the Business Court in a per curiam opinion with no reasoning. *Id.* at 39 (discussing *Graybar*).

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principles are "[in]applicable" in OAH because they fall beyond OAH's jurisdiction. 26 N.C. Admin. Code 03.0127(c).

Cases like these, where an issue "was not raised," create no authority with respect to the non-raised issue, of course. *State v. Jackson*, 322 N.C. 251, 257, 368 S.E.2d 838, 842 (1988). These cases thus carry no weight for this case. Here, unlike these prior cases, the issue of the proper scope of OAH's jurisdiction has now finally been squarely presented for resolution.

None of Philip Morris's arguments, therefore, show that the Business Court erred when it construed section 105-241.17 not to confer jurisdiction onto OAH to resolve as-applied constitutional challenges to tax statutes.

C. Because section 105-241.17's rules are jurisdictional, the Department's jurisdictional argument cannot be waived.

Philip Morris also argues that the Business Court erred in adopting the Department's argument that OAH lacks subject-matter jurisdiction over as-applied challenges because the Department did not advance this argument before OAH itself. Br. at 49-59.

Philip Morris's argument fails because it has long been black-letter law that a tribunal's "lack of subject matter jurisdiction is not waivable and can be raised at any time." *In re K.J.L.*, 363 N.C. 343, 346, 677 S.E.2d 835, 837 (2009). This point is well established because "[s]ubject matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest, and

in its absence a court has no power to act." *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006). Accordingly, judgments issued "without jurisdiction over the subject matter are a nullity," having neither "effect on the person" nor on "property." *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956).

Nonetheless, Philip Morris makes several arguments to try to show that the Department's arguments about OAH's subject-matter jurisdiction are still subject to waiver. None have merit.

Most broadly, Philip Morris argues that the normal rules that govern waiver of arguments *always* apply, even when new arguments are "purely jurisdictional." Br. at 55. In support of this argument, it cites two Court of Appeals decisions, one from 1977 and another more recent unpublished decision. *Id.* at 50-52 (discussing *Grissom v. N.C. Dep't of Revenue*, 34 N.C. App. 381, 238 S.E.2d 311 (1977) & *Crocker v. Griffin*, No. COA09-1000, 2010 WL 1961258 (N.C. Ct. App. May 18, 2010)).

These cases, however, cannot stand for the proposition that Philip Morris claims. If they did, they would have no force here, for they would conflict with this Court's long-established rule providing that arguments that

"judicial decisions" were issued without "[s]ubject matter jurisdiction" cannot be waived. *T.R.P.*, 360 N.C. at 590, 636 S.E.2d at 790.

In any event, these cases do not conflict with this principle. In both of these cases, litigants advanced new arguments on appeal to try to show that lower courts that had wrongly *declined* to exercise jurisdiction. *See Grissom*, 34 N.C. App. at 383, 238 S.E.2d at 312; *Crocker*, 2010 WL 1961258, at *5. That is not what occurred in this case. Below, OAH *exercised* jurisdiction and issued a judgment. As a result, it is now necessary for this Court to assess whether "the indispensable foundation upon which valid judicial decisions rest"—subject-matter jurisdiction—really was present below. *T.R.P.*, 360 N.C. at 590, 636 S.E.2d at 790.

Philip Morris also suggests that arguments about jurisdiction can be waived when they involve "statutory interpretation." Br. at 55. This claim falls short of the mark too. Subject-matter jurisdiction is often "established by statute," so assessing jurisdiction will often mean having to engage in statutory interpretation. *K.J.L.*, 363 N.C. at 345, 677 S.E.2d at 837. For that reason, this Court has previously addressed new arguments not preserved below concerning the proper interpretation of statutes that confer subject-

matter jurisdiction. *Wing*, 382 N.C. at 297-300, 876 S.E.2d at 398-400. This Court thus can do so here as well.

Philip Morris further asserts that arguments about OAH's subject-matter jurisdiction can be waived because OAH is an administrative tribunal. Br. at 49-50, 53-54, 59. To try to support this argument, Philip Morris points to the familiar administrative-law principle that agencies can only be affirmed on judicial review on the original "grounds invoked by the agency." *Id.* at 50 (*Godfrey v. Zoning Bd. of Adjustment of Union Cnty.*, 317 N.C. 51, 64, 344 S.E.2d 272, 280 (1986)).[6]

Even assuming that this principle is applicable here, however, it does not bar courts from ensuring on judicial review that administrative tribunals or agencies acted within their jurisdiction. After all, adjudications carried out "without jurisdiction over the subject matter are a nullity," no matter whether they are performed by courts, administrative tribunals, or agencies. *Hart*, 244 N.C. at 90, 92 S.E.2d at 678. Accordingly, this Court and the Court of Appeals have repeatedly heard new arguments challenging the subject-

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[6] *See also SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (holding that "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency").

matter jurisdiction of agencies and administrative tribunals that were not originally pressed before them.[7]

Philip Morris next suggests that the Department's argument that OAH acted beyond section 105-241.17's limits can be waived because those limits merely "dictate[ ] procedure" about venue and exhaustion, "not jurisdiction." Br. at 55. Philip Morris is certainly correct that section 105-241.17 provides that remedies in OAH must be exhausted before lawsuits go forward in Business Court. *See, e.g., Gust v. N.C. Dep't of Revenue*, 231 N.C. App. 551, 554, 753 S.E.2d 483, 485 (2014) (affirming dismissal due to lack of exhaustion).

But that is not all the statute does. Section 105-241.17 unmistakably establishes jurisdictional rules that limit OAH's authority. Its text states, after all, that OAH "lack[s] . . . *jurisdiction*" when "the sole issue [in a case] is

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[7] *See, e.g.*, *James v. Bartlett*, 359 N.C. 260, 263-65, 263 n.4, 607 S.E.2d 638, 640-41, 640 n.4 (2005) (deciding challenge first raised on appeal to State Board of Elections's subject-matter jurisdiction to resolve election protests); *Letterlough v. Akins*, 258 N.C. 166, 168, 128 S.E.2d 215, 217 (1962) (holding that subject-matter jurisdiction of "administrative board[s] with quasi-judicial functions" may not "be conferred by . . . waiver"); *B&D Integrated Health Servs. v. N.C. Dep't of Health & Hum. Servs.*, 892 S.E.2d 427, 430 (N.C. Ct. App. 2023) (holding that party could argue on judicial review that OAH lacked jurisdiction after arguing before OAH that "OAH possessed subject matter jurisdiction").

the constitutionality of a statute," N.C. Gen. Stat. § 105-241.17(3) (emphasis added), which shows that its text imposes "a jurisdictional rule." *Tillett*, 257 N.C. App. at 224, 809 S.E.2d at 147. Indeed, given this clear textual directive, Philip Morris itself describes section 105-241.17's rules as "jurisdiction[al]" elsewhere in its brief. Br. at 24.

Phillip Morris's penultimate argument is that the Department cannot dispute OAH's jurisdiction now because OAH supposedly can never lose jurisdiction once it acquires it. That is so, Philip Morris claims, because "once jurisdiction attaches, it will not be ousted by subsequent events." *Id.* at 47 (quoting *Finks v. Middleton*, 251 N.C. App. 401, 408, 795 S.E.2d 789, 795 (2016)).

The cases that Philip Morris cites for this proposition, however, do not hold that challenges to subject-matter jurisdiction can be waived. They instead hold that a plaintiff's standing "is determined at the time of the filing of a complaint," thereby preventing the parties from taking steps that could render a case jurisdictionally non-justiciable. *Finks*, 251 N.C. App. at 408, 795 S.E.2d at 795 (quoting *Metcalf v. Black Dog Realty, LLC*, 200 N.C. App. 619, 625, 684 S.E.2d 709, 714 (2009)). These cases therefore provide no support

for Philip Morris's claim that this Court is powerless to assure itself of OAH's jurisdiction.

Philip Morris finally asserts that the Department cannot challenge the jurisdiction of OAH now because such a challenge would purportedly be self-defeating. It reasons that if OAH lacked jurisdiction, then the Department's own "appeal would be a nullity." Br. at 58.

This reasoning gets things backwards. This Court has indeed held that "the proceedings of a court without jurisdiction of the subject matter are a nullity." *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964). But this does not mean that the Department's appeal becomes a nullity if OAH acted beyond its jurisdiction. Rather, it means that the Department may challenge jurisdiction "at any time," because a "judgment is void . . . when there is a want of jurisdiction," and "a void judgment may 'be . . . treated as a nullity everywhere.'" *Hart*, 244 N.C. at 90, 92 S.E.2d at 678 (quoting *City of Monroe v. Niven*, 221 N.C. 362, 364, 20 S.E.2d 311, 312 (1942)).

Philip Morris therefore fails to show that this Court cannot hold that OAH lacks jurisdiction over all constitutional challenges, both facial and as-applied, to tax statutes. The Business Court should therefore be affirmed on that basis.

II. The Business Court Also Correctly Held in the Alternative That OAH Lacked Jurisdiction Because Philip Morris's Challenge Is Facial.

In the alternative, the Business Court should also be affirmed for another reason. Philip Morris agrees that section 105-241.17 would have deprived OAH of jurisdiction below if Philip Morris had asserted a facial challenge. *See, e.g.*, Br. at 20. Because Philip Morris has in fact asserted a facial challenge, jurisdiction is alternatively lacking for this reason too.

As noted, facial challenges to statutes maintain "that no constitutional applications of [a] statute exist, prohibiting its enforcement in any context." *Packingham*, 368 N.C. at 383, 777 S.E.2d at 743. As-applied claims instead assert that a "statute" cannot "be constitutionally applied to a particular [person], even if the statute is otherwise generally enforceable." *Id*.

Importantly, the labels that parties attach to challenges do not determine if they are facial or as-applied. The U.S. Supreme Court has held that the arguments that parties make in support of as-applied challenges can convert such challenges into facial attacks. This occurs when arguments are made for as-applied challenges that "implicate[ ] the facial validity" of statutes. *Citizens United v. FEC*, 558 U.S. 310, 331 (2010). Arguments implicate facial validity when, if accepted, they would require courts to make

"broad[ ] pronouncements of invalidity" that render statutes generally unenforceable. *Id.* (quoting Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1339 (2000)).

Lower courts agree with this principle. Our Court of Appeals has echoed this reasoning in holding that arguments advanced in support of as-applied challenges can make them facial. It has held that when plaintiffs make arguments in support of an as-applied claim that "would, if successful, effectively preclude all enforcement of the statute," then the plaintiffs' claim is really facial. *Kelly v. State*, 286 N.C. App. 23, 33, 878 S.E.2d 841, 849 (2022) (quoting *Copeland v. Vance*, 893 F.3d 101, 107 (2d Cir. 2018)).

Applying those principles here, Philip Morris's constitutional challenge to the provision at issue is really a facial challenge. Philip Morris argues that the General Assembly's decision to draft a provision that denies Philip Morris a deduction under section 105-122(b) for loans to its out-of-state affiliates offends the dormant Commerce Clause. The provision does so, Philip Morris maintains, because it is drafted such that deductions are denied unless loans are made "to affiliated companies doing business in North Carolina." Br. at 69. The provision could only be constitutional, Philip Morris argues further, if it were written differently and thus did not

deny a deduction to all those taxpayers that, like itself, loan "money to affiliated companies not doing business in North Carolina." *Id.*

Philip Morris's challenge to this provision unmistakably "implicates [its] facial validity." *Citizens United*, 558 U.S. at 331. It does so because the provision expressly states that deductions under section 105-122(b) for loans to out-of-state affiliates are not allowed. Specifically, the provision mandates that deductions for loans are only available "to the extent that such debt has been included in the tax base of" an affiliate that does "business in this State." N.C. Gen. Stat. § 105-122(a), (b). Only those affiliates that do business in North Carolina pay franchise tax and thus can include "indebtedness owed to" affiliates "as a part of the base for [their] franchise tax." *Id.* § 105-122(b). This provision thus states expressly that no deductions from a taxpayer's capital base may be made with respect to loans to affiliates that do not conduct business in North Carolina.

Thus, if Philip Morris's arguments were accepted, those arguments would "effectively preclude all enforcement" of this provision's express denial of a deduction for loans to out-of-state affiliates. *Kelly*, 286 N.C. App. at 33, 878 S.E.2d at 849 (quoting *Copeland*, 893 F.3d at 107). Philip Morris's

arguments therefore implicate this statutory denial's "facial validity," rendering Philip Morris's challenge facial. *Citizens United*, 558 U.S. at 331.

Philip Morris nonetheless maintains in its brief that it is making an as-applied challenge. Br. at 43-49. It asserts that, before OAH, it "submitted numerous examples of how [section] 105-122(b) could be constitutionally applied to other taxpayers." *Id.* at 48; *see also id.* at 46 n.15. Below, for example, it claimed that this provision could be validly applied when "there is no affiliated debt between [a] corporation and [its] foreign affiliates," such that a taxpayer's franchise tax could be calculated without any reliance on the denial of the deduction that it challenges. (R p 254)

But this example and the others that Philip Morris identified below fail to show that it asserts an as-applied challenge. They all involve situations where the statutory denial that Philip Morris challenges is not implicated. Like OAH observed below, "in none of [Philip Morris's] scenarios does the member of the interstate affiliate group doing business in North Carolina both calculate Franchise Tax based on its capital stock base calculation and [make loans to] an affiliate corporation not doing business in North Carolina." (R p 29 n.6) For that reason, as OAH also explained, Philip Morris has failed to identify "a situation where the complained of provision

could be applied constitutionally, if a court found it was unconstitutional as applied." (R p 29 n.6)

Despite this analysis, OAH nevertheless held below that Philip Morris had asserted an as-applied challenge to this statutory denial of a deduction. OAH did so even though OAH acknowledged that, based on its analysis, Philip Morris would prevail on "a facial challenge" in Business Court. (R p 29 n.6) OAH believed, however, that it was irrelevant that Philip Morris's arguments in favor of its challenge to the statutory denial of the deduction supported its facial invalidation. OAH held that Philip Morris's claim would remain as-applied, so long as OAH only granted relief "as applied to" Philip Morris. (R p 31) OAH accordingly ordered the Department, when enforcing the statute with respect to Philip Morris, not to apply the statutory denial of a deduction to Philip Morris. (R p 33)

In OAH's view, then, all facial challenges to statutes can be turned into as-applied challenges, so long as tribunals limit the relief that they grant to the specific parties before them. Before this Court, Philip Morris also now echoes this reasoning. It maintains that its arguments requiring the facial invalidation of the statutory denial at issue here *really* make out an as-

applied challenge, because it only seeks relief that is "specifically limited to Philip Morris" itself. Br. at 49.

But as-applied challenges, as noted, become facial challenges when the arguments made in support of them "implicate[ ] the facial validity" of a provision. *Citizens United*, 558 U.S. at 331. That is the case here. Philip Morris's constitutional arguments implicate facial validity because they not only justify not applying the provision's denial of a deduction for loans to out-of-state affiliates to Philip Morris, but also justify not applying the denial to *all* taxpayers that make such loans.

Indeed, Philip Morris's and OAH's view of what qualifies as an as-applied challenge to a statute is so capacious that their view cannot be squared with section 105-241.17. All agree that section 105-241.17 only grants circumscribed jurisdiction to OAH, such that there must be, at a minimum, certain constitutional challenges to tax statutes that OAH cannot hear. Moreover, all disputes litigated under section 105-241.17 necessarily only deal with the "liability" of a specific "taxpayer." N.C. Gen. Stat. § 105-241.17.

Under Philip Morris's and OAH's view of what constitutes an as-applied challenge, however, there would be no challenge to a tax statute that implicated the "liability" of a "taxpayer" that OAH would lack jurisdiction to

decide. *Id.* OAH could always rule on any constitutional challenge, so long as it limited its decree to resolving one taxpayer's liability, even though *every case* that OAH hears necessarily only directly resolves the "liability" of a single "taxpayer." *Id.* Philip Morris's view of what constitutes an as-applied challenge thus improperly turns the limited jurisdiction that the legislature vested in OAH into plenary jurisdiction. That it does so shows that Philip Morris necessarily cannot, within the statute's meaning, really assert an as-applied claim here.

Thus, for all these reasons, Philip Morris asserts a facial claim. The Business Court therefore correctly reversed OAH on the alternative basis that Philip Morris's assertion of a facial challenge deprived OAH of jurisdiction over that challenge.[8]

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[8] Philip Morris also argues that the Business Court erred when that Court held that its challenge is facial, because this holding was supposedly an "advisory opinion" given the Court's other jurisdictional holdings. Br. at 42. Trial courts, however, often without controversy facilitate review on appeal by providing alternative rationales for their holdings. *See, e.g.*, *Potts ex rel. Steel Tube, Inc. v. KEL, LLC*, No. 16 CVS 2877, 2021 WL 5161922, at *8 (N.C. Super. Ct. Nov. 5, 2021), *aff'd* 384 N.C. 634, 887 S.E.2d 698 (2023) (per curiam). The Business Court did not err by doing so here. In any event, even if the Business Court had erred in reaching this issue, that supposed error would be irrelevant. Philip Morris agrees that the Department's argument that it asserts "a facial challenge" is "properly before this Court." Br. at 59.

III. The Merits of Philip Morris's Constitutional Challenge Are Not Properly Before This Court.

Philip Morris also asks this Court, if it determines that OAH actually did have jurisdiction over Philip Morris's constitutional challenge, to resolve that challenge itself. Br. at 59-70. If this Court holds that jurisdiction existed below, however, it should decline Philip Morris's invitation to rule on this issue. Philip Morris's constitutional challenge is not preserved.

To preserve an issue on appeal under Appellate Rule 10, a party must have "presented to the trial court a timely request, objection, or motion." N.C. R. App. P. 10(a)(1). Furthermore, it is "necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion." *Id*.

These preservation rules apply with special force when the validity of a statute is at issue. Like this Court has observed, it is "well established" that this Court "will not decide a constitutional question that was not raised or considered in the court below." *Bland v. City of Wilmington*, 278 N.C. 657, 660, 180 S.E.2d 813, 816 (1971) (quoting *Johnson v. N.C. State Highway Comm'n*, 259 N.C. 371, 373, 130 S.E.2d 544, 546 (1963)). Thus, issues will not be reviewed on appeal, especially constitutional issues, where the "trial court was [not] presented with any argument" or did not make "any ruling on [an]

issue." *Town of Green Level v. Alamance Cnty.*, 184 N.C. App. 665, 676, 646 S.E.2d 851, 858 (2007).[9]

Here, Philip Morris's constitutional challenge was neither raised nor decided below because the Business Court bifurcated the jurisdictional issue now before this Court from the merits of Philip Morris's constitutional challenge. It ordered that "briefing and a decision on the jurisdictional issue" would "precede briefing and a decision on the merits." (R p 290)

As a result, Philip Morris's constitutional challenge was not addressed in the briefing below, which solely focused "on the jurisdictional issue only." (R p 290) Also, because the Business Court ruled for the Department on the jurisdictional issue, there was no decision from the Business Court on the merits of Philip Morris's constitutional challenge. In its jurisdictional decision, the Business Court explicitly noted that it was not expressing "an opinion regarding whether the tax statute in question is, or is not,

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[9] *See also Robinson v. Shanahan*, 233 N.C. App. 34, 37, 755 S.E.2d 398, 400 (2014) (concluding that Court had "nothing to review" when "order from which plaintiffs appealed contain[ed] no findings of fact or conclusions of law relating" to issue); *N.C. Concrete Finishers, Inc. v. N.C. Farm Bureau Mut. Ins. Co.*, 202 N.C. App. 334, 340, 688 S.E.2d 534, 537 (2010) (similar); *Finley Forest Condo. Ass'n v. Perry*, 163 N.C. App. 735, 738, 594 S.E.2d 227, 230 (2004) (similar).

constitutional." (R p 516 n.14) It left that as "a determination for another day." (R p 516 n.14)

Thus, given what occurred below, the merits of Philip Morris's constitutional challenge has not been preserved for review under Appellate Rule 10. Those merits are therefore not properly before this Court in this appeal.

* * * * *

For all these reasons, therefore, the Business Court correctly held that OAH exceeded its jurisdiction when it resolved the constitutional challenge made by Philip Morris. The Court also did not err when it declined to rule on that challenge. The decision below should be affirmed.

CONCLUSION

The Department respectfully requests that the decision of the Business Court be affirmed.

This 28th day of February, 2024.

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Statutes **Appendix Page**

Rule

Regulation

Session Law

2012 North Carolina General Statutes

Chapter 105.

Taxation.

Subchapter I.

Levy of Taxes.

Article 3.

Franchise Tax.

§ 105-114. Nature of taxes; definitions.

(a) Nature of Taxes. – The taxes levied in this Article upon persons and partnerships are for the privilege of engaging in business or doing the act named.

(a1) Scope. – The taxes levied in this Article upon corporations are privilege or excise taxes levied upon:

(1) Corporations organized under the laws of this State for the existence of the corporate rights and privileges granted by their charters, and the enjoyment, under the protection of the laws of this State, of the powers, rights, privileges and immunities derived from the State by the form of such existence; and

(2) Corporations not organized under the laws of this State for doing business in this State and for the benefit and protection which these corporations receive from the government and laws of this State in doing business in this State.

(a2) Condition for Doing Business. – If the corporation is organized under the laws of this State, the payment of the taxes levied by this Article is a condition precedent to the right to continue in the corporate form of organization. If the corporation is not organized under the laws of this State, payment of these taxes is a condition precedent to the right to continue to engage in doing business in this State.

(a3) Tax Year. – The taxes levied in this Article are for the fiscal year of the State in which the taxes become due, except that the taxes levied in G.S. 105-122 are for the income year of the corporation in which the taxes become due.

(a4) No Double Taxation. – G.S. 105-122 does not apply to holding companies taxed under G.S. 105-120.2. G.S. 105-122 applies to a corporation taxed under another section of this Article only to the extent the taxes levied on the corporation in G.S. 105-122 exceed the taxes levied in other sections of this Article on the corporation or on a limited liability company whose assets must be included in the corporation's tax base under G.S. 105-114.1.

(b) Definitions. – The following definitions apply in this Article:

(1) City. – Defined in G.S. 105-228.90.

(1a) Code. – Defined in G.S. 105-228.90.

(2) Corporation. – A domestic corporation, a foreign corporation, an electric membership corporation organized under Chapter 117 of the General Statutes or doing business in this State, or an association that is organized for pecuniary gain, has capital stock represented by shares, whether with or without par value, and has privileges not possessed by individuals or partnerships. The term includes a mutual or capital stock savings and loan association or building and loan association chartered under the laws of any state or of the United States. The term includes a

limited liability company that elects to be taxed as a corporation under the Code, but does not otherwise include a limited liability company.

(3) Doing business. – Each and every act, power, or privilege exercised or enjoyed in this State, as an incident to, or by virtue of the powers and privileges granted by the laws of this State.

(4) Income year. – Defined in G.S. 105-130.2(4b).

(c) Recodified as § 105-114.1 by S.L. 2002-126, § 30G.2(b), eff. Jan. 1, 2003.

§ 105-122. Franchise or privilege tax on domestic and foreign corporations.

(a) An annual franchise or privilege tax is imposed on a corporation doing business in this State. The tax is determined on the basis of the books and records of the corporation as of the close of its income year. A corporation subject to the tax must file a return under affirmation with the Secretary at the place and in the manner prescribed by the Secretary. The return must be signed by the president, vice-president, treasurer, or chief financial officer of the corporation. The return is due on or before the fifteenth day of the fourth month following the end of the corporation's income year.

(b) Determination of Capital Base. – A corporation taxed under this section shall determine the total amount of its issued and outstanding capital stock, surplus, and undivided profits. No reservation or allocation from surplus or undivided profits is allowed except as provided below:

(1) Definite and accrued legal liabilities.

(1a) Billings in excess of costs that are considered a deferred liability under the percentage of completion method of revenue recognition.

(2) Taxes accrued, dividends declared, and reserves for depreciation of tangible assets and for amortization of intangible assets as permitted for income tax purposes.

(3) When including deferred tax liabilities, a corporation may reduce the amount included in its base by netting against that amount deferred tax assets. The reduction may not decrease deferred tax liabilities below zero (0).

(4) Reserves for the cost of any air-cleaning device or sewage or waste treatment plant, including waste lagoons, and pollution abatement equipment purchased or constructed and installed

which reduces the amount of air or water pollution resulting from the emission of air contaminants or the discharge of sewage and industrial wastes or other polluting materials or substances into the outdoor atmosphere or streams, lakes, or rivers, upon condition that the corporation claiming such deductible liability shall furnish to the Secretary a certificate from the Department of Environment and Natural Resources or from a local air pollution control program for air-cleaning devices located in an area where the Environmental Management Commission has certified a local air pollution control program pursuant to G.S. 143-215.112 certifying that the Environmental Management Commission or local air pollution control program has found as a fact that the air-cleaning device, waste treatment plant or pollution abatement equipment purchased or constructed and installed as above described has actually been constructed and installed and that such plant or equipment complies with the requirements of the Environmental Management Commission or local air pollution control program with respect to such devices, plants or equipment, that such device, plant or equipment is being effectively operated in accordance with the terms and conditions set forth in the permit, certificate of approval, or other document of approval issued by the Environmental Management Commission or local air pollution control program and that the primary purpose thereof is to reduce air or water pollution resulting from the emission of air contaminants or the discharge of sewage and waste and not merely incidental to other purposes and functions.

(5) Reserves for the cost of purchasing and installing equipment or constructing facilities for the purpose of recycling or resource recovering of or from solid waste or for the purpose of reducing the volume of hazardous waste generated shall be treated as deductible for the purposes of this section upon condition that the corporation claiming such deductible liability shall furnish to the Secretary a certificate from the Department of Environment and Natural Resources certifying that the Department of Environment and Natural Resources has found as a fact that the

equipment or facility has actually been purchased, installed or constructed, that it is in conformance with all rules and regulations of the Department of Environment and Natural Resources, and the recycling or resource recovering is the primary purpose of the facility or equipment.

(6) Reserves for the cost of constructing facilities of any private or public utility built for the purpose of providing sewer service to residential and outlying areas shall be treated as deductible for the purposes of this section; the deductible liability allowed by this section shall apply only with respect to such pollution abatement plants or equipment constructed or installed on or after January 1, 1955.

(7) The cost of treasury stock.

(8) In the case of an international banking facility, the capital base shall be reduced by the excess of the amount as of the end of the taxable year of all assets of an international banking facility which are employed outside the United States over liabilities of the international banking facility owed to foreign persons. For purposes of such reduction, foreign persons shall have the same meaning as defined in G.S. 105-130.5(b)(13)d.

Every corporation doing business in this State which is a parent, subsidiary, or affiliate of another corporation shall add to its capital stock, surplus, and undivided profits all indebtedness owed to a parent, subsidiary, or affiliated corporation as a part of its capital used in its business and as a part of the base for franchise tax under this section. If any part of the capital of the creditor corporation is capital borrowed from a source other than a parent, subsidiary, or affiliate, the debtor corporation, which is required under this subsection to include in its tax base the amount of debt by reason of being a parent, subsidiary, or affiliate of the creditor corporation, may deduct from the debt included a proportionate part determined on the basis of the ratio of the borrowed capital of the creditor corporation to the total assets of the creditor corporation. If the creditor corporation is also taxable

under the provisions of this section, the creditor corporation is allowed to deduct from the total of its capital, surplus, and undivided profits the amount of any debt owed to it by a parent, subsidiary or affiliated corporation to the extent that the debt has been included in the tax base of the parent, subsidiary, or affiliated debtor corporation reporting for taxation under the provisions of this section.

(b1) Definitions. – The following definitions apply in subsection (b) of this section:

(1) Affiliate. – The same meaning as specified in G.S. 105-130.2.

(2) Indebtedness. – All loans, credits, goods, supplies, or other capital of whatsoever nature furnished by a parent, subsidiary, or affiliated corporation, other than indebtedness endorsed, guaranteed, or otherwise supported by one of these corporations.

(3) Parent. – The same meaning as specified in G.S. 105-130.2.

(4) Subsidiary. – The same meaning as specified in G.S. 105-130.2.

(c) Repealed by S.L. 2007-491, § 2, eff. Jan. 1, 2008.

(c1) Apportionment. – A corporation that is doing business in this State and in one or more other states must apportion its capital stock, surplus, and undivided profits to this State. A corporation must use the apportionment method set out in subdivision (1) of this subsection unless the Department has authorized it to use a different method under subdivision (2) of this subsection. The portion of a corporation's capital stock, surplus, and undivided profits determined by applying the appropriate apportionment method is considered the amount of capital stock, surplus, and undivided profits the corporation uses in its business in this State.

(1) Statutory. – A corporation that is not subject to income tax under Article 4 of this Chapter must apportion its capital stock, surplus, and undivided profits by using the fraction it would be

required to apply in apportioning its income if it were subject to that Article. The apportionment method set out in this subdivision is considered the statutory method of apportionment and is presumed to be the best method of determining the amount of a corporation's capital stock, surplus, and undivided profits attributable to the corporation's business in this State.

(2) Alternative. – A corporation that believes the statutory apportionment method set out in subdivision (1) of this subsection subjects a greater portion of its capital stock, surplus, and undivided profits to tax under this section than is attributable to its business in this State may make a written request to the Secretary for permission to use an alternative method. The request must set out the reasons for the corporation's belief and propose an alternative method. The corporation has the burden of establishing by clear, cogent, and convincing proof that the statutory apportionment method subjects a greater portion of the corporation's capital stock, surplus, and undivided profits to tax under this section than is attributable to its business in this State and that the proposed alternative method is a better method of determining the amount of the corporation's capital stock, surplus, and undivided profits attributable to the corporation's business in this State.

The Secretary must issue a written decision on a corporation's request for an alternative apportionment method. If the decision grants the request, it must describe the alternative method the corporation is authorized to use and state the tax years to which the alternative method applies. A decision may apply to no more than three tax years, unless the provisions of subdivision (3) of this subsection applies. A corporation may renew a request to use an alternative apportionment method by following the procedure in this subdivision. A decision of the Secretary on a request for an alternative apportionment method is final and is not subject to administrative or judicial review. A corporation authorized to use an alternative method may apportion its

capital stock, surplus, and undivided profits in accordance with the alternative method or the statutory method.

(3) Repealed by S.L. 2011-330, § 5, eff. June 27, 2011.

(d) After determining the proportion of its total capital stock, surplus and undivided profits as set out in subsection (c) of this section, which amount shall not be less than fifty-five percent (55%) of the appraised value as determined for ad valorem taxation of all the real and tangible personal property in this State of each corporation nor less than its total actual investment in tangible property in this State, every corporation taxed under this section shall annually pay to the Secretary of Revenue, at the time the report and statement are due, a franchise or privilege tax at the rate of one dollar and fifty cents ($1.50) per one thousand dollars ($1,000) of the total amount of capital stock, surplus and undivided profits as provided in this section. The tax imposed in this section shall not be less than thirty-five dollars ($35.00) and shall be for the privilege of carrying on, doing business, and/or the continuance of articles of incorporation or domestication of each corporation in this State. Appraised value of tangible property including real estate is the ad valorem valuation for the calendar year next preceding the due date of the franchise tax return. The term " total actual investment in tangible property" as used in this section means the total original purchase price or consideration to the reporting taxpayer of its tangible properties, including real estate, in this State plus additions and improvements thereto less reserve for depreciation as permitted for income tax purposes, and also less any indebtedness incurred and existing by virtue of the purchase of any real estate and any permanent improvements made thereon. In computing "total actual investment in tangible personal property" there shall also be deducted reserves for the entire cost of any air-cleaning device or sewage or waste treatment plant, including waste lagoons, and pollution abatement equipment purchased or constructed and installed which reduces the amount of air or water pollution resulting from the emission of air contaminants or the discharge of sewage and industrial wastes or other polluting materials or substances into the outdoor atmosphere or into streams, lakes, or

rivers, upon condition that the corporation claiming this deduction shall furnish to the Secretary a certificate from the Department of Environment and Natural Resources or from a local air pollution control program for air-cleaning devices located in an area where the Environmental Management Commission has certified a local air pollution control program pursuant to G.S. 143-215.112 certifying that said Department or local air pollution control program has found as a fact that the air-cleaning device, waste treatment plant or pollution abatement equipment purchased or constructed and installed as above described has actually been constructed and installed and that the device, plant or equipment complies with the requirements of the Environmental Management Commission or local air pollution control program with respect to the devices, plants or equipment, that the device, plant or equipment is being effectively operated in accordance with the terms and conditions set forth in the permit, certificate of approval, or other document of approval issued by the Environmental Management Commission or local air pollution control program and that the primary purpose is to reduce air or water pollution resulting from the emission of air contaminants or the discharge of sewage and waste and not merely incidental to other purposes and functions. The cost of constructing facilities of any private or public utility built for the purpose of providing sewer service to residential and outlying areas is treated as deductible for the purposes of this section; the deductible liability allowed by this section shall apply only with respect to pollution abatement plants or equipment constructed or installed on or after January 1, 1955.

(d1) Credits. – A corporation is allowed a credit against the tax imposed by this section for a taxable year equal to one-half of the amount of tax payable during the taxable year under Article 5E of this Chapter. The credit allowed by this subsection may not exceed the amount of tax imposed by this section for the taxable year, reduced by the sum of all other credits allowed against that tax, except tax payments made by or on behalf of the taxpayer.

(e) Any corporation which changes its income year, and files a “short period” income tax return pursuant to G.S. 105-130.15 shall file a

franchise tax return in accordance with the provisions of this section in the manner and as of the date specified in subsection (a) of this section. Such corporation shall be entitled to deduct from the total franchise tax computed (on an annual basis) on such return the amount of franchise tax previously paid which is applicable to the period subsequent to the beginning of the new income year.

(f) The report, statement and tax required by this section shall be in addition to all other reports required or taxes levied and assessed in this State.

(g) Counties, cities and towns shall not levy a franchise tax on corporations taxed under this section.

(h) Repealed by Laws 1981 (Reg. Sess., 1982), c. 1211, § 5.

North Carolina General Statutes

Chapter 1.

Civil Procedure.

Subchapter VIII.

Judgment.

Article 26A.

Three-Judge Panel for Redistricting Challenges and for Certain Challenges to State Laws.

§ 1-267.1. Three-judge panel for actions challenging plans apportioning or redistricting State legislative or congressional districts; claims challenging the facial validity of an act of the General Assembly.

(a) Any action challenging the validity of any act of the General Assembly that apportions or redistricts State legislative or congressional districts shall be filed in the Superior Court of Wake County. Any action that is a facial challenge to the validity of an act of the General Assembly shall be, unless filed in the Superior Court of Wake County, transferred pursuant to G.S. 1A-1, Rule 42(b)(4), to the Superior Court of Wake County.

All actions referenced in this subsection shall be heard and determined by a three-judge panel of the Superior Court of Wake County organized as provided by subsection (b2) of this section.

(a1) through (b1) repealed by S.L. 2023-134, § 16.21(a), eff. Oct. 3, 2023.

(b2) For each challenge referenced in subsection (a) of this section, the Chief Justice of the Supreme Court shall appoint three superior court judges to a three-judge panel of the Superior Court of Wake County to

hear the challenge. The Chief Justice shall appoint a presiding judge of each three-judge panel. Should any member of a three-judge panel be disqualified or otherwise unable to serve on the three-judge panel or be removed from the panel at the discretion of the Chief Justice, the Chief Justice shall appoint as a replacement another superior court judge. No member of the panel on an action challenging the validity of any act of the General Assembly that apportions or redistricts State legislative or congressional districts may be a former member of the General Assembly.

(c) No order or judgment shall be entered affecting the validity of any act of the General Assembly that apportions or redistricts State legislative or congressional districts, or finds that an act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution or federal law, except by a three-judge panel of the Superior Court of Wake County organized as provided by subsection (b2) of this section. In the event of disagreement among the three superior court judges comprising a three-judge panel, then the opinion of the majority shall prevail.

(d) This section applies only to civil proceedings. Nothing in this section shall be deemed to apply to criminal proceedings, to proceedings under Chapter 15A of the General Statutes, to proceedings making a collateral attack on any judgment entered in a criminal proceeding, or to civil proceedings filed by a taxpayer pursuant to G.S. 105-241.17.

(e) For the purposes of this section, the position of superior court judge shall include regular, special, and emergency superior court judges. !

Subchapter IX.

Appeal.

Article 27.

Appeal.

§ 1-277. Appeal from superior or district court judge.

(a) An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, that affects a substantial right claimed in any action or proceeding; or that in effect determines the action and prevents a judgment from which an appeal might be taken; or discontinues the action or grants or refuses a new trial.

(b) Any interested party has the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant, or the party may preserve the party's objection for determination upon any subsequent appeal in the cause.

Chapter 7A.

Judicial Department.

Subchapter II.

Appellate Division of the General Court of Justice.

Article 5.

Jurisdiction.

§ 7A-27. Appeals of right from the courts of the trial divisions.

(a) Appeal lies of right directly to the Supreme Court in any of the following cases:

(1) All cases in which the defendant is convicted of murder in the first degree and the judgment of the superior court includes a sentence of death.

(2) From any final judgment in a case designated as a mandatory complex business case pursuant to G.S. 7A-45.4 or designated as a discretionary complex business case pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts.

(3) From any interlocutory order of a Business Court Judge that does any of the following: a. Affects a substantial right. b. In effect determines the action and prevents a judgment from which an appeal might be taken. c. Discontinues the action. d. Grants or refuses a new trial.

(4) Any trial court's decision regarding class action certification under G.S. 1A-1, Rule 23.

(5) Repealed by Session Laws 2021-18,s. 1, effective July 1, 2021, and

applicable to appeals filed on or after that date.

(a1) Repealed by Session Laws 2016-125, s. 22(b), 4th Ex. Sess., effective December 1, 2016.

(b) Except as provided in subsection (a) of this section, appeal lies of right directly to the Court of Appeals in any of the following cases:

(1) From any final judgment of a superior court, other than one based on a plea of guilty or nolo contendere, including any final judgment entered upon review of a decision of an administrative agency, except for a final judgment entered upon review of a court martial under G.S. 127A-62.

(2) From any final judgment of a district court in a civil action.

(3) From any interlocutory order or judgment of a superior court or district court in a civil action or proceeding that does any of the following:

a. Affects a substantial right.

b. In effect determines the action and prevents a judgment from which an appeal might be taken.

c. Discontinues the action.

d. Grants or refuses a new trial.

e. Determines a claim prosecuted under G.S. 50-19.1.

f. Grants temporary injunctive relief restraining the State or a political subdivision of the State from enforcing the operation or execution of an act of the General Assembly. This sub-subdivision only applies where the State or a political subdivision of the State is a party in the civil action.

g. Denies, upon the court's own motion or the motion of a party, the transfer of an action or proceeding pursuant to Rule 42(b)(4) of the North Carolina Rules of Civil Procedure.

(4) From any other order or judgment of the superior court from which an appeal is authorized by statute.

(c) through (e) Repealed by Session Laws 2013-411, s. 1, effective August 23, 2013.

Subchapter III.

Superior Court Division of the General Court of Justice.

Article 7.

Organization.

§ 7A-45.4. Designation of complex business cases.

(a) Any party may designate as a mandatory complex business case an action that involves a material issue related to any of the following:

(1) Disputes involving the law governing corporations, except charitable and religious organizations qualified under G.S. 55A-1-40(4) on the grounds of religious purpose, partnerships, and limited liability companies, including disputes arising under Chapters 55, 55A, 55B, 57D, and 59 of the General Statutes.

(2) Disputes involving securities, including disputes arising under Chapter 78A of the General Statutes.

(3) Disputes involving antitrust law, including disputes arising under Chapter 75 of the General Statutes that do not arise solely under G.S. 75-1.1 or Article 2 of Chapter 75 of the General Statutes.

(4) Disputes involving trademark law, including disputes arising under Chapter 80 of the General Statutes.

(5) Disputes involving the ownership, use, licensing, lease, installation, or performance of intellectual property, including computer software, software applications, information technology and systems, data and data security, pharmaceuticals, biotechnology products, and bioscience technologies.

(6), (7) Repealed by Session Laws 2014-102, s. 3, effective October 1, 2014.

(8) Disputes involving trade secrets, including disputes arising under Article 24 of Chapter 66 of the General Statutes.

(9) Contract disputes in which all of the following conditions are met:

a. At least one plaintiff and at least one defendant is a corporation, partnership, or limited liability company, including any entity authorized to transact business in North Carolina under Chapter 55, 55A, 55B, 57D, or 59 of the General Statutes.

b. The complaint asserts a claim for breach of contract or seeks a declaration of rights, status, or other legal relations under a contract.

c. The amount in controversy computed in accordance with G.S. 7A-243 is at least one million dollars ($1,000,000).

d. All parties consent to the designation.

(b) The following actions shall be designated as mandatory complex business cases:

(1) An action involving a material issue related to tax law that has been the subject of a contested tax case for which judicial review is requested under G.S. 105-241.16, or a civil action under G.S. 105-241.17 containing a constitutional challenge to a tax statute, shall be designated as a mandatory complex business case by the petitioner or plaintiff.

(2) An action described in subdivision (1), (2), (3), (4), (5), or (8) of subsection (a) of this section in which the amount in controversy computed in accordance with G.S. 7A-243 is at least five million

dollars ($5,000,000) shall be designated as a mandatory complex business case by the party whose pleading caused the amount in controversy to equal or exceed five million dollars ($5,000,000).

(3) Repealed by Session Laws 2015-119, s. 6, effective June 29, 2015, and applicable to any action filed on or after that date.

(4) An action in which a general receiver is sought to be appointed pursuant to G.S. 1-507.24 for a debtor that is not an individual business debtor as defined in G.S. 1-507.20 and has assets having a fair market value of not less than five million dollars ($5,000,000), if the party making the designation is either (i) the debtor or (ii) one or more creditors or creditors' duly authorized representatives that assert a claim or claims against the debtor exceeding, in the aggregate, twenty-five thousand dollars ($25,000) that in each case is not contingent as to liability and is not the subject of a bona fide dispute as to liability or amount. Any creditor or creditor's duly authorized representative that is not a party to the action may join in the notice of designation with the same effect as if such joining creditor or creditor's representative were a party.

(c) A party designating an action as a mandatory complex business case shall file a Notice of Designation in the Superior Court in which the action has been filed, shall contemporaneously serve the notice on each opposing party or counsel and on the Special Superior Court Judge for Complex Business Cases who is then the Chief Business Court Judge, and shall contemporaneously send a copy of the notice by e-mail to the Chief Justice of the Supreme Court for approval of the designation of the action as a mandatory complex business case. The Notice of Designation shall, in good faith and based on information reasonably available, succinctly state the basis of the designation and include a certificate by or on behalf of the designating party that the civil action meets the criteria for designation as a mandatory complex business case pursuant to subsection (a) or (b) of this section.

(d) The Notice of Designation shall be filed:

(1) By the plaintiff, the third-party plaintiff, or the petitioner for judicial review contemporaneously with the filing of the complaint, third-party complaint, or the petition for judicial review in the action.

(2) By any intervenor when the intervenor files a motion for permission to intervene in the action.

(3) By any defendant or any other party within 30 days of receipt of service of the pleading seeking relief from the defendant or party.

(4) By any party whose pleading caused the amount in controversy computed in accordance with G.S. 7A-243 to equal or exceed five million dollars ($5,000,000) contemporaneously with the filing of that pleading.

(5) In the case of an action described in subdivision (4) of subsection (b) of this section, by the debtor, any person with a lien on receivership property, or any creditor of the debtor.

(e) Within 30 days after service of the Notice of Designation, any other party may, in good faith, file and serve an opposition to the designation of the action as a mandatory complex business case. The opposition to the designation of the action shall assert all grounds on which the party opposing designation objects to the designation, and any grounds not asserted shall be deemed conclusively waived. Within 30 days after the entry of an order staying a pending action pursuant to subsection (g) of this section, any party opposing the stay shall file an objection with the Business Court asserting all grounds on which the party objects to the case proceeding in the Business Court, and any grounds not asserted shall be deemed conclusively waived. Based on the opposition or on its own motion, the Business Court Judge shall rule by written order on the opposition or objection and determine whether the action should be designated as a mandatory complex business case. If a party disagrees with the decision, the party may appeal in accordance with G.S. 7A-27(a).

(f) Once a designation is filed under subsection (d) of this section, and after preliminary approval by the Chief Justice, a case shall be designated and administered a complex business case. All proceedings in the action shall be before the Business Court Judge to whom it has been assigned unless and until an order has been entered under subsection (e) of this section ordering that the case not be designated a mandatory complex business case or the Chief Justice revokes approval. If complex business case status is revoked or denied, the action shall be treated as any other civil action, unless it is designated as an exceptional civil case or a discretionary complex business case pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts.

(g) If an action required to be designated as a mandatory complex business case pursuant to subsection (b) of this section is not so designated, the Superior Court in which the action has been filed shall, by order entered sua sponte, stay the action until it has been designated as a mandatory complex business case by the party required to do so in accordance with subsection (b) of this section.

(h) Nothing in this section is intended to permit actions for personal injury grounded in tort to be designated as mandatory complex business cases or to confer, enlarge, or diminish the subject matter jurisdiction of any court.

Chapter 105.

Taxation.

Subchapter I.

Levy of Taxes.

Article 3.

Franchise Tax.

§ 105-122. Franchise or privilege tax on domestic and foreign corporations.

(a) Tax Imposed. – An annual franchise or privilege tax is imposed on a corporation doing business in this State for the privilege of doing business in this State and for the continuance of articles of incorporation or domestication of each corporation in this State. A corporation subject to the tax must file a return under affirmation with the Secretary at the place and in the manner prescribed by the Secretary. The return must be signed by the president, vice-president, treasurer, or chief financial officer of the corporation. The return is due on or before the fifteenth day of the fourth month following the end of the corporation's income year.

(b) Determination of Net Worth. – A corporation taxed under this section shall determine the total amount of its net worth on the basis of the books and records of the corporation as of the close of its income year. The net worth of a corporation is its total assets without regard to the deduction for accumulated depreciation, depletion, or amortization less its total liabilities, computed in accordance with generally accepted accounting principles as of the end of the corporation's taxable year. If the corporation does not maintain its books and records in accordance with generally accepted accounting principles, then its net worth is computed in accordance with the accounting

method used by the entity for federal tax purposes. A corporation's net worth is subject to the following adjustments:

(1) A deduction for accumulated depreciation, depletion, and amortization as determined in accordance with the method used for federal tax purposes.

(1a) Repealed by Session Laws 2015-241, s. 32.15(d), effective for taxable years beginning on or after January 1, 2017, and applicable to the calculation of franchise tax reported on the 2016 and later corporate income tax return.

(1b) Assets for which a deduction is allowed under subdivision (1) of this subsection are valued in accordance with the method used in computing depreciation, depletion, and amortization for federal income tax purposes.

(2) **(Effective for taxable years beginning before January 1, 2021)** An addition for indebtedness the corporation owes to a parent, a subsidiary, an affiliate, or a noncorporate entity in which the corporation or an affiliated group of corporations owns directly or indirectly more than fifty percent (50%) of the capital interests of the noncorporate entity. The amount added back to the corporation's net worth may be further adjusted if part of the capital of the creditor is capital borrowed from a source other than a parent, a subsidiary, or an affiliate. The debtor corporation may deduct a proportionate part of the indebtedness based on the ratio of the borrowed capital of the creditor to the total assets of the creditor. For purposes of this subdivision, borrowed capital does not include indebtedness incurred by a bank arising out of the receipt of a deposit and evidenced by a certificate of deposit, a passbook, a cashier's check, a certified check, or other similar document.

(2) **(Effective for taxable years beginning on or after January 1, 2021)** An addition for the amount of indebtedness the corporation owes to a parent, a subsidiary, an affiliate, or a

noncorporate entity in which the corporation or group of corporations owns directly or indirectly more than fifty percent (50%) of the capital interest of the noncorporate entity, unless the indebtedness creates qualified interest expense, as defined in G.S. 105-130.7B(b)(4)a. through G.S. 105-130.7B(b)(4)d.

(2a) If the creditor corporation is taxable under this Article, the creditor corporation may deduct the amount of indebtedness owed to it by a parent, subsidiary, or affiliated corporation to the extent that such indebtedness has been added by the debtor corporation.

(2b) **(Effective for taxable years beginning on or after January 1, 2023 – see note)** The net worth of a foreign entity filing a federal income tax return is based on the value of assets deemed to be in the United States.

(3) Repealed by Session Laws 2018-5, s. 38.2(b), effective beginning on or after January 1, 2019, and applicable to the calculation of franchise tax reported on the 2018 and later corporate income tax return.

(4) through (8) Repealed by Session Laws 2015-241, s. 32.15(c), effective for taxable years beginning on or after January 1, 2017, and applicable to the calculation of franchise tax reported on the 2016 and later corporate income tax return.

(b1) Definitions. – The following definitions apply in subsection (b) of this section:

(1) Affiliate. – A corporation is an affiliate of another corporation when both are directly or indirectly controlled by the same parent corporation or by the same or associated financial interests by stock ownership, interlocking directors, or by any other means whatsoever, whether the control is direct or through one or more subsidiary, affiliated, or controlled corporations.

(2) Affiliated group. – The same meaning as defined in G.S. 105-114.1.

(3) Capital interest. – The right under an entity's governing law to receive a percentage of the entity's assets upon dissolution after payments to creditors.

(4) Governing law. – The law under which the noncorporate entity is organized.

(5) Indebtedness. – All loans, credits, goods, supplies, or other capital of whatsoever nature furnished by a parent, a subsidiary, an affiliate, or a noncorporate entity in which the corporation or an affiliated group of corporations owns directly or indirectly more than fifty percent (50%) of the capital interests of the noncorporate entity, other than indebtedness endorsed, guaranteed, or otherwise supported by one of these corporations.

(6) Noncorporate entity. – A person that is neither a human being nor a corporation.

(7) Parent. – A corporation is a parent of another corporation when, directly or indirectly, it controls the other corporation by stock ownership, interlocking directors, or by any other means whatsoever exercised by the same or associated financial interests, whether the control is direct or through one or more subsidiary, affiliated, or controlled corporations.

(8) Subsidiary. – A corporation is a subsidiary of another corporation when, directly or indirectly, it is subject to control by the other corporation by stock ownership, interlocking directors, or by any other means whatsoever exercised by the same or associated financial interest, whether the control is direct or through one or more subsidiary, affiliated, or controlled corporations.

(c) Repealed by Session Laws 2007-491, s. 2, effective January 1, 2008.

(c1) **(Effective for taxable years beginning before January 1, 2020)** Apportionment. – A corporation that is doing business in this State and in one or more other states must apportion its net worth to this State. A corporation must use the apportionment method set out in subdivision (1) of this subsection unless the Department has authorized it to use a different method under subdivision (2) of this subsection. The portion of a corporation's net worth determined by applying the appropriate apportionment method is considered the amount of net worth the corporation uses in its business in this State:

(1) Statutory. – A corporation that is subject to income tax under Article 4 of this Chapter must apportion its net worth by using the fraction it applies in apportioning its income under that Article. A corporation that is not subject to income tax under Article 4 of this Chapter must apportion its net worth by using the fraction it would be required to apply in apportioning its income if it were subject to that Article. The apportionment method set out in this subdivision is considered the statutory method of apportionment and is presumed to be the best method of determining the amount of a corporation's net worth attributable to the corporation's business in this State.

(2) Alternative. – A corporation that believes the statutory apportionment method set out in subdivision (1) of this subsection subjects a greater portion of its net worth to tax under this section than is attributable to its business in this State may make a written request to the Secretary for permission to use an alternative method. The request must set out the reasons for the corporation's belief and propose an alternative method. The corporation has the burden of establishing by clear, cogent, and convincing proof that the statutory apportionment method subjects a greater portion of the corporation's net worth to tax under this section than is attributable to its business in this State and that the proposed alternative method is a better method of determining the amount of the corporation's net worth attributable to the corporation's business in this State.

The Secretary must issue a written decision on a corporation's request for an alternative apportionment method. If the decision grants the request, it must describe the alternative method the corporation is authorized to use and state the tax years to which the alternative method applies. A decision may apply to no more than three tax years. A corporation may renew a request to use an alternative apportionment method by following the procedure in this subdivision. A decision of the Secretary on a request for an alternative apportionment method is final and is not subject to administrative or judicial review. A corporation authorized to use an alternative method may apportion its net worth in accordance with the alternative method or the statutory method.

(3) Repealed by Session Laws 2011-330, s. 5, effective June 27, 2011.

(c1) **(Effective for taxable years beginning on or after January 1, 2020)** Apportionment. – A corporation that is doing business in this State and in one or more other states must apportion its net worth to this State. A corporation must use the apportionment method set out in subdivision (1) of this subsection unless the Department has authorized it to use a different method under subdivision (2) of this subsection. A taxpayer that has made an election under G.S. 105-130.4(t3) must use the apportionment method set out in subdivision (1) of this subsection as if the election had not been made, unless the Department has authorized a different method under subdivision (2) of this subsection. The portion of a corporation's net worth determined by applying the appropriate apportionment method is considered the amount of net worth the corporation uses in its business in this State:

(1) Statutory. – A corporation that is subject to income tax under Article 4 of this Chapter must apportion its net worth by using the fraction it applies in apportioning its income under that Article. A corporation that is not subject to income tax under Article 4 of this Chapter must apportion its net worth by using the fraction it would be required to apply in apportioning its income if it were subject to that Article. The apportionment

method set out in this subdivision is considered the statutory method of apportionment and is presumed to be the best method of determining the amount of a corporation's net worth attributable to the corporation's business in this State.

(2) Alternative. – A corporation that believes the statutory apportionment method set out in subdivision (1) of this subsection subjects a greater portion of its net worth to tax under this section than is attributable to its business in this State may make a written request to the Secretary for permission to use an alternative method. The request must set out the reasons for the corporation's belief and propose an alternative method. The corporation has the burden of establishing by clear, cogent, and convincing proof that the statutory apportionment method subjects a greater portion of the corporation's net worth to tax under this section than is attributable to its business in this State and that the proposed alternative method is a better method of determining the amount of the corporation's net worth attributable to the corporation's business in this State.

The Secretary must issue a written decision on a corporation's request for an alternative apportionment method. If the decision grants the request, it must describe the alternative method the corporation is authorized to use and state the tax years to which the alternative method applies. A decision may apply to no more than three tax years. A corporation may renew a request to use an alternative apportionment method by following the procedure in this subdivision. A decision of the Secretary on a request for an alternative apportionment method is final and is not subject to administrative or judicial review. A corporation authorized to use an alternative method may apportion its net worth in accordance with the alternative method or the statutory method.

(3) Repealed by Session Laws 2011-330, s. 5, effective June 27, 2011.

(d) **(Effective for taxable years beginning before January 1, 2023)** Tax Base. – A corporation's tax base is the greatest of the following:

(1) The proportion of its net worth as set out in subsection (c1) of this section.

(2) Fifty-five percent (55%) of the corporation's appraised value as determined for ad valorem taxation of all the real and tangible personal property in this State. For purposes of this subdivision, the appraised value of tangible property, including real estate, is the ad valorem valuation for the calendar year next preceding the due date of the franchise tax return.

(3) **(Effective for taxable years beginning before January 1, 2020)** The corporation's total actual investment in tangible property in this State. For purposes of this subdivision, the total actual investment in tangible property in this State is the total original purchase price or consideration to the reporting taxpayer of its tangible properties, including real estate, in this State plus additions and improvements thereto less reserve for depreciation as permitted for income tax purposes.

(3) **(Effective for taxable years beginning on or after January 1, 2020, and applicable to the calculation of franchise tax reported on the 2019 and later corporate income tax returns)** The corporation's total actual investment in tangible property in this State. For purposes of this subdivision, the total actual investment in tangible property in this State is the total original purchase price or consideration to the reporting taxpayer of its tangible properties, including real estate, in this State plus additions and improvements thereto less (i) reserve for depreciation as permitted for income tax purposes and (ii) any indebtedness specifically incurred and existing solely for and as the result of the purchase of any real estate and any permanent improvements made on the real estate.

(d) **(Effective for taxable years beginning on or after January 1, 2023)** Tax Base. – A corporation's tax base is the proportion of its net worth as set out in subsection (c1) of this section.

(d1) Repealed by Session Laws 2015-241, s. 32.15(c), effective for taxable years beginning on or after January 1, 2017, and applicable to the calculation of franchise tax reported on the 2016 and later corporate income tax return.

(d2) Tax Rate. – For a C Corporation, as defined in G.S. 105-130.2, [the] tax rate is one dollar and fifty cents ($1.50) per one thousand dollars ($1,000) of the corporation's tax base as determined under subsection (d) of this section. For an S Corporation, as defined in G.S. 105-130.2, the tax rate is two hundred dollars ($200.00) for the first one million dollars ($1,000,000) of the corporation's tax base as determined under subsection (d) of this section and one dollar and fifty cents ($1.50) per one thousand dollars ($1,000) of its tax base that exceeds one million dollars ($1,000,000). In no event may the tax imposed by this section be less than two hundred dollars ($200.00).

(e) Short Period. – Any corporation which changes its income year, and files a "short period" income tax return pursuant to G.S. 105-130.15 shall file a franchise tax return in accordance with the provisions of this section in the manner and as of the date specified in subsection (a) of this section. Such corporation shall be entitled to deduct from the total franchise tax computed (on an annual basis) on such return the amount of franchise tax previously paid which is applicable to the period subsequent to the beginning of the new income year.

(f) Return and Tax. – The return and tax required by this section are in addition to all other reports required or taxes levied and assessed in this State.

(g) Local Prohibition. – Counties, cities and towns shall not levy a franchise tax on corporations taxed under this section.

(h) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1211, s. 5.

Article 9.

General Administration; Penalties and Remedies.

§ 105-241.17. Civil action challenging statute as unconstitutional.

A taxpayer who claims that a tax statute is unconstitutional may bring a civil action in the Superior Court of Wake County to determine the taxpayer's liability under that statute if all of the conditions in this section are met. In filing an action under this section, a taxpayer must follow the procedures for a mandatory business case set forth in G.S. 7A-45.4(b) through (f). The conditions for filing a civil action are:

(1) The taxpayer exhausted the prehearing remedy by receiving a final determination after a review and a conference.

(2) The taxpayer commenced a contested case at the Office of Administrative Hearings.

(3) The Office of Administrative Hearings dismissed the contested case petition for lack of jurisdiction because the sole issue is the constitutionality of a statute and not the application of a statute.

(4) The taxpayer has paid the amount of tax, penalties, and interest the final determination states is due.

(5) The civil action is filed within two years of the dismissal.

Chapter 150B.

Administrative Procedure Act.

Article 3.

Administrative Hearings.

§ 150B-23. Commencement; assignment of administrative law judge; hearing required; notice; intervention.

(a) A contested case shall be commenced by paying a fee in an amount established in G.S. 150B-23.2 and by filing a petition with the Office of Administrative Hearings and, except as provided in Article 3A of this Chapter, shall be conducted by that Office. The party that files the petition shall serve a copy of the petition on all other parties and, if the dispute concerns a license, the person that holds the license. A party that files a petition shall file a certificate of service together with the petition. A petition shall be signed by a party, an attorney representing a party, or other representative of the party as may specifically be authorized by law, and, if filed by a party other than an agency, shall state facts tending to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights and that the agency did any of the following:

(1) Exceeded its authority or jurisdiction.

(2) Acted erroneously.

(3) Failed to use proper procedure.

(4) Acted arbitrarily or capriciously.

(5) Failed to act as required by law or rule.

The parties in a contested case shall be given an opportunity for a hearing without undue delay. Any person aggrieved may commence a contested case under this section.

A local government employee, applicant for employment, or former employee to whom Chapter 126 of the General Statutes applies may commence a contested case under this Article in the same manner as any other petitioner. The case shall be conducted in the same manner as other contested cases under this Article.

A business entity may represent itself using a nonattorney representative who is one or more of the following of the business entity: (i) officer, (ii) manager or member-manager, if the business entity is a limited liability company, (iii) employee whose income is reported on IRS Form W-2, if the business entity authorizes the representation in writing, or (iv) owner of the business entity, if the business entity authorizes the representation in writing and if the owner's interest in the business entity is at least twenty-five percent (25%). Authority for and prior notice of nonattorney representation shall be made in writing, under penalty of perjury, to the Office on a form provided by the Office.

(a1) Repealed by Session Laws 1985 (Regular Session, 1986), c. 1022, s. 1(9).

(a2) An administrative law judge assigned to a contested case may require a party to the case to file a prehearing statement. A party's prehearing statement shall be served on all other parties to the contested case.

(a3) A Medicaid enrollee, or the enrollee's authorized representative, who appeals a notice of resolution issued by a managed care entity under Chapter 108D of the General Statutes may commence a contested case under this Article in the same manner as any other petitioner. The case shall be conducted in the same manner as other contested cases

initiated by Medicaid enrollees under this Article. Solely and only for the purposes of contested cases commenced pursuant to G.S. 108D-15 by enrollees of LME/MCOs to appeal a notice of resolution issued by the LME/MCO, an LME/MCO is considered an agency as defined in G.S. 150B-2. The LME/MCO is not considered an agency for any other purpose. When a prepaid health plan, as defined in G.S. 108D-1, other than an LME/MCO, is under contract with the Department of Health and Human Services to issue notices of resolution under Article 2 of Chapter 108D of the General Statutes, then solely and only for the purposes of contested cases commenced pursuant to G.S. 108D-15 to appeal a notice of resolution issued by the prepaid health plan, the prepaid health plan is considered an agency as defined in G.S. 150B-2. The prepaid health plan is not considered an agency for any other purpose.

(a4) If an agency fails to take any required action within the time period specified by law, any person whose rights are substantially prejudiced by the agency's failure to act may commence a contested case in accordance with this section seeking an order that the agency act as required by law. If the administrative law judge finds that the agency has failed to act as required by law, the administrative law judge may order that the agency take the required action within a specified time period.

(a5) A county that appeals a decision of the Department of Health and Human Services to temporarily assume Medicaid eligibility administration in accordance with G.S. 108A-70.42 or G.S. 108A-70.50 may commence a contested case under this Article in the same manner as any other petitioner. The case shall be conducted in the same manner as other contested cases under this Article.

(b) The parties to a contested case shall be given a notice of hearing not less than 15 days before the hearing by the Office of Administrative Hearings. If prehearing statements have been filed in the case, the notice shall state the date, hour, and place of the hearing. If prehearing

statements have not been filed in the case, the notice shall state the date, hour, place, and nature of the hearing, shall list the particular sections of the statutes and rules involved, and shall give a short and plain statement of the factual allegations.

(c) Notice shall be given by one of the methods for service of process under G.S. 1A-1, Rule 4(j) or Rule 4(j3). If given by registered or certified mail, by signature confirmation as provided by the United States Postal Service, or by designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) with delivery receipt, notice is deemed to have been given on the delivery date appearing on the return receipt, copy of the proof of delivery provided by the United States Postal Service, or delivery receipt. If giving of notice cannot be accomplished by a method under G.S. 1A-1, Rule 4(j) or Rule 4(j3), notice shall then be given in the manner provided in G.S. 1A-1, Rule 4(j1).

(d) Any person may petition to become a party by filing a motion to intervene in the manner provided in G.S. 1A-1, Rule 24. In addition, any person interested in a contested case may intervene and participate in that proceeding to the extent deemed appropriate by the administrative law judge.

(e) All hearings under this Chapter shall be open to the public. Hearings shall be conducted in an impartial manner. Hearings shall be conducted according to the procedures set out in this Article, except to the extent and in the particulars that specific hearing procedures and time standards are governed by another statute.

(f) Unless another statute or a federal statute or regulation sets a time limitation for the filing of a petition in contested cases against a specified agency, the general limitation for the filing of a petition in a contested case is 60 days. The time limitation, whether established by another statute, federal statute, or federal regulation, or this section, commences when notice is given of the agency decision to all persons

aggrieved that are known to the agency by personal delivery, electronic delivery, or by the placing of the notice in an official depository of the United States Postal Service wrapped in a wrapper addressed to the person at the latest address given by the person to the agency. The notice shall be in writing, shall set forth the agency action, and shall inform the persons of the right, the procedure, and the time limit to file a contested case petition. When no informal settlement request has been received by the agency prior to issuance of the notice, any subsequent informal settlement request shall not suspend the time limitation for the filing of a petition for a contested case hearing. When the Chief Justice of the North Carolina Supreme Court determines and declares that catastrophic conditions exist or have existed in one or more counties of the State and issues an order pursuant to G.S. 7A-39(b), the chief administrative law judge may by order entered pursuant to this subsection extend, to a date certain no fewer than 10 days after the effective date of the order, the time or period of limitation, whether established by another statute or this section, for the filing of a petition for a contested case. The order shall be in writing and becomes effective for each affected county upon the date set forth in the order, and if no date is set forth in the order, then upon the date the order is signed by the chief administrative law judge. The order shall provide that it expires upon the expiration of the Chief Justice's order.

(g) Where multiple licenses are required from an agency for a single activity, the Secretary or chief administrative officer of the agency may issue a written determination that the administrative decision reviewable under Article 3 of this Chapter occurs on the date the last license for the activity is issued, denied, or otherwise disposed of. The written determination of the administrative decision is not reviewable under this Article. Any licenses issued for the activity prior to the date of the last license identified in the written determination are not reviewable under this Article until the last license for the activity is issued, denied, or otherwise disposed of. A contested case challenging the last license decision for the activity may include challenges to

agency decisions on any of the previous licenses required for the activity.

§ 150B-33. Powers of administrative law judge.

(a) An administrative law judge shall stay any contested case under this Article on motion of an agency which is a party to the contested case, if the agency shows by supporting affidavits that it is engaged in other litigation or administrative proceedings, by whatever name called, with or before a federal agency, and this other litigation or administrative proceedings will determine the position, in whole or in part, of the agency in the contested case. At the conclusion of the other litigation or administrative proceedings, the contested case shall proceed and be determined as expeditiously as possible.

(b) An administrative law judge may:

(1) Administer oaths and affirmations;

(2) Sign, issue, and rule on subpoenas in accordance with G.S. 150B-27 and G.S. 1A-1, Rule 45;

(3) Provide for the taking of testimony by deposition and rule on all objections to discovery in accordance with G.S. 1A-1, the Rules of Civil Procedure;

(3a) Rule on all prehearing motions that are authorized by G.S. 1A-1, the Rules of Civil Procedure;

(4) Regulate the course of the hearings, including discovery, set the time and place for continued hearings, and fix the time for filing of briefs and other documents;

(5) Direct the parties to appear and confer to consider simplification of the issues by consent of the parties;

(6) Stay the contested action by the agency pending the outcome of the case, upon such terms as he deems proper, and subject to the provisions of G.S. 1A-1, Rule 65;

(7) Determine whether the hearing shall be recorded by a stenographer or by an electronic device; and

(8) Enter an order returnable in the General Court of Justice, Superior Court Division, to show cause why the person should not be held in contempt. The Court shall have the power to impose punishment as for contempt for any act which would constitute direct or indirect contempt if the act occurred in an action pending in Superior Court.

(9) Determine that a rule as applied in a particular case is void because (1) it is not within the statutory authority of the agency, (2) is not clear and unambiguous to persons it is intended to direct, guide, or assist, or (3) is not reasonably necessary to enable the agency to fulfill a duty delegated to it by the General Assembly.

(10) Impose the sanctions provided for in G.S. 1A-1 or Chapter 3 of Title 26 of the North Carolina Administrative Code for noncompliance with applicable procedural rules.

(11) Order the assessment of reasonable attorneys' fees and witnesses' fees against the State agency involved in contested cases decided under this Article where the administrative law judge finds that the State agency named as respondent has substantially prejudiced the petitioner's rights and has acted arbitrarily or capriciously or under Chapter 126 where the administrative law judge finds discrimination, harassment, or orders reinstatement or back pay.

(12) Repealed by Session Laws 2011-398, s. 17.

Article 4.

Judicial Review.

§ 150B-51. Scope and standard of review.

(a), (a1) Repealed by Sessions Laws, 2011-398, s. 27. For effective date and applicability, see editor's note.

(b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions;

(2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary, capricious, or an abuse of discretion.

(c) In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its

review of the final decision using the de novo standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

(d) In reviewing a final decision allowing judgment on the pleadings or summary judgment, the court may enter any order allowed by G.S. 1A-1, Rule 12(c) or Rule 56. If the order of the court does not fully adjudicate the case, the court shall remand the case to the administrative law judge for such further proceedings as are just.

North Carolina Rules of Appellate Procedure.

Article II.

Appeals from Judgments and Orders of Superior Courts and District Courts.

Rule 10. Preservation of Issues at Trial; Proposed Issues on Appeal.

(a) Preserving Issues During Trial Proceedings.

(1) General. In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion. Any such issue that was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, including, but not limited to, whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction over the subject matter, and whether a criminal charge is sufficient in law, may be made the basis of an issue presented on appeal.

. . .

North Carolina Administrative Code

Title 26.

Office of Administrative Hearings.

Chapter 3.

Hearings Division.

Section .0110.

Hearing Procedures.

Subsection .0127. Administrative Law Judge's Decision.

(a) An administrative law judge shall issue a final decision or order in a contested case within 45 days after the later of the date the administrative law judge receives any proposed findings of fact and written arguments submitted by the parties and the date the contested case hearing ends.

(b) An administrative law judge's final decision shall be based exclusively on:

(1) competent evidence and arguments presented during the hearing and made a part of the official record;

(2) stipulations of fact;

(3) matters officially noticed;

(4) any proposed findings of fact and written arguments submitted by the parties under Paragraph (g) of Rule .0119 of this Section; and

(5) other items in the official record that are not excluded by G.S. 150B-29(b).

(c) An administrative law judge's final decision shall fully dispose of all issues required to resolve the case and shall contain:

(1) a caption;

(2) the appearances of the parties;

(3) a statement of the issues;

(4) references to specific statutes or rules at issue;

(5) findings of fact;

(6) conclusions of law based on the findings of fact and applicable constitutional principles, statutes, rules, or federal regulations;

(7) in the discretion of the administrative law judge, a memorandum giving reasons for his findings of fact and conclusions of law; and

(8) a statement that each party has the right to file an appeal of the administrative law judge's final decision by filing a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides, or, where applicable pursuant to G.S. 7A-29(a), a Notice of Appeal to the Court of Appeals.

(d) The chief administrative law judge may extend the 45-day time limit for issuing a decision. An administrative law judge who needs an extension must submit a request for extension to the chief administrative law judge before the 45-day period has expired.

SECTION 61.(b) Except as otherwise provided, this act is effective when it becomes law.

In the General Assembly read three times and ratified this the 26th day of July, 2013.

Became law upon approval of the Governor at 10:53 a.m. on the 23rd day of August, 2013.

Session Law 2013-414 **H.B. 14**

AN ACT TO MAKE TECHNICAL, CLARIFYING, AND ADMINISTRATIVE CHANGES TO THE REVENUE LAWS AND RELATED STATUTES, AS RECOMMENDED BY THE REVENUE LAWS STUDY COMMITTEE.

The General Assembly of North Carolina enacts:

REVENUE LAWS RECOMMENDATIONS

SECTION 1.(a) G.S. 105-116(b) reads as rewritten:

"(b) ~~Report~~ Return and Payment. – The tax imposed by this section is payable quarterly or monthly as specified in this subsection. A return is due quarterly.

A water company or public sewerage company must pay tax quarterly when filing a return. An electric power company must pay tax in accordance with the schedule and requirements that apply to payments of sales and use tax under G.S. 105-164.16 and must file a return quarterly.

A quarterly return covers a calendar quarter and is due by the last day of the month that follows the quarter covered by the return. A taxpayer must submit a return on a form provided by the Secretary. The return must include the taxpayer's gross receipts from all property it owned or operated during the reporting period in connection with its business taxed under this section. A taxpayer must report its gross receipts on an accrual basis. A return must contain the following information:

(1) The taxpayer's gross receipts for the reporting period from business inside and outside this State, stated separately.

(2) The taxpayer's gross receipts from commodities or services described in subsection (a) that are sold to a vendee subject to the tax levied by this section or to a joint agency established under Chapter 159B of the General Statutes or a city having an ownership share in a project established under that Chapter.

(3) The amount of and price paid by the taxpayer for commodities or services described in subsection (a) that are purchased from others engaged in business in this State and the name of each vendor.

(4) For an electric power company the entity's gross receipts from the sale within each city of the commodities and services described in subsection (a)."

SECTION 1.(b) G.S. 105-120.2 reads as rewritten:

"§ **105-120.2. Franchise or privilege tax on holding companies.**

(a) Every corporation, domestic and foreign, incorporated or, by an act, domesticated under the laws of this State or doing business in this State ~~which,~~ that, at the close of its taxable ~~year~~ year, is a holding company as defined in subsection (c) of this section, shall, pursuant to the provisions of ~~G.S. 105-122:~~G.S. 105-122, do all of the following:

(1) ~~Make a report and statement, and~~File a return.

(2) Determine the total amount of its issued and outstanding capital stock, surplus and undivided ~~profits, and~~profits.

(3) Apportion such outstanding capital stock, surplus and undivided profits to this State.

(b) (1) Every corporation taxed under this section shall annually pay to the Secretary of Revenue, at the time the ~~report and statement are~~ return is due, a franchise or privilege ~~tax, which is hereby levied,~~ tax at the rate of one dollar

and fifty cents ($1.50) per one thousand dollars ($1,000) of the amount determined under subsection (a) of this section, but in no case shall the tax be more than seventy-five thousand dollars ($75,000) nor less than thirty-five dollars ($35.00).

(2) Notwithstanding the provisions of subdivision (1) of this subsection, if the tax produced pursuant to application of this paragraph (2) exceeds the tax produced pursuant to application of subdivision (1), then the tax ~~shall be~~ is levied at the rate of one dollar and fifty cents ($1.50) per one thousand dollars ($1,000) on the greater of the ~~amounts of~~following:

a. Fifty-five percent (55%) of the appraised value as determined for ad valorem taxation of all the real and tangible personal property in this State of each such corporation plus the total appraised value of intangible property returned for taxation of intangible personal property as computed under ~~G.S. 105-122(d); or~~G.S. 105-122(d).

b. The total actual investment in tangible property in this State of such corporation as computed under G.S. 105-122(d).

…."

SECTION 1.(c) G.S. 105-122 reads as rewritten:

"§ **105-122. Franchise or privilege tax on domestic and foreign corporations.**

…

(d) After determining the proportion of its total capital stock, surplus and undivided profits as set out in subsection ~~(c)~~(c1) of this section, which amount shall not be less than fifty-five percent (55%) of the appraised value as determined for ad valorem taxation of all the real and tangible personal property in this State of each corporation nor less than its total actual investment in tangible property in this State, every corporation taxed under this section shall annually pay to the Secretary of Revenue, at the time the ~~report and statement are~~ return is due, a franchise or privilege tax at the rate of one dollar and fifty cents ($1.50) per one thousand dollars ($1,000) of the total amount of capital stock, surplus and undivided profits as provided in this section. The tax imposed in this section shall not be less than thirty-five dollars ($35.00) and ~~shall be~~ is for the privilege of carrying on, doing business, and/or the continuance of articles of incorporation or domestication of each corporation in this State. Appraised value of tangible property including real estate is the ad valorem valuation for the calendar year next preceding the due date of the franchise tax return. The term "total actual investment in tangible property" as used in this section means the total original purchase price or consideration to the reporting taxpayer of its tangible properties, including real estate, in this State plus additions and improvements thereto less reserve for depreciation as permitted for income tax purposes, and also less any indebtedness incurred and existing by virtue of the purchase of any real estate and any permanent improvements made thereon. In computing "total actual investment in tangible personal property" ~~there shall also be deducted~~ a corporation may deduct reserves for the entire cost of any air-cleaning device or sewage or waste treatment plant, including waste lagoons, and pollution abatement equipment purchased or constructed and installed which reduces the amount of air or water pollution resulting from the emission of air contaminants or the discharge of sewage and industrial wastes or other polluting materials or substances into the outdoor atmosphere or into streams, lakes, or rivers, upon condition that the corporation claiming this deduction shall furnish to the Secretary a certificate from the Department of Environment and Natural Resources or from a local air pollution control program for air-cleaning devices located in an area where the Environmental Management Commission has certified a local air pollution control program pursuant to G.S. 143-215.112 certifying that said Department or local air pollution control program has found as a fact that the air-cleaning device, waste treatment plant or pollution abatement equipment purchased or constructed and installed as above described has actually been constructed and installed and that the device, plant or equipment complies with the requirements of the Environmental Management Commission or local air pollution control program with respect to the devices, plants or

equipment, that the device, plant or equipment is being effectively operated in accordance with the terms and conditions set forth in the permit, certificate of approval, or other document of approval issued by the Environmental Management Commission or local air pollution control program and that the primary purpose is to reduce air or water pollution resulting from the emission of air contaminants or the discharge of sewage and waste and not merely incidental to other purposes and functions. The cost of constructing facilities of any private or public utility built for the purpose of providing sewer service to residential and outlying areas is treated as deductible for the purposes of this section; the deductible liability allowed by this section ~~shall apply~~ applies only with respect to pollution abatement plants or equipment constructed or installed on or after January 1, 1955.

…

(f) The ~~report, statement~~ return and tax required by this section ~~shall be~~ are in addition to all other reports required or taxes levied and assessed in this State.

…."

SECTION 1.(d) G.S. 105-127(a) reads as rewritten:

"(a) Every corporation, domestic or foreign, that is required to file a return with the Secretary ~~from which a report is required by law to be made to the Secretary of Revenue,~~ shall, unless otherwise provided, pay annually ~~to said Secretary annually~~ the franchise tax as required by G.S. 105-122."

SECTION 1.(e) G.S. 105-134.2(b) reads as rewritten:

"(b) In lieu of the tax imposed by subsection (a) of this section, there is imposed for each taxable year upon the North Carolina taxable income of every individual a tax determined under tables, applicable to the taxable year, which may be prescribed by the Secretary. The amounts of the tax determined under the tables shall be computed on the basis of the rates prescribed by subsection (a) of this section. This subsection does not apply to an individual ~~making~~ filing a return under section 443(a)(1) of the Code for a period of less than 12 months on account of a change in the individual's annual accounting period, or to an estate or trust. The tax imposed by this subsection shall be treated as the tax imposed by subsection (a) of this section."

SECTION 1.(f) G.S. 105-164.19 reads as rewritten:

"§ **105-164.19. Extension of time for making returns and payment.**

The Secretary for good cause may extend the time for ~~making~~ filing any return under the provisions of this Article and may grant ~~such~~ additional time within which to ~~make such~~ file the return as he may deem ~~proper~~ proper, but the time for filing any ~~such~~ return shall not be extended for more than 30 days after the regular due date of ~~such~~ the return. If the time for filing a return ~~be~~ is extended, interest accrues at the rate established pursuant to G.S. 105-241.21 from the time the return was due to be filed to the date of payment.~~payment shall be added and paid.~~"

SECTION 1.(g) G.S. 105-164.30 reads as rewritten:

"§ **105-164.30. Secretary or agent may examine books, etc.**

For the purpose of enforcing the collection of the tax levied by this Article, the Secretary or his duly authorized agent is ~~hereby specifically~~ authorized ~~and empowered~~ to examine at all reasonable hours during the day the books, papers, records, documents or other data of all retailers or wholesale merchants bearing upon the correctness of any return or for the purpose of ~~making~~ filing a return where none has been made as required by this Article, and may require the attendance of any person and take his testimony with respect to any such matter, with power to administer oaths to such person or persons. If any person summoned as a witness ~~shall fail~~ fails to obey any summons to appear before the Secretary or his authorized agent, or ~~shall refuse~~ refuses to testify or answer any material question or to produce any book, record, paper, or other data when required to do so, ~~such~~ the Secretary or his authorized agent shall report the failure or refusal ~~shall be reported~~ to the Attorney General or the district solicitor, who shall thereupon institute proceedings in the superior court of the county where ~~such~~ the witness resides to compel obedience to any summons of the Secretary or his authorized agent.

Officers who serve summonses or subpoenas, and witnesses attending, shall receive like compensation as officers and witnesses in the superior courts, to be paid from the proper appropriation for the administration of this Article.

In the event any retailer or wholesale merchant ~~shall fail or refuse~~ fails or refuses to permit ~~examination of~~ the Secretary or his authorized agent to examine his books, papers, accounts, records, documents or other ~~data by the Secretary or his authorized agents as aforesaid,~~ data, the Secretary ~~shall have the power to proceed by citing said~~ may require the retailer or wholesale merchant to show cause before the superior court of the county in which said taxpayer resides or has its principal place of business as to why ~~such~~ the books, records, papers, or documents should not be examined and ~~said~~ the superior court shall have jurisdiction to enter an order requiring the production of all necessary books, records, papers, or documents and to punish for contempt any person who violates the order.~~of such order any person violating the same.~~"

SECTION 1.(h) G.S. 105-236(a)(9) reads as rewritten:

"(9) Willful Failure to File Return, Supply Information, or Pay Tax. – Any person required to pay any tax, to ~~make~~ file a return, to keep any records, or to supply any information, who willfully fails to pay the tax, ~~make~~ file the return, keep the records, or supply the information, at the time or times required by law, or rules issued pursuant thereto, ~~shall,~~ is, in addition to other penalties provided by law, ~~be~~ guilty of a Class 1 misdemeanor. Notwithstanding any other provision of law, no prosecution for a violation brought under this subdivision ~~shall be~~ is barred before the expiration of six years after the date of the violation."

SECTION 1.(i) G.S. 105-258(a) reads as rewritten:

"(a) Secretary May Examine Data and Summon Persons. – The Secretary of ~~Revenue,~~Revenue is authorized to do any of the following for the purpose of ascertaining the correctness of any return, ~~making~~ filing a return where none has been ~~made,~~ filed, or determining the liability of any person for a tax, or collecting any tax:~~such tax, shall have the power~~

(1) ~~to examine,~~ Examine, personally, or by an agent designated by him, any books, papers, records, or other data ~~which~~ that may be relevant or material to ~~such inquiry, and the Secretary may~~ the inquiry.

(2) ~~summon~~ Summon any of the following persons to appear at a time and place named in the summons, to produce such books, papers, records, or other data, and to give such testimony under oath as may be relevant or material to the inquiry:

a. ~~the~~ Any person liable for the tax or required to perform the act, or any officer or employee of such ~~person, or any~~ person.

b. Any person having possession, custody, care or control of books of account containing entries relevant or material to the income and expenditures of the person liable for the tax or required to perform the act, or any other person having knowledge in the premises.~~premises, to appear before the Secretary, or his agent, at a time and place named in the summons, and to produce such books, papers, records or other data, and to give such testimony under oath as may be relevant or material to such inquiry, and the Secretary or his agent may~~

(3) ~~administer~~ Administer oaths to ~~such person or persons.~~ the persons listed in this subsection.

(4) ~~If any person so summoned refuses to obey such summons or to give testimony when summoned, the Secretary may apply~~ Apply to the Superior Court of Wake County for an order requiring ~~such person or persons to comply with the summons of the Secretary, and the failure~~any person who

refuses to obey the summons or to give testimony when summoned. Failure to comply with ~~such~~ the court order shall be punished as for contempt."

SECTION 1.(j) G.S. 105-263(b) reads as rewritten:

"(b) Extension. – The Secretary may extend the time in which a person must file a ~~report or~~ return with the Secretary. To obtain an extension of time for filing a ~~report or~~ return, a person must comply with any application requirement set by the Secretary. An extension of time for filing a franchise tax return or an income tax return does not extend the time for paying the tax due or the time when a penalty attaches for failure to pay the tax. An extension of time for filing ~~a report or~~ any return other than a franchise tax return or an income tax return extends the time for paying the tax due and the time when a penalty attaches for failure to pay the tax. When an extension of time for filing a ~~report or~~ return extends the time for paying the tax expected to be due with the ~~report or~~ return, interest, at the rate established pursuant to G.S. 105-241.21, accrues on the tax due from the original due date of the ~~report or~~ return to the date the tax is paid."

SECTION 2.(a) G.S. 105-122(c1) reads as rewritten:

"(c1) Apportionment. – A corporation that is doing business in this State and in one or more other states must apportion its capital stock, surplus, and undivided profits to this State. A corporation must use the apportionment method set out in subdivision (1) of this subsection unless the Department has authorized it to use a different method under subdivision (2) of this subsection. The portion of a corporation's capital stock, surplus, and undivided profits determined by applying the appropriate apportionment method is considered the amount of capital stock, surplus, and undivided profits the corporation uses in its business in this State.

…

(2) Alternative. – A corporation that believes the statutory apportionment method set out in subdivision (1) of this subsection subjects a greater portion of its capital stock, surplus, and undivided profits to tax under this section than is attributable to its business in this State may make a written request to the Secretary for permission to use an alternative method. The request must set out the reasons for the corporation's belief and propose an alternative method. The corporation has the burden of establishing by clear, cogent, and convincing proof that the statutory apportionment method subjects a greater portion of the corporation's capital stock, surplus, and undivided profits to tax under this section than is attributable to its business in this State and that the proposed alternative method is a better method of determining the amount of the corporation's capital stock, surplus, and undivided profits attributable to the corporation's business in this State.

The Secretary must issue a written decision on a corporation's request for an alternative apportionment method. If the decision grants the request, it must describe the alternative method the corporation is authorized to use and state the tax years to which the alternative method applies. A decision may apply to no more than three tax ~~years, unless the provisions of subdivision (3) of this subsection applies.~~ years. A corporation may renew a request to use an alternative apportionment method by following the procedure in this subdivision. A decision of the Secretary on a request for an alternative apportionment method is final and is not subject to administrative or judicial review. A corporation authorized to use an alternative method may apportion its capital stock, surplus, and undivided profits in accordance with the alternative method or the statutory method."

SECTION 2.(b) G.S. 105-130.4(t1) reads as rewritten:

"(t1) Alternative Apportionment Method. – A corporation that believes the statutory apportionment method that otherwise applies to it under this section subjects a greater portion of its income to tax than is attributable to its business in this State may make a written request