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THE SUPREME COURT OF NEW HAMPSHIRE

Merrimack
Case No. 2025-0240
Citation: Hologic, Inc. v. Comm'r, N.H. Dep't of Revenue Admin., 2026 N.H. 32

HOLOGIC, INC. AND SUBSIDIARIES

v.

COMMISSIONER, NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION & a.

Argued: May 12, 2026
Opinion Issued: August 26, 2026

Rath, Young and Pignatelli, P.C., of Concord (Michael S. Lewis and Kathryn H. Bibbo on the brief, and Michael S. Lewis orally), for Hologic, Inc. and its subsidiaries.

John M. Formella, attorney general, and Anthony J. Galdieri, solicitor general (Anthony J. Galdieri on the brief and orally), for the New Hampshire Department of Revenue Administration and its Commissioner.

Pierce Atwood LLP, of Portland, Maine (Jonathan A. Block and Olga J. Goldberg on the brief), for Council on State Taxation, as amicus curiae.

DONOVAN, J.

[¶1] The defendants, the Commissioner of the New Hampshire Department of Revenue Administration (DRA) and the DRA, appeal an order of the Superior Court (Kissinger, J.) ruling in favor of Hologic, Inc. and its subsidiaries (collectively, the plaintiff). The trial court determined that RSA chapter 77-A (2012 & Supp. 2025) permitted the plaintiff, a water's edge combined group under New Hampshire's business profits tax law, to reduce its tax liability by carrying back a capital loss incurred by one group member to offset another member's capital gain. We disagree and therefore reverse and remand.

I. Facts

[¶2] The trial court found, or the record supports, the following facts. Hologic, Inc., a Delaware corporation headquartered in Massachusetts, is the parent company of several affiliated companies that jointly file a combined tax return as a water's edge combined group under RSA chapter 77-A for the purpose of New Hampshire's business profits tax. In 2020, the DRA began auditing the plaintiff group's combined tax returns for the fiscal year ending (FYE) 2017 and FYE 2018.

[¶3] In 2021, Hologic, Inc., acting on behalf of the plaintiff group, filed an amended tax return for FYE 2017 requesting a tax refund. The bulk of the group's requested refund stemmed from an attempted capital loss carryback. Specifically, the group sought to carry back a long-term capital loss from FYE 2020 to offset net capital gains to the group's combined net income for FYE 2017. Hologic, Inc., the parent company, incurred the FYE 2020 loss largely from selling a subsidiary, Cynosure, in 2019. Another member of the group, Gen-Probe Incorporated (Gen-Probe), had produced the FYE 2017 gain by selling its blood screening division in 2017.

[¶4] In November 2021, the DRA issued a proposed audit adjustment rejecting the attempted capital loss carryback. The DRA reasoned that under RSA chapter 77-A, a capital loss carryback may offset only those capital gains generated by the same group member that produced the loss. Later that month, the DRA finalized its proposed audit adjustment and issued a notice of assessment denying the portion of the refund request that corresponded to the plaintiff's requested capital loss carryback.

[¶5] The plaintiff petitioned the DRA's Hearings Bureau for a redetermination of the tax assessment. The DRA held a hearing and issued a final order affirming the notice of assessment. The plaintiff appealed the DRA's decision to the superior court. See RSA 21-J:28-b, IV (2020) (providing that superior court "shall hear the appeal de novo"). Following a bench trial at which the plaintiff's expert, a professor of tax law, testified, the trial court

found in favor of the plaintiff and granted its requested application of the capital loss carryback. The trial court also ruled that New Hampshire Administrative Rules, Rev 302.09(c) and (d) and 302.10, which specify that members of combined groups must determine their gross business profits separately, "impermissibly conflict" with RSA chapter 77-A. Against the plaintiff's objection, the defendants moved to reconsider. The trial court denied the defendants' motion. This appeal followed.

II. Analysis

A. Capital Loss Carrybacks Under RSA Chapter 77-A

[¶6] On appeal, the defendants first contest the trial court's interpretation of RSA chapter 77-A as permitting the plaintiff's requested carryback. Addressing their claims requires us to construe various provisions of that chapter. "Statutory interpretation [presents] a question of law, which we review de novo." Appeal of Town of Salem, 168 N.H. 572, 577 (2016). "We first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning." Boucher v. Town of Moultonborough, 176 N.H. 271, 274 (2023). "We give effect to every word of a statute whenever possible and will not consider what the legislature might have said or add language that the legislature did not see fit to include." Id. "We also construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result." Id. "However, we do not construe statutes in isolation; instead, we attempt to construe them in harmony with the overall statutory scheme." Id. Further, "[t]he legislature is not presumed to waste words or enact redundant provisions." Doe v. Attorney General, 175 N.H. 349, 352 (2022).

[¶7] As this appeal concerns several provisions of RSA chapter 77-A, we begin by reviewing New Hampshire's statutory business profits tax regime. See Gen. Elec. Co. v. Comm'r, N.H. Dep't of Revenue Admin., 154 N.H. 457, 459 (2006). The parties agree that the plaintiff water's edge combined group is a "unitary business" under New Hampshire law. See RSA 77-A:1, XV (2012) ("'Water's edge combined group' means a group of business organizations . . . operating a unitary business."). "'Unitary business' means one or more related business organizations engaged in business activity both within and without this state among which there exists a unity of ownership, operation, and use; or an interdependence in their functions." RSA 77-A:1, XIV (2012).

[¶8] "The tax liability of a unitary business is calculated using a combined reporting method that apportions the income of the unitary business to the state," based on the proportion of the business's activity conducted in New Hampshire. Gen. Elec. Co., 154 N.H. at 459 (citing RSA 77-A:1, XIII, XV, XVI (2003)). For a water's edge combined group, "[t]he commissioner shall determine liability . . . for the elements of both tax base and apportionment by

the water's edge method," so long as the business complies with statutory and regulatory tax filing requirements. RSA 77-A:2-b (2012) (emphases added). "'Water's edge method' means the determination of taxable business profits for a group of business organizations conducting a unitary business by adding their combined net income, the additions and deductions provided in RSA 77-A:4 for the members of the group, and apportioning the result as provided in RSA 77-A:3." RSA 77-A:1, XVI (2012).

[¶9] We have explained that this process "operates generally in the following manner: First, the combined net income of the domestic members of the unitary business group is determined." Caterpillar Inc. v. N.H. Dep't of Revenue Admin., 144 N.H. 253, 256 (1999). "'Combined net income' means the revenues less expenses as would be determinable under the provisions of the Internal Revenue Code . . . and applied within the concepts of RSA 77-A for all business organizations conducting a unitary business." RSA 77-A:1, XIII (2012) (emphasis added). As relevant to the dispute here, the Internal Revenue Code specifies how capital losses and gains affect a corporation's net income. See 26 U.S.C. § 165(f) (2021); 26 U.S.C. §§ 1211(a), 1212(a)(1) (2022). For example, with some exceptions, a corporation may carry back "a net capital loss for any taxable year" to "each of the 3 taxable years preceding the loss year." 26 U.S.C. § 1212(a)(1). A corporation's "losses from sales or exchanges of capital assets shall be allowed only to the extent of gains from such sales or exchanges." 26 U.S.C. § 1211(a).

[¶10] Separately, an "apportionment percentage" tabulated under RSA 77-A:3 (Supp. 2025) "determine[s] the percent of the group's net income attributable to the State for taxation." Caterpillar Inc., 144 N.H. at 256. This percentage of the group's combined net income adjusted for additions and deductions under RSA 77-A:4 (Supp. 2025) "is the amount of business profits that New Hampshire may tax." Caterpillar Inc., 144 N.H. at 256-57; see also RSA 77-A:1, IV (Supp. 2025) (defining "[t]axable business profits"); RSA 77-A:1, XVI (noting that additions and deductions under RSA 77-A:4 apply "for the members of the group"). Applying the governing tax rate to these "taxable business profits" determines the group's tax liability. See RSA 77-A:2 (Supp. 2025).

[¶11] Finally, RSA 77-A:6, IV (2012) mandates that a "business organization which is part of a water's edge combined group and required to report under this chapter shall file a return containing the combined net income of the water's edge combined group." Further,

> [t]he commissioner is authorized to impose the tax as though the entire combined net income of the water's edge combined group was that of one business organization or the commissioner may adjust the tax or income in such other manner . . . if . . . necessary

> in order to clearly reflect the net income earned by such organization from business done in this state.

RSA 77-A:6, IV (emphasis added).

[¶12] In its order, the trial court concluded that RSA 77-A:6, IV and the definitions in RSA 77-A:1 are silent regarding how to allocate members' capital losses. The court then reasoned that allowing one member's loss to offset another's gains would further the legislature's intent in RSA chapter 77-A to tax water's edge combined groups as a single entity. On appeal, the defendants assert that the trial court erroneously ignored the statutory directive in RSA 77-A:2-b, I, to "determine liability for any business organization . . . by the water's edge method." They further argue that the water's edge method contemplates that each member must separately compute its net income — which would preclude diminishing any member's capital gain by another member's capital loss. See RSA 77-A:1, XIII, XVI.

[¶13] We agree with the defendants. As noted above, the water's edge method tabulates a water's edge combined group's taxable business profits "by adding their combined net income," then adjusting the result under RSA 77-A:4 and apportioning it under RSA 77-A:3. RSA 77-A:1, XVI; see also Caterpillar Inc., 144 N.H. at 256-57. The statutory definitions of "[c]ombined net income" and "[w]ater's edge method" contemplate that a group should first determine each member's net income under the Internal Revenue Code before totaling those incomes to arrive at the combined net income for the group. See RSA 77-A:1, XIII, XVI. We acknowledge that the definition of "water's edge method" would be more explicit if it called for aggregating "their combined net incomes" instead of the use of the singular "income." We cannot, however, consider the use of the singular noun in isolation. In particular, the use of "adding" in the "[w]ater's edge method" definition makes clear that each member has a "net income" that is aggregated with other members' net incomes to yield the total "combined net income." RSA 77-A:1, XVI. If a group's combined net income were instead calculated at once, by subtracting all members' losses from all members' revenues, there would be no need for "adding their combined net income." Id.

[¶14] Additionally, RSA 77-A:1, XIII defines "[c]ombined net income" as "the revenues less expenses . . . for all business organizations conducting a unitary business," with no reference to the group as a whole. (Emphasis added.) This contrasts with the statute's apportionment provision, which determines a water's edge combined group's "income attributable to this state . . . by means of the applicable combined apportionment factors of the unitary business group." RSA 77-A:3, III (emphasis added). Likewise, the "[w]ater's edge method" definition, which encompasses the taxation process's adjustment and apportionment phases, also refers to the group in its entirety: "the

determination of taxable business profits for a group of business organizations conducting a unitary business." RSA 77-A:1, XVI (emphasis added).

[¶15] Our construction of the water's edge method also accords with the statutory definitions of gross and taxable profits as applied to various types of business entities. The definition of "[t]axable business profits" clarifies that "gross" profits are a business entity's profits before adjustment and apportionment. See RSA 77-A:1, IV. Meanwhile, RSA 77-A:1, III (2012) defines "[g]ross business profits" for different categories of business organizations. It specifies that for "any business organization which is part of a water's edge combined group and which does not make or file a United States income tax return or schedule," gross business profits are "the amount of net income as would be determinable under the provisions of the United States Internal Revenue Code." RSA 77-A:1, III(f) (emphasis added). This definition indicates that each water's edge combined group member has its own gross business profits figure corresponding to its "net income." See id.

[¶16] The accounting of capital loss carrybacks occurs during the first step: the tabulation of each member's net income. See RSA 77-A:1, XIII ("'Combined net income' means the revenues less expenses as would be determinable under the provisions of the Internal Revenue Code . . . ."); 26 U.S.C. §§ 165(a) (2021), (f), 1211(a), 1212(a)(1). This step precedes the aggregation of these incomes. It therefore follows that applying any member's capital loss against another member's gain would be inconsistent with the Act's step-by-step process of computing a group's tax base. See RSA 77-A:1, XIII, XVI. We thus conclude that under RSA 77-A:2-b and the definitions in RSA 77-A:1, capital losses incurred by a member of a water's edge combined group may offset only that member's own capital gains.

[¶17] Next, we turn to the parties' dispute over the relevance of RSA 77-A:6, IV to this inquiry. The plaintiff endorses the trial court's construction of RSA 77-A:6, IV as conveying the legislature's intent to tax group members jointly in all respects. In contrast, the defendants describe it as merely "an end-step reporting requirement" with no bearing on the tabulation of a group's combined net income.

[¶18] Regardless, as the defendants observe, the trial court misquoted and misconstrued RSA 77-A:6, IV as "provid[ing] that a water's edge group is to be treated 'as one business organization.'" (Emphasis omitted.) Contrary to the trial court's statement, RSA 77-A:6, IV does not contain the phrase "as one business organization." Nor does the reference in RSA 77-A:6, IV to "income," rather than "incomes," imply otherwise. The phrase "by adding their combined net income" in the statutory definition of "[w]ater's edge method" likewise uses the word "income," even though it expressly refers to multiple entities' incomes. See RSA 77-A:1, XVI. As RSA 21:3 (2020) explains, statutory language "importing the singular number may extend and be applied

to several persons or things." The term "adding" is inconsistent with reading RSA 77-A:26, IV as requiring a "combined net income" for the water's edge group without regard for each constituent entity's gains and losses as the Internal Revenue Code contemplates.

[¶19] Further, the plaintiff's construction of RSA 77-A:6, IV — under which the commissioner must treat members of a unitary business as a single taxpayer for all purposes — would undermine other provisions specifying discrete steps when calculating tax liability at which the commissioner should treat groups jointly. For example, as noted above, RSA 77-A:3, III instructs that the commissioner must apportion a group's income "by means of the applicable combined apportionment factors of the unitary business group." (Emphasis added.) Elsewhere, RSA 77-A:5, XIII(c) (2021) mandates that a "unitary business or an enterprise consisting of one or more taxpayers under this chapter shall be considered a single taxpayer for purposes of claiming" a research and development tax credit. (Emphasis added.) The plaintiff's interpretation of RSA 77-A:6, IV would render both RSA 77-A:3, III and :5, XIII(c) superfluous. This construction conflicts with our presumption that the legislature does not "enact redundant provisions." Doe, 175 N.H. at 352.

[¶20] Finally, the plaintiff's assertion that RSA 77-A:6, IV is "[t]he foundational statute describing how the [business profits tax] should be imposed on the tax base of a combined group" is incorrect. To the contrary, RSA 77-A:1 and :2-b supply methodical instructions for calculating a group's tax base, as described above. This calculation occurs before the commissioner ultimately "impose[s] the tax" pursuant to RSA 77-A:6, IV. Indeed, we have described a prior version of RSA 77-A:6 as providing merely "a possible reporting requirement" that "did not establish the method by which a corporation was taxed." Baxter Int'l v. State, 140 N.H. 214, 216-17 (1995). The version of RSA 77-A:6 at issue in Baxter International did not meaningfully differ from the text now in RSA 77-A:6, IV. Compare RSA 77-A:6 (Supp. 1985), with RSA 77-A:6, IV. We thus conclude that RSA 77-A:6, IV does not alter the methodology set forth in RSA 77-A:1 and :2-b to account for capital loss carrybacks when computing a water's edge combined group's tax base.

B. Constitutional Claims

[¶21] We next address the plaintiff's state and federal constitutional challenges to the DRA's construction of RSA chapter 77-A.[1] The constitutionality of a statute presents a question of law, which we review de

[1] Although the plaintiff presented its constitutional claims to the trial court, the trial court did not reach them because it construed RSA chapter 77-A in the plaintiff's favor. We address the plaintiff's constitutional arguments "in the first instance" because they present purely legal questions; as such, "there is only one way the trial court could have ruled as a matter of law." Cf. In the Matter of Sheys & Blackburn, 168 N.H. 35, 40 (2015) (declining to address discretionary issue in the first instance).

novo. Polonsky v. Town of Bedford, 173 N.H. 226, 230 (2020). When reviewing a statute, "we presume it to be constitutional and will not declare it invalid except upon inescapable grounds." Id. at 231. Thus, we resolve any doubts in favor of the statute's constitutionality and uphold the statute "unless a clear and substantial conflict exists between it and the constitution." Id. "The party challenging a statute's constitutionality bears the burden of proof." Id.

i. State Constitution

[¶22] The plaintiff first argues that applying RSA chapter 77-A to preclude water's edge combined group members' sharing of capital loss carrybacks violates the uniformity requirement under Part I, Article 12 and Part II, Articles 5 and 6 of the New Hampshire Constitution. "These three constitutional provisions" work in tandem and "require that taxation be just, uniform, equal, and proportional." Eby v. State, 166 N.H. 321, 328 (2014). "First, Part I, Article 12 . . . requires that a given class of taxable property be taxed at a uniform rate and that taxes must be . . . in due proportion." Id. (quotation omitted). "Second, Part II, Article 5 . . . requires that all taxes be proportionate and reasonable, equal in valuation and uniform in rate, and just." Id. at 328-29 (quotation omitted). "Third, Part II, Article 6 grants the legislature broad power to declare property to be taxable or non-taxable based upon a classification of the property's kind or use, but not based upon a classification of the property's owner." Id. at 329 (quotation omitted).

[¶23] "Together, Part II, Articles 5 and 6 permit the disproportionality inherent in taxes levied upon classes of property, so long as there is uniformity and proportionality within each class." Id. Thus, "the legislature may not create systems of taxation which would result in two classes of taxpayers paying differing rates of tax on essentially the same class of property, business income." Opinion of the Justices, 131 N.H. 640, 642 (1989) (quotation omitted). Although "the legislature has broad power to create exemptions, such as deductions, adjustments and credits, from taxable income under the business profits tax, such exemptions must be reasonable and uniform." Opinion of the Justices, 132 N.H. 777, 783 (1990) (quotation omitted). Setoff of a business gain with a carryover loss, as here, effectively constitutes "a deduction from income" for tax purposes. See Somerset Tel. Co. v. State Tax Assessor, 259 A.3d 97, 106 (Me. 2021).

[¶24] The plaintiff argues that the DRA unconstitutionally seeks to tax business income differently based on the filing entity's identity. The plaintiff observes that "the DRA's construction permits the tax base of a single business organization . . . to include capital losses up to the amount of the organization's capital gains," while "the tax base of a combined group ('combined net income') cannot."

[¶25] The defendants' position allows each member of a water's edge combined group to set off its losses in full, just like a business entity operating alone. In this respect, the defendants' application of RSA chapter 77-A "operate[s] with identical effect on all business entities" — that is, both solo businesses and those forming part of a water's edge combined group — and "satisf[ies] the requirement that all such entities be treated with substantial equality." Opinion of the Justices, 132 N.H. at 782. We cannot conclude that the legislature acted unreasonably in establishing a scheme that determines income based on the capital losses incurred by each business organization, irrespective of whether the organization belongs to a water's edge combined group.

[¶26] Nor do the statutory provisions at issue accord preferential treatment to any particular type of business entity. This situation thus differs from instances in which we have rejected tax legislation as unconstitutionally non-uniform — for example, where a credit or deduction turns on a business's number of employees or individual employees' compensation, thereby favoring businesses that hire more workers or pay less to each employee. See, e.g., id. at 784; Opinion of the Justices, 131 N.H. at 641-43 (explaining that proposed statute capping "reasonable compensation" tax deductions at $100,000 would "impose differing tax burdens . . . on business organizations which have identical gross income and aggregate reasonable compensation expenses"). Accordingly, we find no infirmity here under the New Hampshire Constitution.

ii. Federal Constitution

[¶27] In addition, the plaintiff challenges the DRA's denial of its requested capital loss carryback as violating the Federal Constitution's Commerce and Due Process Clauses. "The Commerce Clause and the Due Process Clause impose distinct but parallel limitations on a State's power to tax out-of-state activities." MeadWestvaco Corp. v. Illinois Dept. of Revenue, 553 U.S. 16, 24 (2008). "The Due Process Clause demands that there exist . . . some minimum connection[] between a state and the person, property or transaction it seeks to tax, as well as a rational relationship between the tax and the values connected with the taxing State." Id. (quotations omitted). "The Commerce Clause forbids the States to levy taxes that . . . burden [interstate commerce] by subjecting activities to multiple or unfairly apportioned taxation." Id. The Commerce Clause thus requires that a state tax on interstate commerce is, among other things, "fairly apportioned" and "fairly related to the services the State provides." South Dakota v. Wayfair, Inc., 585 U.S. 162, 174 (2018) (citing Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977)).

[¶28] The United States Supreme Court has explained that under both clauses, "a State need not isolate the intrastate income-producing activities from the rest of the business but may tax an apportioned sum of the

corporation's multistate business if the business is unitary." MeadWestvaco Corp., 553 U.S. at 25 (quotations omitted). The Court has termed this precept the "unitary business principle." Id.

[¶29] The plaintiff emphasizes the parties' agreement that: (1) Gen-Probe's blood screening division, the sale of which generated the capital gain at issue, lacked any operations in New Hampshire; and (2) conversely, Hologic, Inc., whose sale of Cynosure produced the capital loss, did operate in this state. The plaintiff thus asserts that disallowing a setoff of its capital loss against Gen-Probe's capital gain yields a tax burden out of proportion to the group's in-state activities, in violation of the Due Process and Commerce Clauses. See id.; Wayfair, Inc., 585 U.S. at 174. As the plaintiff puts it, by "including unitary capital gains earned largely outside the borders of New Hampshire in the tax base . . . while denying unitary capital losses that have a nexus to New Hampshire," the "DRA's position does not bear a 'rational relationship between the income attributed to the [s]tate and the intrastate values of the enterprise.'" (Quoting Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425, 436-37 (1980).) This argument, however, confuses the determination of the combined net income of the water's edge group with the separate statutory step of apportionment.

[¶30] The plaintiff concedes that "the unitary business principle allows New Hampshire to tax an apportioned share of Gen-Probe's out-of-state capital gains." Indeed, the United States Supreme Court has repeatedly endorsed apportionment under the "three-factor formula" used in New Hampshire, even extolling this method as "something of a benchmark against which other apportionment formulas are judged." Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159, 170 (1983); see also Scott & Williams, Inc. v. Board of Taxation, 117 N.H. 189, 193 (1977) (describing our jurisprudence upholding New Hampshire's three-factor apportionment method under RSA 77-A:3, and noting that "[s]imilar apportionment formulas elsewhere have also been upheld against constitutional attacks"). We have also emphasized: "[T]he state's taxation methods need 'not apportion income perfectly[;] the Federal Constitution does not require mathematical exactitude, only a rough approximation.'" Gen. Elec. Co., 154 N.H. at 470 (quoting Caterpillar Inc., 144 N.H. at 262). In focusing its constitutional argument on the tabulation of the group's income before apportionment, the plaintiff does not explain why application of the apportionment formula in RSA 77-A:3 did not approximate the group's in-state activities in a manner consistent with constitutional commands.

[¶31] Further, as we have previously stressed, RSA 77-A:3 "provides for modification of the apportionment formula used if it 'does not fairly reflect the extent of the business activities of a business organization within this state.'" Scott & Williams, Inc., 117 N.H. at 194 (quoting RSA 77-A:3, III (Supp. 1975)); see RSA 77-A:3, II(a) (allowing for a modified apportionment method "in respect

to all or any part of the business organization's business activity," upon the business's petition or at the commissioner's discretion (emphasis added)). The record does not indicate that the plaintiff has "petitioned for such a modification." Scott & Williams, Inc., 117 N.H. at 194. We therefore reject the plaintiff's claim that denying the setoff of Hologic, Inc.'s capital loss carryback against Gen-Probe's capital gain effected an unconstitutional tax on the group's extraterritorial income. Finally, given our holding that RSA chapter 77-A requires group members to determine their net incomes separately before combining them, we reverse the trial court's ruling that New Hampshire Administrative Rules, Rev 302.09 and 302.10 contradict the statute.

III. Conclusion

[¶32] In sum, we conclude that under RSA chapter 77-A, capital losses incurred by a member of a water's edge combined group may offset only that member's own capital gains. We further reject the plaintiff's contention that barring groups from applying one member's capital loss carryback against another member's capital gain infringes on the State and Federal Constitutions. Lastly, we reverse the trial court's determination regarding New Hampshire Administrative Rules, Rev 302.09 and 302.10. We therefore reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

COUNTWAY, GOULD, and WILL, JJ., concurred; MACDONALD, C.J., sat for oral argument but did not participate in the final vote.