

STATE OF MINNESOTA

TAX COURT

COUNTY OF RAMSEY

REGULAR DIVISION

Sinclair Broadcast Group, Inc.,
and Subsidiaries,

**ORDER ON CROSS-MOTIONS
FOR SUMMARY JUDGMENT**

Appellants,

File No. 8919-R

vs.

Commissioner of Revenue,

Filed: August 11, 2017

Appellee.

These matters came before The Honorable Bradford S. Delapena, Chief Judge of the Minnesota Tax Court, on the parties' cross-motions for summary judgment.

Walter A. Pickhardt and Caitlin E. Abram, Faegre Baker Daniels LLP, represent appellants Sinclair Broadcast Group, Inc., and Subsidiaries.

Jennifer A. Kitchak, Assistant Minnesota Attorney General, represents appellee Commissioner of Revenue.

In this case, the parties disagree about the computation of Sinclair's Minnesota net operating loss deduction for 2011, 2012, and 2013. Specifically, they dispute the extent to which Sinclair is permitted to use the losses of a separate corporation it had previously acquired.

In a system that taxes net income, deductions are valuable because they offset income to reduce tax. Federal law provides for a net operating loss deduction that allows a corporation to "carry" net losses from previous years into the current year to offset current income. A corporation may carry over not only its own prior losses, but also those of certain corporations it has acquired.

Congress became concerned that the right to use the losses of acquired entities might prompt corporations to purchase one another solely to obtain and use their prior losses, rather than

for any legitimate business reason. Congress thus passed Internal Revenue Code section 382, which limits the amount of taxable income a purchasing corporation may offset each year using acquired losses—for the years in issue here, roughly five percent of the purchased corporation’s stock value. Without this limitation, a \$10,000,000 corporation with \$9,000,000 of accumulated losses would be an attractive purchase solely for tax reasons, because it would allow the purchaser to offset \$9,000,000 of current income. Under section 382, in contrast, the purchaser could use only \$500,000 of losses in the year of purchase and in each year thereafter ($(\$10,000,000 \text{ stock value}) \times (0.05) = \$500,000$). Congress thus sought to eliminate tax-motivated acquisitions by deferring the use of acquired losses.

Like federal law, Minnesota law: (1) provides for a net operating loss deduction; and (2) allows corporations to use losses sustained by entities they have purchased. Without a limitation parallel to that contained in I.R.C. § 382, therefore, a Minnesota taxpayer that purchased the \$10,000,000 corporation with \$9,000,000 of Minnesota losses could, in the year of purchase, use the entire loss to offset current *Minnesota* taxable income. The Legislature thus incorporated the section 382 limitation into state law: “The limitation amount determined under [I.R.C.] section 382 shall be applied to [Minnesota] net income, before apportionment, in each ... year to which a loss is carried.” Minn. Stat. § 290.095, subd. 3(d) (2016).

The parties dispute the interpretation and application of section 290.095, subdivision 3(d). We grant Sinclair’s motion for summary judgment and deny the Commissioner’s motion.

The court, upon all the files, records, and proceedings herein, now makes the following:

ORDER

1. Sinclair’s motion for summary judgment is granted.

2. Because the I.R.C. § 382 limitation incorporated into Minn. Stat. § 290.095, subd. 3(d), is not subject to apportionment, the Commissioner shall allow Sinclair to apply net operating loss carryovers as follows:


- a. \$455,042 from 2001 to be used in 2011;
- b. \$254,781 from 2001 to be used in 2012;
- c. \$903,395 from 2002 to be used in 2012;
- d. \$358,123 from 2003 to be used in 2012;
- e. \$419,343 from 2003 to be used in 2013;

3. The Commissioner's motion for summary judgment is denied.

IT IS SO ORDERED. THIS IS A FINAL ORDER. LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT,




Bradford S. Delapena, Chief Judge
MINNESOTA TAX COURT

DATED: August 11, 2017

MEMORANDUM

I. FACTUAL BACKGROUND

This matter is here on stipulated facts. Appellant Sinclair Broadcasting Group, Inc. (Sinclair), is the parent of a multi-state, diversified television broadcasting organization.¹ During

¹ Stipulation of Facts ¶¶ 1-2.

the years at issue (2011-13), Sinclair Television Group, Inc. (Television), was a wholly-owned subsidiary of Sinclair.² Television, in turn, owned other subsidiaries and disregarded entities, *i.e.*, LLCs.³

This case involves the deduction of net operating losses (NOLs) sustained by KLGT, Inc. (KLGT), a corporation that Sinclair acquired through a subsidiary in May 1998,⁴ and that Sinclair owned indirectly through Television and a disregarded entity, SC LLC, during the years at issue.⁵ The parties agree that KLGT's accumulated losses were available for use by Sinclair; they disagree only about the manner in which those losses could be used under Minnesota law.⁶ Sinclair filed Minnesota tax returns (combined reports) during the years at issue reflecting its understanding of the proper use of the KLGT NOLs.⁷ The Commissioner subsequently issued an order adjusting

² Stip. ¶ 3.

³ Stip. ¶ 3.

⁴ Stip. ¶¶ 4, 6.

⁵ Stip. ¶¶ 4-5, 7-8. The Stipulation of Facts recites in detail the history of Sinclair's indirect ownership of KLGT from 1998 through 2013. The following two paragraphs describe that ownership during the years at issue, in particular:

9. During 2011, Sinclair was the ultimate parent company; it owned Television as a subsidiary; Television owned SC LLC (a disregarded entity); and SC LLC owned KLGT (a corporation).

10. During 2012 and 2013, Sinclair was the ultimate parent company; it owned Television; Television owned SC LLC (a disregarded entity); and SC LLC owned WUCW (a disregarded entity [into which KLGT had merged on December 31, 2011]).

Stip. ¶¶ 9-10.

⁶ Compare Ex. J7 ("spreadsheet showing the utilization of [the KLGT] net operating losses in accordance with the position of the Commissioner," Stip. ¶ 21), with Ex. J8 ("spreadsheet showing the utilization of net operating losses in accordance with the position of the Appellant," Stip. ¶ 22).

⁷ Stip. ¶ 11.

the use of those NOLs in accordance with her interpretation of Minnesota law.⁸ Sinclair appeals the Commissioner's order.⁹

II. LOCATING THE ISSUE

Minnesota imposes “[a]n annual franchise tax on the exercise of the corporate franchise to engage in contacts with this state that produce gross income attributable to sources within this state.” Minn. Stat. § 290.02 (2016). The tax is measured by a corporation’s “taxable income.” *Id.* For a corporation (like Sinclair) that does business partly within and partly without Minnesota, the procedure for computing Minnesota “taxable income” eliminates the *federal* net operating loss deduction, but then allows a *Minnesota* net operating loss deduction:

1. **Determine Minnesota “net income”:** Minnesota “net income” is “federal taxable income” with certain “modifications.” Minn. Stat. § 290.01, subd. 19 (2016). As relevant here, a corporation must add back to federal taxable income “the amount of any net operating loss deduction taken for federal income tax purposes under section 172 ... of the Internal Revenue Code” Minn. Stat. § 290.01, subd. 19c(4) (2010, Supp. 2011, 2012, & Supp. 2013) (recodified at Minn. Stat. § 290.0133, subd. 5 (2016)).
2. **Determine Minnesota “taxable net income”:** Minnesota law provides that “the net income from a trade or business carried on partly within and partly without this state must be apportioned to this state.” Minn. Stat. § 290.191, subd. 1(a) (2016). For a taxpayer subject to apportionment, Minnesota “taxable net income” is “the part of net income that is allocable to Minnesota by ... apportionment.” Minn. Stat. § 290.01, subd. 22(3) (2016).
3. **Determine Minnesota “taxable income”:** As relevant here, Minnesota “taxable income” for a corporation is Minnesota “taxable net income” less “the net operating loss deduction under section 290.095.” Minn. Stat. § 290.01, subd. 29(2)(i) (2016).

Although this movement from “net income” to “taxable net income” to “taxable income” eliminates the federal NOL deduction, it grants a Minnesota NOL deduction. By reducing

⁸ Ex. J1 at 15-26, 43-54.

⁹ Not. Appeal (filed Feb. 1, 2016).

Minnesota “taxable income,” the Minnesota NOL deduction reduces Minnesota tax. In this case, the parties disagree about the computation of Sinclair’s Minnesota NOL deductions for the taxable years preceding and through the years at issue.

III. CONCEPTUAL BACKGROUND

“[A] taxpayer incurs a ‘net operating loss’ (NOL) when its deductible expenses exceed its federal taxable income in a given year.” *Eilian v. Dir. of Revenue*, 402 S.W.3d 566, 568 (Mo. 2013) (citing I.R.C. § 172(c)). A taxpayer may use, or carry over, NOLs to offset income in future tax years. I.R.C. § 172(b); *Carryover*, Black’s Law Dictionary (10th ed. 2014) (“An income-tax deduction (esp. for a net operating loss) that cannot be taken entirely in a given period but may be taken in a later period”). Congress enacted carryovers “to ameliorate the unduly drastic consequences of taxing income strictly on an annual basis. They were designed to permit a taxpayer to set off its lean years against its lush years, and to strike something like an average taxable income computed over a period longer than one year.” *Libson Shops, Inc. v. Koehler*, 353 U.S. 382, 386 (1957); *see also Six Seam Co., Inc. v. United States*, 524 F.2d 347, 351 (6th Cir. 1975) (noting that net operating loss carryovers are the “statutory expression of a Congressional belief that ‘the allowance of a net operating business loss carry-over will greatly aid business and stimulate new enterprises.’ ” (citing I.R.C. § 172 (1954) and quoting H.R. Rep. No. 855 (1939))).

Congress has addressed the use of net operating loss carryovers when corporate ownership changes. Section 381 generally allows an acquiring corporation to take on the tax attributes of a purchased corporation. I.R.C. § 381(a). As relevant here, an acquiring corporation generally may use net operating loss carryovers of a corporation it has purchased. I.R.C. § 381(a), (c)(1).

Congress was concerned, however, that this authorization would encourage the purchase of corporations solely for their NOLs.¹⁰ See, e.g., *Euclid-Tennessee, Inc. v. Comm'r*, 352 F.2d 991, 994-95 (6th Cir. 1965). Section 382 therefore restricts the amount of federal taxable income a taxpayer may offset with acquired NOLs: “The amount of the taxable income of any new loss corporation for any post-change year which may be offset by pre-change losses shall not exceed the section 382 limitation for such year.” I.R.C. § 382(a). As the United States Tax Court has explained, “[s]ection 382 in its present form is the most recent statutory expression of a long standing congressional perception that trafficking in loss carryovers must be regulated to prevent abuse.” *Berry Petroleum Co. v. Comm'r*, 104 T.C. 584, 632 (1995).

Section 382 is triggered by an “ownership change.” I.R.C. § 382(g). The annual limitation is an amount equal to the stock value of the “loss corporation” multiplied by a specified long-term tax-exempt rate. I.R.C. § 382(b)(1), (e), (f). If a taxpayer cannot use “pre-change” NOLs up to the annual limitation amount, the unused portion increases the ensuing year’s limitation. I.R.C. § 382(b)(2). In effect, section 382 “approximate[s] the annual income that the business capital of the old loss corporation would have generated, and thereby prevent[s] the new loss corporation from using the loss carryovers faster than the old loss corporation could have used them in the absence of a change in ownership.” *Berry Petroleum*, 104 T.C. at 633-34 (citation omitted). It thus provides “an objective standard governing the availability of a major tax benefit.” *Six Seam Co., Inc.*, 524 F.2d at 352 (internal quotation marks and citation omitted).

The restrictive effect of section 382 varies depending on the relationship between the loss corporation’s NOLs and its pre-change stock value. Assume a long-term tax-exempt rate of five

¹⁰ Comm’r’s Mem. Supp. Summ. J. 8-9 (filed Apr. 7, 2017); Appellant’s Mem. Supp. Summ. J. 1-2 (filed Apr. 7, 2017).

percent. If the loss corporation's accumulated NOLs are less than five percent of its stock value, section 382 would not limit the new loss corporation's use of pre-change NOLs. If the loss corporation's NOLs exceed five percent of its stock value, section 382 creates a straight-line schedule limiting the new loss corporation's use of the pre-change NOLs. NOLs equaling ten percent of stock value may be used over a two-year period; equaling fifteen percent of stock value over a three-year period; and equaling one hundred percent of stock value over a twenty-year period.¹¹ This differential impact directly reflects Congressional concern, because the higher the ratio of pre-change NOLs to stock value, the greater the likelihood that the loss corporation was acquired for its NOLs.¹²

The overall purpose of sections 381 and 382—taken together—is to provide a benefit to acquiring corporations by allowing them to keep certain tax attributes of loss corporations, but also to discourage them from buying loss corporations solely for tax purposes (rather than legitimate business purposes). “Sections 381 and 382 were added to th[e] statutory scheme in 1954 in an effort to protect taxpayers against the loss of favorable tax attributes, as well as to prevent the avoidance of unfavorable ones by paper reorganizations.” *World Serv. Life Ins. Co. v. United States*, 471 F.2d 247, 251 (8th Cir. 1973) (internal quotation marks and citation omitted); *see also Maxwell Hardware Co. v. Comm’r*, 343 F.2d 713, 718 (9th Cir. 1965) (“[I]t was the clearly expressed intention of Congress to ... countenance ‘trafficking’ in operating loss carryovers except as affected by the special limitations of Section 382 and the general limitations of Section

¹¹ Under federal law, an NOL “shall be a net operating loss carryover to each of the 20 taxable years following the taxable year of the loss.” I.R.C. § 172(b)(1)(A)(ii).

¹² The “new loss corporation” must also “continue the business enterprise of the old loss corporation at all time during the 2-year period beginning on the change date,” otherwise carryovers are disallowed entirely. I.R.C. § 382(c). This requirement is not in issue.

381.”); accord *Exel Corp. v. United States*, 451 F.2d 80, 84 (8th Cir. 1971); *Frederick Steel Co. v. Comm’r*, 375 F.2d 351, 353 (6th Cir. 1967).

IV. THE NOLs IN ISSUE

Sinclair acquired KLGTV (indirectly) on May 12, 1998, pursuant to a November 1997 stock purchase agreement.¹³ KLGTV was a Minnesota corporation that owned and operated a television station in the Minneapolis area.¹⁴ Before its May 1998 acquisition, KLGTV generated the following net operating losses apportionable entirely to Minnesota:¹⁵

<u>Year</u>	<u>NOL</u>
1992	\$907,751
1993	\$1,757,772
1994	\$1,938,006
1995	\$164,687
1998 (through May 12)	\$222,183

KLGTV had taxable net income in 1996 and 1997 of \$564,301 and \$256,198, respectively.¹⁶ KLGTV used its 1992 Minnesota NOL to offset that income, so that the original \$907,751 NOL was reduced to \$87,252.¹⁷ Consequently, as of May 12, 1998, KLGTV’s accumulated unused NOLs for state income tax purposes totaled \$4,169,900.¹⁸

Sinclair’s purchase of KLGTV’s stock (through a subsidiary) constituted an “ownership change” under I.R.C. § 382,¹⁹ which therefore limited KLGTV’s annual NOL deduction for federal

¹³ Stip. ¶ 4.

¹⁴ Stip. ¶ 6.

¹⁵ Stip. ¶¶ 12-13. KLGTV’s Minnesota apportionment percentage was 100 percent for this entire period. Stip. ¶ 13.

¹⁶ Stip. ¶ 14.

¹⁷ Stip. ¶ 14.

¹⁸ Stip. ¶ 15.

¹⁹ Stip. ¶ 16.

income tax purposes in the taxable years after the change.²⁰ The parties have stipulated that, for purposes of section 382, KLG T's value was \$52,500,000; the pertinent long-term tax-exempt rate was 5.05 percent; and, accordingly, for federal tax purposes, the section 382 limitation on the use of KLG T's accumulated pre-change losses was \$2,651,250 per year,²¹ prorated to \$1,692,442 for the post-change period May 13 through December 31, 1998.²²

V. CONTROLLING STATUTE

Minnesota law allows a deduction for net operating losses: "There shall be allowed as a deduction for the taxable year the amount of any net operating loss deduction as provided in section 172 of the Internal Revenue Code, subject to the limitations and modifications provided in this section." Minn. Stat. § 290.095, subd. 1(a) (2016). Under state law, "net operating loss" means "a net operating loss as defined in section 172(c) of the Internal Revenue Code," *id.*, subd. 2(a), and "net operating loss deduction" means "the aggregate of the net operating loss carryovers to the taxable year, computed in accordance with subdivision 3," *id.*, subd. 2(b). This case involves subdivision 3 computations.

Like federal law, then, state law allows NOL carryovers. *Id.*, subd. 3(a) ("A net operating loss incurred during the taxable year shall be a net operating loss carryover to each of the 15 taxable years following the taxable year of such loss."). The dispute in this case revolves around the following two provisions of subdivision 3, and the emphasized passage in particular:

(c) Where a corporation apportions its income under the provisions of section 290.191, the net operating loss deduction incurred in any taxable year shall be allowed to the extent of the apportionment ratio of the loss year.

²⁰ Stip. ¶ 16.

²¹ Stip. ¶ 17.

²² Stip. ¶ 17; Exs. J7, J8.

(d) The provisions of sections 381, 382, and 384 of the Internal Revenue Code apply to carryovers in certain corporate acquisitions and special limitations on net operating loss carryovers. *The limitation amount determined under section 382 shall be applied to net income, before apportionment, in each post change year to which a loss is carried.*

Id., subd. 3(c)-(d) (emphasis added). Sinclair apportions its income under section 290.191, and acquired KLGIT, which had accumulated NOLs subject to the section 382 limitation. The precise issue is how that limitation applies under subdivision 3(d).

VI. THE PARTIES' INTERPRETATIONS

The Commissioner contends that subdivisions 3(c) and 3(d); the definitions of “net income” and “taxable income”; and the apportionment provisions of section 290.191—when read together—render the second sentence of subdivision 3(d) ambiguous with respect to application of the section 382 limitation.²³ In the Commissioner’s view, that limitation is to be applied *twice*.²⁴ First, the limitation is applied *without* being apportioned (“before apportionment”) to a taxpayer’s Minnesota “net income.”²⁵ Second, the limitation *is* apportioned, and is then applied to a taxpayer’s Minnesota “taxable income.”²⁶ The Commissioner bases this interpretation on Revenue Notice 99-07, which first announced her double-application theory.²⁷ The Commissioner argues that her interpretation of the contested statutory language is “reasonable,”²⁸ and that we should defer to it because it is “longstanding.”²⁹

²³ Comm’r’s Mem. Supp. Summ. J. 12.

²⁴ Comm’r’s Mem. Supp. Summ. J. 1-2, 5, 12.

²⁵ Comm’r’s Mem. Supp. Summ. J. 12.

²⁶ Comm’r’s Mem. Supp. Summ. J. 12.

²⁷ Comm’r’s Mem. Supp. Summ. J. 15-16 (discussing Minnesota Department of Revenue, Revenue Notice 99-07).

²⁸ Comm’r’s Mem. Supp. Summ. J. 5, 10, 12.

²⁹ Comm’r’s Mem. Supp. Summ. J. 15-16.

Sinclair contends that “the Commissioner must follow the statute and must not apportion the section 382 limitation.”³⁰ In Sinclair’s view, “[t]he statute says ‘before apportionment,’ so no apportionment ratio is to apply to the section 382 limitation.”³¹ Sinclair thus argues that “the *unapportioned* section 382 limitation should be ‘applied to’ the *unapportioned* net income.”³² Sinclair further contends that “[t]he Commissioner’s position, as set forth in Revenue Notice 99-07, does not follow the statutory directive,”³³ and observes that this court has previously rejected, as contrary to the plain meaning of subdivision 3(d), the very position the Commissioner now urges.³⁴

The parties’ differing interpretations significantly affect Sinclair’s use of the KLGT NOLs. Because the Commissioner—in her *second* application of the section 382 limitation—apportions the limitation amount (using Sinclair’s present-taxable-year apportionment ratios of approximately one percent) before applying it to “taxable income,” she radically limits Sinclair’s use of the KLGT NOLs.³⁵ Indeed, of the \$4,169,900 accumulated NOLs KLGT had as of its May 12, 1998 acquisition by Sinclair, \$3,562,992 “expire” unused under the Commissioner’s theory.³⁶ Under Sinclair’s interpretation, in contrast, Sinclair is able to use all of the KLGT NOLs before any of

³⁰ Appellants’ Mem. Supp. Summ. J. 2.

³¹ Appellants’ Mem. Supp. Summ. J. 14.

³² Appellants’ Mem. Supp. Summ. J. 15.

³³ Appellants’ Mem. Supp. Summ. J. 15.

³⁴ Appellants’ Mem. Supp. Summ. J. 2-3 & nn.2-3 (discussing *Express Scripts, Inc. v. Comm’r of Revenue*, No. 8272-R, 2012 WL 3642291, at *13-15 (Minn. T.C. Aug. 20, 2012) (concluding that “the Commissioner’s methodology for applying a section 382 limitation for Minnesota tax purposes is unsupported by the plain language of” section 290.095, subd. 3(d))).

³⁵ See Ex. J7.

³⁶ Ex. J7. If a Minnesota NOL cannot be used within 15 years, it expires. See Minn. Stat. § 290.095, subd. 3(a) (“A net operating loss ... [is] a net operating loss carryover to each of the 15 taxable years following the taxable year of such loss.”).

them expire.³⁷ The expirations generated by the Commissioner’s interpretation compelled Sinclair to use NOLs other than those it acquired through the KLGT acquisition to offset a significant amount of post-change income *before the years at issue* and, consequently, made those non-KLGT NOLs unavailable for use *during the years at issue*.³⁸

Sinclair asks us for summary judgment adopting its interpretation of subdivision 3(d); approving its use of the KLGT NOLs; and ruling that it is entitled to use specified amounts of non-KLGT NOLs during the years at issue.³⁹ The Commissioner asks us for summary judgment granting essentially contrary relief and affirming her order.⁴⁰

VII. GOVERNING PRINCIPLES

Summary judgment shall be rendered if the pleadings, the record in the case, and any supporting affidavits show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03; *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). When, as here, parties file cross-motions for summary judgment, they tacitly agree that there are no genuine issues of material fact. *Am. Family Mut. Ins. Co. v. Thiem*, 503 N.W.2d 789, 790 (Minn. 1993). Summary judgment is a suitable vehicle for addressing the application of law to undisputed facts. *See A. J. Chromy Constr. Co. v. Commercial Mech. Serv., Inc.*, 260 N.W.2d 579, 581 (Minn. 1977).

“The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature.” Minn. Stat. § 645.16 (2016). Legislative intent is determined

³⁷ See Ex. J8.

³⁸ Compare Ex. J7, with Ex. J8.

³⁹ Appellants’ Proposed Findings of Fact & Conclusions of Law (filed Apr. 7, 2017); Ex. J8.

⁴⁰ Comm’r’s Proposed Order (filed Apr. 7, 2017).

“primarily from the language of the statute itself.” *Brayton v. Pawlenty*, 781 N.W.2d 357, 363 (Minn. 2010) (quoting *Gleason v. Geary*, 214 Minn. 499, 516, 8 N.W.2d 808, 816 (1943)). Courts use statutory canons of interpretation to determine a statute’s meaning. *Laase v. 2007 Chevrolet Tahoe*, 776 N.W.2d 431, 435 (Minn. 2009). Under pertinent canons, “words and phrases are construed according to rules of grammar and according to their common and approved usage; but technical words and phrases and such others as have acquired a special meaning ... are construed according to such special meaning or their definition.” Minn. Stat. § 645.08(1) (2016). “Every law shall be construed, if possible, to give effect to all its provisions.” Minn. Stat. § 645.16.

When initially ascertaining the meaning of a particular provision, courts consider related provisions: “It is a cardinal rule of statutory construction that a particular provision of a statute cannot be read out of context but must be taken together with other related provisions *to determine its meaning*.” *Kollodge v. F. & L. Appliances, Inc.*, 248 Minn. 357, 360, 80 N.W.2d 62, 64 (1956) (emphasis added). Courts thus “interpret each section in light of the surrounding sections to avoid conflicting interpretations,” *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000), and to “harmonize and give effect to all its parts,” *Van Asperen v. Darling Olds, Inc.*, 254 Minn. 62, 73-74, 93 N.W.2d 690, 698 (1958). Likewise, separate statutes *in pari materia*—those “relating to the same person or thing or having a common purpose”—are construed in light of one another. *Apple Valley Red-E-Mix, Inc. v. State*, 352 N.W.2d 402, 404 (Minn. 1984). “When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.” Minn. Stat. § 645.16.

VIII. ANALYSIS

The contested provision in this case reads: “The limitation amount determined under section 382 shall be applied to net income, before apportionment, in each post change year to

which a loss is carried.” Minn. Stat. § 290.095, subd. 3(d). It contains a simple, imperative sentence with a parenthetical interjection. We have no difficulty applying the words of the statute to the situation presented and therefore reject the Commissioner’s alternative interpretation.

A. Plain Meaning

Stripped of its parenthetical, the statute commands that “[t]he limitation amount determined under section 382 shall be applied to net income ... in each post change year to which a loss is carried.” Minn. Stat. § 290.095, subd. 3(d). The limitation amount to be applied is plainly that computed under I.R.C. § 382. The amount to which the limitation is applied is plainly Minnesota “net income” as defined by section 290.01, subdivision 19, for “each post change year to which a loss is carried.” Minn. Stat. § 290.095, subd. 3(d). The provision’s grammatical subject and object could not be clearer.

The notion of “applying” the section 382 limitation “to” an income figure is borrowed directly from federal law. Section 382 provides that “[t]he amount of the taxable income ... for any post-change year *which may be offset* by pre-change losses shall not exceed the section 382 limitation for such year.” I.R.C. § 382(a) (emphasis added). Thus, section 382 limits not federal NOL carryovers themselves but, instead, the amount of federal taxable income that federal NOL carryovers may be used to “offset.” *See Berry Petroleum*, 104 T.C. at 633 (“The section 382 limitation does not directly limit the amount of the loss carryovers of an old loss corporation. It limits only their continuing usefulness.” (citations omitted)). In drafting section 290.095, the Legislature determined that the section 382 limitation should be “applied to” Minnesota “net income.” *See* Minn. Stat. § 290.095, subd. 3(d). Under Minnesota law, therefore, as under federal law, the limitation restricts not the amount of Minnesota NOL carryovers, but the amount of Minnesota “net income” that Minnesota NOL carryovers can offset. The maximum amount of post-change net income a Minnesota taxpayer can offset with acquired NOLs for a given taxable

year is either (1) the taxpayer's net income, or (2) "[t]he limitation amount determined under section 382," whichever is less.⁴¹

The meaning of the basic imperative sentence contained in subdivision 3(d) is plain. The question, then, is whether ambiguity arises when restoring the omitted parenthetical. Immediately after "net income" follows the phrase "before apportionment," set off by commas. "[I]t is a rule of grammar that nonrestrictive or parenthetical clauses in sentences are set off by commas." *DiFiore v. Am. Airlines, Inc.*, 561 F. Supp. 2d 131, 135 (D. Mass. 2008) (citing *The Chicago Manual of Style* 247-48, 250 (15th ed. 2003); William Strunk, *The Elements of Style* 2-5 (4th ed., Longman 2000)); *see also Dale v. Beta-C, Inc.*, 574 N.W.2d 697, 702 (Mich. Ct. App. 1997) ("Proper syntax provides that commas usually set off words, phrases, and other sentence elements that are parenthetical or independent."⁴² Its parenthetical structure indicates that the phrase "before apportionment" is a nonrestrictive modifier:

A nonrestrictive phrase or clause is one that could be taken out of the sentence without changing the meaning. It gives additional description or information that is incidental to the central meaning of the sentence

Bryan A. Garner, *The Redbook: A Manual on Legal Style* § 1.6(a) (3d ed. 2013).

That a phrase might "be taken out of [a] sentence without changing the meaning" does not render it surplusage because, by hypothesis, a nonrestrictive (parenthetical) phrase "gives

⁴¹ If net income is less than the section 382 limitation, net income is the effective NOL carryover limit because carryovers cannot be used to *create* a new net operating loss (reduce taxable income below zero). *See* Minn. Stat. § 290.095, subs. 3(b), 4; *cf.* I.R.C. § 172(b)(2).

⁴² The Legislature's use of commas rather than parentheses to set off the parenthetical phrase here was appropriate because the sentence is quite short. *See Stratton v. Wallace*, No. 11-CV-74-A, 2014 WL 3809479, at *4 (W.D.N.Y. Aug. 1, 2014) ("For the drafter, parenthetical expressions are the best available device for combining complicated ideas within a single sentence in a way that achieves clarity.... Most parenthetical expressions could just as well be set off by commas instead, of course, and commas are generally better when the sentence involved is short and simple." (quoting Lawrence E. Filson & Sandra L. Strokkoff, *The Legislative Drafter's Desk Reference* § 23.6 (2d ed. 2007))).

additional description or information.” *Redbook* § 1.6(a). Courts so hold. *See, e.g., Holmes Fin. Assocs., Inc. v. Resolution Tr. Corp.*, 33 F.3d 561, 566-67 (6th Cir. 1994) (“Congress’ choice of punctuation is significant. The parentheses indicate that the matter enclosed is in addition to, or in explanation of, the rest of the sentence.”); *Artesian Water Co. v. Gov’t of New Castle Cty.*, 605 F. Supp. 1348, 1355 (D. Del. 1985) (rejecting argument that “[n]o person (including the United States or any State)” contains surplusage because the parenthetically named entities were already defined as “persons,” and instead concluding that “[a] more reasonable explanation is that the parenthetical clauses were added for emphasis”). Reading subdivision 3(d)’s parenthetical phrase, “before apportionment,” as furnishing additional information about the adjacent noun, “net income,” is not only mandatory, *see* Minn. Stat. § 645.08(1) (“phrases are construed according to rules of grammar”), it also helps “give effect to all [subdivision 3(d)]’s provisions,” Minn. Stat. § 645.16.

Statutory context makes plain why the Legislature included in subdivision 3(d) a parenthetical addressing apportionment. The immediately preceding subdivision provides that “[w]here a corporation *apportions its income ...*, the net operating loss deduction incurred in any taxable year shall be allowed *to the extent of the apportionment ratio* of the loss year.” Minn. Stat. § 290.095, subd. 3(c) (emphasis added). Subdivision 3(c) thus deals with two *apportioned* amounts—income and loss. Subdivision 3(d), in contrast, provides that the section 382 limitation must be applied to Minnesota “net income,” an *unapportioned* amount, that is then apportioned to determine Minnesota “taxable net income.” *See* Minn. Stat. § 290.01, subd. 22(3) (defining Minnesota “taxable net income” as “the part of net income that is allocable to Minnesota by ... apportionment”).

Because the overall statutory context involves both apportioned and unapportioned amounts, the Legislature chose to emphasize that subdivision 3(d) involves *unapportioned* amounts. The parenthetical phrase “before apportionment” reflects the Legislature’s appreciation that “net income” is *not* an apportioned amount, and emphasizes its intention that the section 382 limitation be applied to net income “*before* [its eventual] apportionment” to derive Minnesota “taxable net income.” *See Goodyear Tire & Rubber Co. v. Dynamic Air, Inc.*, 702 N.W.2d 237, 244 (Minn. 2005) (“In enacting statutes, [courts] presume that the legislature acts with full knowledge of existing law.”). Considered in context, the parenthetical does not create ambiguity; it clarifies legislative intent. We therefore agree with Sinclair that under the plain meaning of subdivision 3(d), “the *unapportioned* section 382 limitation should be ‘applied to’ the *unapportioned* net income”⁴³

B. Application of Law to Facts

For purposes of section 382, KLG T’s stock value was \$52,500,000; the pertinent long-term tax-exempt rate was 5.05 percent; and, accordingly, *for federal tax purposes*, the section 382 limitation on the use of KLG T’s accumulated pre-change losses was \$2,651,250 per year, prorated to \$1,692,442 for the post-change period May 13 through December 31, 1998.⁴⁴ *See* I.R.C. § 382(b)(3)(B) (providing for a prorated amount in partial years). Based on our conclusion that section 290.095, subdivision 3(d), adopts the section 382 limitation without modification (without apportionment), we conclude that the subdivision 3(d) limitation on the use of KLG T’s accumulated pre-change losses *for state tax purposes* was likewise \$2,651,250 per year, again prorated to \$1,692,442 for the remainder of 1998.

⁴³ Appellants’ Mem. Supp. Summ. J. 15.

⁴⁴ Stip. ¶ 17; Exs. J7, J8.

As previously indicated, the restrictive effect of section 382 varies depending on the relationship between the loss corporation's NOLs and its pre-change stock value. As of May 12, 1998, KLGT's accumulated NOLs for state tax purposes totaled \$4,169,900,⁴⁵ or approximately eight percent of its pre-change stock value.⁴⁶ Although the ratio between KLGT's NOLs and value was therefore sufficient to subject Sinclair to *some* limitation under section 382 (and subdivision 3(d)), that limitation was modest indeed. Given the \$1,692,442 prorated limitation for 1998 and the full-year \$2,651,250 limitation for 1999, Sinclair's limitation for the first two post-change years—taken together—was \$4,343,692. Subdivision 3(d) thus allowed Sinclair to use *all* of KLGT's accumulated NOLs within two years. The statute permitted this tempo of use because the financial benefit would not exceed the return on the investment of KLGT's stock value at the applicable long-term tax-exempt rate.

Sinclair had no Minnesota taxable income to offset in 1998. Consequently, its subdivision 3(d) limitation for 1999 was increased by \$1,692,442, to \$4,343,692. In 1999, Sinclair had \$409,465 of Minnesota taxable income. Considering that subdivision 3(d) would have allowed Sinclair to use all \$4,169,900 of the KLGT NOLs to offset Minnesota taxable income in 1999, KLGT NOLs in the lesser amount of \$409,465 were plainly available for this purpose. For taxable years 2000 and beyond, subdivision 3(d) effectively placed no limitation on Sinclair's right to use the KLGT NOLs. Consequently, we conclude that Sinclair's use of the KLGT NOLs, as

⁴⁵ Stip. ¶ 15.

⁴⁶ $\$4,169,900 \div \$52,500,000 = 0.0794$.

summarized in Exhibit J8, was proper under subdivision 3(d), and that Sinclair is entitled to the relief it requests.⁴⁷

C. Commissioner's Interpretation Is Unsupported

The Commissioner argues that when “considering the definition of ‘net income’ and its relationship to ‘taxable income’ subject to Minnesota corporate franchise tax, reading subdivision 3(d) together with subdivision 3(c) and section 290.191 demonstrates an ambiguity with respect to apportionment” in subdivision 3(d).⁴⁸ Observing (1) that NOLs are deducted from (apportioned) “taxable net income” to determine “taxable income,” and (2) that the section 382 limitation is “applied to net income, before apportionment,” the Commissioner argues that it is “reasonable to read these provisions together” to require a double application of the section 382 limitation—once *before* apportionment and once *after*.⁴⁹ She reads the provisions, in other words, as requiring: “(1) that the federal section 382 limitation applies to net income before apportionment, and (2) the state limitation continues to apply at the taxable income level after apportionment.”⁵⁰ We disagree.

Even if we credited the Commissioner's ambiguity argument, there is simply no textual basis for the Commissioner's interpretation of section 290.095, subdivision 3(d). First, subdivision 3(d) provides for only a single application of the section 382 limitation: to *net income*. Nowhere does the Legislature provide for a *further* application of any kind. See *Hutchinson Tech., Inc. v. Comm'r of Revenue*, 698 N.W.2d 1, 8 (Minn. 2005) (“[W]e will not add requirements to

⁴⁷ Because we rule that Sinclair properly used the KLGT NOLs, we need not reach Sinclair's alternative argument that it should not be penalized for a substantial understatement of tax. See Appellants' Mem. Supp. Summ. J. 18-20.

⁴⁸ Comm'r's Mem. Supp. Summ. J. 12.

⁴⁹ Comm'r's Mem. Supp. Summ. J. 12.

⁵⁰ Comm'r's Mem. Supp. Summ. J. 12.

the statute beyond those specified by the legislature.”). Second, the Commissioner’s theory—in its second application—would apply the section 382 limitation to an entirely separate measure: to *taxable income*. Subdivision 3(d), however, does not mention taxable income, and the Commissioner does not explain how application of the limitation to that measure could possibly be justified by the text of subdivision 3(d). Finally, the Commissioner would apply to taxable income a *modified* version of the section 382 limitation, one apportioned by the new loss corporation’s present-year apportionment ratio.⁵¹ There is no textual basis for this requirement, either. Indeed, whereas subdivision 3(c) provides that an NOL deduction “shall be allowed to the extent of the apportionment ratio of the loss year,” subdivision 3(d)—which does not provide for apportionment of the section 382 limitation—perforce furnishes no similar guidance concerning the proper apportionment ratio.

In an attempt to justify apportionment of the section 382 limitation, the Commissioner says that “[b]y including the words, ‘before apportionment,’ the Legislature did not intend to preclude apportionment of the limitation,”⁵² and she argues that the Legislature did not need to specify an apportionment ratio because the present taxable year is a default.⁵³ These arguments about what subdivision 3(d) doesn’t mean, and doesn’t say, reveal the difficulty with the Commissioner’s interpretation: the absence of statutory text to support it. We reached the same conclusion five years ago: “The Commissioner’s methodology for applying a section 382 limitation for Minnesota tax purposes is unsupported by the plain meaning of the statute and would create an unnecessary

⁵¹ See Ex. J7.

⁵² Comm’r’s Mem. Opp’n Summ. J. 4-5 (filed Apr. 28, 2017).

⁵³ Comm’r’s Mem. Opp’n Summ. J. 3.

disconnect between Minnesota and federal law.” *Express Scripts*, 2012 WL 3642291, at *15.

Because the Commissioner’s theory is unsupported by the statutory text, it is not reasonable.

The Commissioner cites Revenue Notice 99-07 as evidence that her double-application theory is a longstanding agency interpretation entitled to deference.⁵⁴ “Revenue notices do not have the force and effect of law and have no precedential effect.” Minn. Stat. § 270C.07, subd. 2 (2016). Accordingly, “[o]ur deference to a revenue notice is ... commensurate with its inherent persuasiveness.” *Ashland Inc. v. Comm’r of Revenue*, No. 08819-R, 2016 WL 6635813, at *9 (Minn. T.C. June 27, 2016) (internal quotation marks and citations omitted), *aff’d* ___ N.W.2d ___, 2017 WL 3272091 (Minn. Aug. 2, 2017). Revenue Notice 99-07 makes no attempt whatsoever to ground its double-application theory in the text of subdivision 3(d).⁵⁵ In the final analysis, the notice sets forth not an *interpretation* of subdivision 3(d) but, instead, a diktat imposing agency will. In any event, because we interpret the statute in accordance with its plain meaning (finding no ambiguity), we have no occasion to rely on an administrative interpretation. Minn. Stat. § 645.16 (authorizing consultation of “[l]egislative and administrative interpretations” only when a statute is ambiguous); *Hutchinson Tech.*, 698 N.W.2d at 14 (“Administrative interpretations do not control our interpretation of a statute when the language of the statute is clear.”).

The Commissioner argues that her apportioned section 382 limitation had a “meaningful impact,” whereas allowing Sinclair to use the full section 382 limitation—when only one percent of its post-change income was allocable to Minnesota—would be “completely out of scale to

⁵⁴ Comm’r’s Mem. Supp. Summ. J. 15-16 & n.4.

⁵⁵ See Rev. Not. 99-07 (“In a post-change year, the amount of Minnesota net income used to determine the net operating loss deduction, with regard to pre-change losses, is limited to the IRC § 382 limitation determined for that year. *This limited net income is then multiplied by that post-change year’s apportionment percentage to determine the limited amount of (apportioned) taxable net income that is eligible for a net operating loss deduction for those losses being carried forward from pre-change years.*” (emphasis added)).

[Sinclair's] Minnesota income.”⁵⁶ We agree that the Commissioner's approach produced a meaningful impact, but conclude that it was not one intended by the Legislature.

By adopting the federal section 382 limitation, the Legislature evinced its intention to discourage the purchase of corporations solely for their NOLs.⁵⁷ See, e.g., *Euclid-Tennessee, Inc.*, 352 F.2d at 994-95. To accomplish this goal, section 382 limits the income a purchaser may offset with acquired NOLs so as to approximate the return on an alternative investment at the applicable long-term tax-exempt rate. See *Berry Petroleum*, 104 T.C. at 633-34. That very policy objective was effectuated under subdivision 3(d)—without apportionment of the section 382 limitation. Here, the applicable five-percent long-term rate would produce a ten-percent return in two years. As discussed above, the KLGT NOLs amounted to approximately eight percent of its pre-change stock value. Therefore, under the Legislature's chosen “objective standard,” although Sinclair could not have used all of the KLGT NOLs in one year, it could have used them all within two years. See *Six Seam Co., Inc.*, 524 F.2d at 352. The unapportioned limitation fully accomplished the anti-trafficking objective of section 382 as applicable at the state level though subdivision 3(d).

⁵⁶ Comm'r's Mem. Supp. Summ. J. 16-17. The Commissioner argues that applying the unapportioned section 382 limitation is contrary to the “purpose and goal of the apportionment provisions ... to properly and fairly approximate the income of a multi-state business that is attributable to its business activities in Minnesota.” Comm'r's Mem. Supp. Summ. J. 12-13. Taxpayers, however, may take NOL deductions only “to the extent of the apportionment ratio of the loss year.” Minn. Stat. § 290.095, subd. 3(c). Accordingly, only pre-change NOLs attributable to Minnesota are available to offset post-change Minnesota income. See also *Nat'l Can Corp. v. Comm'r of Revenue*, 437 N.W.2d 416, 421 (Minn. 1989) (“The obvious purpose of subd. 3(c) is to ensure corporations which apportion their income are allowed to deduct only a proportionate share of the expense of producing that income and the classification is reasonably related to that purpose. ... By requiring corporations to apportion their net operating loss carryovers, the state can achieve its purpose of fairly allocating tax burdens and allowing deductions on a proportionate basis to income.” (internal citations omitted)). Even if there were sound reasons to apportion the section 382 limitation, the decision whether to do so is for the Legislature.

⁵⁷ The Commissioner agrees that this was the Legislature's objective. Comm'r's Mem. Supp. Summ. J. 9, 14.

Necessarily, then, any *further* restriction on Sinclair’s use of NOLs would implement policy goals extrinsic to subdivision 3(d).

We agree that the Commissioner’s approach produced an additional restriction, and a significant one at that.⁵⁸ Rather than being able to use all \$4,169,900 of the KLGT NOLs during the *fifteen* post-change years they were available under Minnesota law, the Commissioner’s apportioned section 382 limitation entailed the expiration of \$3,526,992 of those NOLs—roughly 85 percent.⁵⁹ The Commissioner’s approach therefore produced a radically sharper restriction upon the use of acquired NOLs than that required or authorized by subdivision 3(d). Indeed, this additional restriction is actually *contrary* to subdivision 3(d), which *also* incorporates the provisions of I.R.C. § 381. Congress adopted that statute “to protect taxpayers against the loss of favorable tax attributes,” *World Serv. Life Ins. Co.*, 471 F.2d at 251 (internal quotation marks and citation omitted), including acquired NOLs. Contrary to the permissive intention of the Legislature in adopting section 381 along with section 382, the Commissioner’s approach deprives taxpayers of a favorable tax attribute.

For all the foregoing reasons, we grant Sinclair’s motion for summary judgment.

B.S.D.

⁵⁸ Compare Ex. J7, with Ex. J8.

⁵⁹ Ex. J7.