

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:	)	OTA Case No. 230713916
KIMCO REALTY CORPORATION AND	)	
SUBSIDIARIES	)	
	)	
	)	

OPINION

Representing the Parties:

For Appellants:	Kathy Freeman, Representative
	Tony Fuller, Representative
	Jaemin Ko, Representative

For Respondent:	Ken Havens, Attorney
	Katie Frank, Attorney

For Office of Tax Appeals:	William J. Stafford, Attorney
----------------------------	-------------------------------

T. LEUNG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, Kimco Realty Corporation (Kimco) and Subsidiaries (appellants) appeal an action by the Franchise Tax Board (respondent) proposing additional tax of \$203,748 (plus interest) and \$81,921 (plus interest) for the 2014 and 2015 taxable years (the taxable years at issue), respectively.

Office of Tax Appeals (OTA) Panel Members Josh Lambert, Greg Turner, and Tommy Leung held an oral hearing for this matter in Sacramento, California on October 22, 2025. At the conclusion of the hearing, the record was closed, and this matter was submitted for an opinion pursuant to California Code of Regulations, title 18, (Regulation) section 30209(b).

ISSUES

1. Whether respondent's action imposing tax of \$203,748 and \$81,921 for the 2014 and 2015 taxable years, respectively, was erroneous.
2. If appellants prevail on Issue 1, whether their net operating loss (NOL) carryovers need to be adjusted.

FACTUAL FINDINGS

1. Kimco is a real estate investment trust (REIT) that owns and operates shopping centers through numerous subsidiaries.
2. One of Kimco's wholly-owned subsidiaries during the taxable years at issue was Kimco Realty Services, Inc. (KRS), a taxable REIT subsidiary.
3. For the taxable years at issue, Kimco and KRS were engaged in a unitary business and Kimco filed a California water's-edge group return (Form 100W) which included Kimco and KRS as members of a combined reporting group; Kimco also filed federal Forms 1120-REIT for 2014 and 2015, which did not include KRS.
4. For 2014 and 2015, KRS paid dividends to Kimco, which included \$67,590,004 and \$647,229 (qualified dividends), respectively. Those qualified dividends were paid from earnings and profits generated from KRS's qualified REIT activities and were eliminated as intercompany dividends pursuant to R&TC section 25106.
5. Kimco distributed its entire federal taxable income (which, as relevant, included the qualified dividends) to its shareholders for each respective tax year and took dividends-paid deductions (DPD) under Internal Revenue Code (IRC) section 857(b)(2)(B).
6. California begins its computation of a REIT's taxable income by using the REIT's federal income after accounting for the DPD—as set forth, for the taxable years at issue, on line 22 of federal Form 1120-REIT and line 1 of California Form 100W.
7. When preparing its California Forms 100W for the taxable years at issue, Kimco eliminated the respective qualified dividends pursuant to R&TC section 25106 on line 10 of the Forms 100W, even though such dividends had not been included in Kimco's California income on line 1 of the respective Forms 100W because of the claimed DPD.
8. Respondent examined appellants' tax returns for the taxable years at issue and, among other adjustments, disallowed their R&TC section 25106 elimination of the qualified dividends.
9. Appellants protested, and while they were successful with respect to other issues, respondent issued Notices of Action (NOAs) affirming the disallowance of the R&TC section 25106 elimination of the qualified dividends.

DISCUSSION

Issue 1: Whether respondent's action imposing tax of \$203,748 and \$81,921 for the 2014 and 2015 taxable years, respectively, was erroneous.

A REIT is defined in IRC section 856 as a corporation, trust, or association that would be taxed as a domestic corporation (but for its treatment as a REIT) and that meets several organizational, income, ownership, asset, and distribution requirements, which are outlined in IRC sections 856 through 860. California generally conforms to federal REIT rules, with specific modifications. (See R&TC, §§ 24870, 24872, 24872.4, 24872.6, 24872.7.)

With respect to the DPD, if an electing entity qualifies for REIT status and meets other specified conditions, the portion of its income that is distributed to its shareholders as a dividend distribution each year is deductible by the REIT (whereas a regular subchapter C corporation cannot deduct such distributions) and is typically taxed at the shareholder level. (IRC, §§ 857(a)(1), (b)(2)(B), 561.) Thus, in general, a REIT can use a DPD under IRC section 857(b)(2)(B) to avoid paying federal income tax at the entity level.

Under California law, where one corporation pays dividends to another corporation in the same unitary group, to the extent those dividends are paid out of earnings and profits of the unitary business, those dividends are *eliminated* from the recipient's income. (R&TC, § 25106(a).) Furthermore, except for purposes of applying R&TC section 24345 (which deals with deductions for taxes and licenses), the dividends "*shall not be taken into account under [R&TC] Section 24344 [relating to interest deductions] or in any other manner in determining the tax of any member of the unitary group.*" (R&TC, § 25106(a), emphasis added.) The purpose of R&TC section 25106 is to prevent double taxation of dividend payments among members of a unitary group. (R&TC, § 25106(b); *Fujitsu IT Holdings, Inc. v. Franchise Tax Board* (2004) 120 Cal.App.4th 459, 477 (*Fujitsu*).)

Appellants argue that the plain language of R&TC section 25106 expressly mandates the elimination of intercompany dividends that are paid out of income of a unitary business and, therefore, absent an applicable statutory exception, the qualified dividends for the respective taxable years at issue are eligible for elimination under R&TC section 25106; to deny the claimed dividend elimination would subject appellants to double taxation. Respondent contends that allowing appellants to claim the R&TC section 25106 dividend elimination would amount to granting appellants an impermissible double deduction or double tax benefit, citing to cases

such as *Ilfeld*,¹ but otherwise does not contradict the mandatory elimination language contained in R&TC section 25106.² As explained below, the arguments propounded by the parties miss the mark.

The first rule of statutory interpretation is “read on.” (*Arkansas Game and Fish Comm’n v. U.S.* (2012) 568 U.S. 23, 36.) In this instance, the parties need not look far; R&TC section 25106(a) mandates (as relevant here) that once the intercompany dividend is eliminated, it cannot be considered “in determining the tax of any member of the unitary group.” Furthermore, the law provides that “[s]ubchapter M of Chapter 1 of Subtitle A of the Internal Revenue Code, relating to regulated investment companies and real estate investment trusts, shall apply, *except as otherwise provided in this part.*” (R&TC, § 24870, emphasis added.) Thus, when respondent states in its brief that “California’s modifications to the REIT rules of Subchapter M are contained in R&TC sections 24872, 24872.4, 24872.6, and 24872.7” (which appellants disputed at the hearing), it incorrectly expands California’s conformity with the federal REIT tax rules, as contained in the IRC. The term “this part” in R&TC section 23870 refers to the entirety of Part 11, Division 2, of the R&TC, otherwise known as the Corporation Tax Law. (See R&TC, § 23001.) Part 2 spans from R&TC section 23001 to R&TC section 25141, and includes R&TC sections 25106 and 24425.³ Simply put, California does not completely conform to the federal REIT tax rules, but subordinates the relevant REIT IRC sections where they conflict with the Corporation Tax Law.

Thus, while the law allows appellants to eliminate the qualified dividends, the law also bars appellants from simultaneously taking a DPD or otherwise taking into account those same

¹ *Charles Ilfeld Co. v. Hernandez* (1934) 292 U.S. 62, 68.

² Regulation section 25106.5-1(a)(2) appears to support respondent’s contention, but the parties neither cite to nor attempt to distinguish its provisions. This regulation provides as follows: “When a federal regulation that is incorporated explicitly provides that no federal tax benefit can be derived from its application, similarly, when that regulation is applied for California purposes, no California tax benefit can be derived from its application.”

³ “No deduction shall be allowed for any amount otherwise allowable as a deduction which is allocable to one or more classes of income not included in the measure of the tax imposed by this part, regardless of whether that income was received or accrued during the taxable year.” (R&TC, §24425(a).) While a literal application of R&TC section 24425(a) would disallow appellants’ claimed DPD, R&TC section 25106(a)’s directive to not consider the eliminated dividends “in determining the tax of any member of the unitary group” can serve as a bar to denying the use of R&TC section 24425(a) for this purpose. (See *Apple, Inc. v. Franchise Tax Bd.* (2011) 132 199 Cal.App.4th 1, 23, fn. 26.) Fortunately, the outcome of this appeal does not rely on R&TC section 24425(a), and resolution of the apparent tension between R&TC sections 24425(a) and 25106(a) will be left for another day.

qualified dividends to determine their tax. (See *Fujitsu, supra*, at p. 477.⁴) Paradoxically, this methodology conflicts with the approach taken by respondent – i.e., allowing the DPD and denying the R&TC section 25106 dividend elimination. Nevertheless, the function of OTA’s appeals process is to determine the correct amount of tax. (*Appeal of Robinson*, 2018-OTA-059P.) When the ruling on an issue is necessary to decide an appeal, and the record contains sufficient facts to permit it, an OTA panel can raise that issue, regardless of whether the parties have pled it. (See *Barnette v. Commissioner*, T.C. Memo. 1992-595.) Furthermore, in reviewing a proposed deficiency determination, an OTA panel’s primary concern is “with the question [of] whether under the law . . . [an] additional amount of tax is due,” and an OTA panel is not limited to only considering respondent’s theories and “the manner in which [it] determined an additional amount of tax to be due.” (See *Appeal of Great Northern Railway Co.* (39-SBE-009) 1939 WL 310; cf. *Appeal of Sierra Pacific Industries* (94-SBE-002) 1994 WL 14076 [if the assertion of a new theory by respondent (which is not the case here) merely clarifies or develops the original determination without being inconsistent with it or increasing the amount of the deficiency, it is not a new matter that requires the shifting of the burden of proof to respondent].)

Consequently, to arrive at the “correct amount of tax,” appellants cannot claim both the R&TC section 25106 dividend elimination and the DPD for their qualified dividends; to do so would violate R&TC section 25106 and grant appellants an impermissible double tax benefit. Instead, appellants will be allowed to eliminate their qualified dividends, but will also need to take a California modification to add back their claimed DPD. In essence, respondent’s impositions for the taxable years at issue would be sustained, albeit using a different legal analysis.

With respect to appellants’ argument regarding double taxation, any such outcome is a result of appellants’ formation of its taxable REIT subsidiary, KRS. While Kimco is a “tax preferred” investment vehicle in that it can claim a DPD, the same cannot be said for KRS, which is treated as a regular subchapter C corporation and files a regular Form 1120. As the record shows, KRS and Kimco could not file consolidated federal income tax returns for the taxable years at issue, and KRS could not claim a DPD when it distributed the qualified dividends to Kimco. In turn, Kimco could not claim a dividends received deduction when it received the qualified dividends from KRS. Hence, while Kimco recognized the qualified

⁴ “The Legislature could hardly have chosen words with a clearer meaning. Simply put, section 25106 ensures that amounts included in the combined income of a unitary group can be moved (in the form of dividends) among members of the unitary group without tax consequence.” (*Fujitsu, supra*, at p. 477.)

dividends as income upon receipt, Kimco could use its DPD when it distributed those same dividends to its shareholders. Hence, for federal tax purposes, the income that generated the qualified dividends was taxed once at the entity level through KRS, and then again through Kimco's shareholders. For California tax purposes, because Kimco and KRS were engaged in a unitary business, they were required to be included in a combined report. (See R&TC, §§ 25101, 25102.) When KRS earned the income that was later distributed to Kimco as qualified dividends, KRS had to recognize that income and include it in the combined report as group combined report business income. (See generally Cal. Code Regs., tit. 18, § 25106.5.) Under California's intercompany transactions regime, Kimco was allowed to eliminate those qualified dividends from income. After so doing, the income earned by KRS would only be taxed once at the group, or entity level. When Kimco later distributed the qualified dividends to its shareholders, those shareholders would then be subject to tax on those dividends. In summary, for federal income tax purposes, there is one entity tax on the earned income and one shareholder tax on the qualified dividends; for California tax purposes, there is one entity tax on the earned income and one shareholder tax on the qualified dividends. The United States Supreme Court has found that this form of "double taxation" is permissible. (See *Moore v. U.S.* (2024) 602 U.S. 572, fn. 9.)

But for the existence of KRS and KRS's earnings which became the source of the qualified dividends, Kimco would have avoided paying any tax on the qualified dividends using the DPD. Because Kimco chose to form KRS, it must accept the tax consequences of that choice, whether contemplated or not, and may not enjoy the benefit of some other route it might have chosen to follow but did not. (See *Commissioner v. National Alfalfa Dehydrating & Milling Co.* (1974) 417 U.S. 134, 149; *Appeal of Sierra Pacific Industries*, supra.)

Issue 2: If appellants prevail on Issue 1, whether their net operating loss (NOL) carryovers need to be adjusted.

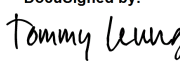
Because appellants will not prevail on Issue 1 in this appeal, there is no need for Issue 2 to be addressed.

HOLDINGS

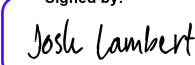
1. While appellants are entitled to claim an R&TC section 25106 dividend elimination for their qualified dividends, they cannot simultaneously claim the DPD for those same dividends. Therefore, respondent's NOAs were not erroneous.
2. There is no need to adjust appellants' NOL carryovers.

DISPOSITION

Appellants are entitled to claim the R&TC section 25106 dividend elimination for their qualified dividends, but are not allowed to claim a DPD for those same qualified dividends; in all other respects, respondent's actions are sustained.

DocuSigned by:

0C90542BE88D4E7...

Tommy Leung
Administrative Law Judge

I concur:
Signed by:

CB1F7DA37831416...

Josh Lambert
Administrative Law Judge

G. TURNER, Administrative Law Judge, Dissenting.

The issue here is whether dividend elimination under Revenue and Taxation Code (R&TC) section 25106 can be denied in order to offset an otherwise valid deduction when the consequence is deemed to produce an undesirable tax benefit for appellants. Though differing in their approaches, the majority opinion and respondent imbue R&TC section 25106 with a power and purpose that is not supported by regulatory authority, statutory construction, or relevant judicial authority. The result is dividend elimination under R&TC section 25106 becoming a tool to adjust any tax consequence within the unitary method respondent might find objectionable.

A Real Estate Investment Trust (REIT) is not a passthrough entity, but an entity that is permitted a “dividends paid deduction” (DPD) against otherwise taxable income and through which Congress intended to eliminate taxation at the entity level. (See IRC, §§ 857(b)(2)(B) and (3)(A)(ii); Treas. Reg. § 1.857-2(a)(3).) In fact, a REIT is *required* to distribute at least 90 percent of its “real estate investment trust taxable income” (REITTI) to maintain its REIT status. (Internal Revenue Code (IRC), § 857(a)(1).) Though REITs are generally proscribed from owning subsidiaries and engaging in most non-passive real estate activities, Congress in 2001 authorized REITs not only to own substantial shares of certain other companies but have wholly owned subsidiaries that can engage in many of the activities generally proscribed to REITs. (P.L. 106-170, § 546, The Tax Relief Extension Act of 1999; IRC, § 856(l).) This new type of REIT-related entity is called a “taxable REIT subsidiary” (TRS). (IRC, § 856(l).) While a REIT can derive income from the TRS,¹ the taxability of TRS income is achieved by excluding REITs from filing consolidated returns (IRC, § 1504(b)(4); Treas. Reg. § 1.1502-100) and through the adoption of certain earnings stripping rules and penalties. (See IRC, §§ 856(l)(1), 857(b)(7).) Because TRS income is federally taxable, and dividends paid to a parent REIT from TRS earnings and profits are not excludable as dividends received, dividends paid by the TRS to a parent REIT are included in REITTI. (IRC, § 857(b)(2)(A).) Consequently, dividends paid by a TRS are included in the measure of the REIT’s DPD (IRC, § 857(b)(2)) and therefore reduce the REIT’s taxable income when distributed to shareholders in the form of dividends.

California’s Corporation Tax Law (CTL) is foundationally built on a different methodology, the unitary method and formula apportionment. (*Edison California Stores v. McColgan* (1947) 30 Cal.2d 472.) The unitary method seeks to apply the same rules to a group

¹ See Rev. Rul. 2003-86.

of companies operating a unitary business as applies to a single entity engaged similarly. (*Butler Bros. v. McColgan* (1941) 17 Cal.2d 664.) This creates a bit of structural incongruity whereas here when the income of one member is intended to be eliminated. The unitary method, however, does not disregard the individual taxable entities involved in a unitary business. Rather, its function is merely to ascertain the true income of the unitary business attributable to sources within California and distribute the obligation to pay tax among the members of that unitary group which conducts a unitary business in this state. (*Appeal of Household Finance Corp.* (68-SBE-0049) 1968 WL 1678.) This second apportionment is necessary because California taxes each member of the unitary group in its individual capacity; California does not tax the unitary group as a single entity. (R&TC, § 23151(a); *Great Western Financial Corp. v. Franchise Tax Board* (1971) 4 Cal.3d 1, 5; *Edison California Stores, supra*, 30 Cal.2d at p. 481; *Appeal of Young's Market Company* (86-SBE-198) 1986 WL 22859; *Appeal of Huffy Corp* (99-SBE-005) 199 WL 386938.)

Distributing the unitary tax burden is achieved by the combined report where members of the unitary group are first required to compute their "total separate net income" from all sources before allocation and apportionment. (Cal. Code Regs., tit. 18, § 25106.5(c)(1), (b)(18).) While most corporations in a combined report determine their "net income" pursuant to R&TC section 24341 ("'[n]et income' means the gross income . . . less the deductions allowed . . ."), for purposes of the CTL, the "net income" of a REIT is equal to its "real estate investment trust income" (R&TC, § 24872(b)(2)) "as defined in Section 857(b)(2) of the Internal Revenue Code" which is REITTI with specific modifications. (R&TC, § 24872(c).) California makes no modifications to the federal definition of the DPD. (R&TC, § 24872). By expressly conforming to the IRC, the Legislature has afforded, indeed required, REITs to deduct at least 90 percent of their REITTI, which includes payments made to the REIT in the form of dividends from a TRS. The parties do not argue otherwise.

Respondent's and the majority's objection arrives on the application of R&TC section 25106. Subdivision (a)(1) of that section provides:

"In any case in which the income of a corporation is or has been determined under this chapter with reference to the income and apportionment factors of one or more other corporations with which it is doing or has done a unitary business, all dividends paid by one to another of any of those corporations shall, to the extent those dividends are paid out of the income previously described of the unitary business, be eliminated from the income of the recipient and, except for purposes of applying Section 24345, shall not be taken into account under Section 24344 or in any other manner in determining the tax of any member of the unitary group."

There is no dispute appellant REIT received dividends from its subsidiary TRS, that the TRS is unitary with appellant REIT, or that those dividends were the product of the earnings and profits of the unitary business and therefore qualify for elimination under the express terms of R&TC section 25106. Both respondent and the majority, however, have concluded that restriction of dividend elimination is warranted because the DPD otherwise produces an inappropriate benefit to appellants, though their legal rationale differ.

Respondent initially presents R&TC section 24425 as authority which disallows “[a]ny amount otherwise allowable as a deduction which is allocable to one or more classes of income not included in the measure of the tax imposed by this part.” Except, dividend elimination is not a deduction (See *Fujitsu IT Holdings, Inc. v. Franchise Tax Board* (2004) 120 Cal.App.4th 459) and the income at issue is clearly included in the measure of the tax imposed. (*Id.* at p. 477 [the “clear statutory language” of R&TC section 25106 “ensures that amounts included in the combined income of a unitary group can be moved (in the form of dividends) among members of the unitary group without tax consequence”].) Respondent ultimately settles on the “purpose and intent” of R&TC section 25106 not operating as intended here “because the DPD deduction for REITs already prevents taxation of [appellants’] intercompany dividends received.” This mischaracterizes both the DPD and R&TC section 25106. The DPD is a deduction for dividends *paid* and it is measured by REITTI to which California fully conforms. Dividend elimination under R&TC section 25106, then becomes the only malleable tool to achieve the desired end. Only respondent must contort “purpose and intent” in contrast to express language or judicial interpretation to achieve the denial of dividend elimination as a proxy for constraining the DPD.

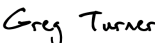
The majority opinion embraces respondent’s objection; however, their path to denying dividend elimination contorts R&TC section 25106 into a general unitary exception to federal conformity, at least where respondent or the majority finds that conformity produces an inappropriate tax benefit. By the majority’s analysis, California’s conformity to the federal treatment of REITs is subordinate to “conflicts” with the CTL. This stems from R&TC section 25106’s clause that dividends paid “shall not be taken into account . . . in any other manner in determining the tax of any member of the unitary group” and the qualification of California’s conformity to federal REIT provisions “except as otherwise provided in this part.” (R&TC, § 24870.) Except, the reference in R&TC section 25106 clearly only concerns itself with the second recognition of income for dividends paid from unitary earnings and profits. (See *Apple, Inc. v. Franchise Tax Bd.* (2011) 199 Cal.App.4th 1.) The construction also reverses a

fundamental rule of statutory construction.² Ultimately, however, the majority opinion does not identify a statutory conflict, but simply points to the assertion that appellants are simultaneously taking the DPD and dividend elimination and they find those inextricably in conflict because of the perceived tax benefit it produces. Except, R&TC section 25106 is not a universal tool of adjustment for tax policy respondent or the Office of Tax Appeals (OTA) finds objectionable. That is the role and responsibility of the Legislature.

The real issue here is whether the scope or calculation of the DPD should reflect an adjustment for dividends from a TRS. Except that question is entirely one for the Legislature. Dividend elimination under R&TC section 25106 has nothing to do with the measure of the DPD, which is statutorily and without qualification REITTI. There can be no dispute that in the absence of the DPD, dividend elimination under R&TC section 25106 would not be at issue here. It is only because the DPD affords appellants a tax benefit (a clearly defined statutory deduction measured by REITTI) that R&TC section 25106 has been made an issue. Whether allowing appellants the DPD measured by REITTI constitutes an inappropriate “tax benefit” because the DPD is not measured by appellants’ *California* income *post* dividend elimination is a policy question that is neither respondent’s nor OTA’s to make. The Legislature’s power to tax is plenary and limited only by express Constitutional constraint. (*Delaney v. Lowery* (1944) 25 Cal.2d 561, 568.) The Legislature saw fit to deny REITs a deduction for dividends received (R&TC, § 24872(c)(1)), had there been an intent to restrict the DPD to reflect dividends from a TRS one would expect the Legislature to have spoken, which they have not. “It is fundamental . . . that the extent of allowable deductions is dependent exclusively upon legislative grace and does not turn upon equitable considerations . . .” (*Krumpotich v. Franchise Tax Bd.* (1994) 26 Cal.App.4th 1667, 1671) and there is no meaningful dispute that appellants comes within the terms of both the DPD and R&TC section 25106. “Men must turn square corners when they deal with the Government,’ it is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens.” (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal. 4th 715, 730.)

² See *San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal.4th 571. “It is well settled ... that a general provision is controlled by one that is special, the latter being treated as an exception to the former. A specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates.” (*Id.* citing *Rose v. State of California* (1942) 19 Cal.2d 713, 723-724.)

For these reasons, I would find for appellants.

Signed by:

1B8F50433F1D4D5...

Greg Turner
Administrative Law Judge

Date Issued: 1/27/2026