

**COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
FOURTH DIVISION**

Civil Action No. 20-CI-00332

filed electronically

HAYNES PROPERTIES, LLC, *et al.*

PLAINTIFFS

v.

**BURLEY TOBACCO GROWERS
COOPERATIVE ASSOCIATION, *et al.***

DEFENDANTS

**Motion for Ruling re
Co-op's Remaining Net Operating Loss (NOL)**

NOTICE

Please take notice that this Motion will be heard Friday, December 15, 2023, beginning at the hour of 10:00 a.m. or as soon thereafter as counsel may be heard.

MOTION

Plaintiffs / Settlement Class Representatives, the Burley Tobacco Growers Cooperative Association and its Dissolution Committee (“BTGCA” or the “Co-op”), through their respective attorneys, hereby move this Court for an order that the parties may proceed to calculate and plan for the third and final distribution of the Co-op’s net dissolution proceeds without further delay or expense to consider or attempt to distribute/transfer the Co-op’s remaining net operating loss (“NOL”) as a “tax attribute.” In support of their request, Movants state as follows:

1. In the course of this litigation, the question has been raised whether the Co-op’s final unused NOL could be a tax attribute that could be distributed or passed through to Settlement Class members. This NOL has been accrued from losses in various years and carried forward from year to year by the Co-op and used to reduce/eliminate tax liability on business

activities and sale of its various assets — which has already benefited Class members. It is anticipated that the Co-op will have a large remaining unused NOL on its books following the filing of its final tax returns for the fiscal year ending September 30, 2023. The books of the Co-op do not show, and no evidence has been produced, that the Co-op has ever transferred, distributed, or passed-through such losses to its members in the past.

2. Paragraph 8 of the Amended Final Status Report from BTGCA/Dissolution Committee on Fiscal Year Ending 9/30/23 provides information and analysis about the NOL topic, in accordance with an agreement with Objectors Roger Quarles *et al.* In brief, the information and analysis does not support transferability to or usability by any member of a share of Co-op NOL,¹ and suggests that even if a portion of the NOL was transferable, it would not be to Class members *per se*, but to former patronage members who sold tobacco through the Co-op ... if sold in such year(s) that the Co-op generated a NOL.² The regular tax preparer for the Co-op (Blue & Co., CPAs) has not identified any basis to allow such a pass-through of NOL; counsel for BTGCA shared the Blue & Co. letter with Mr. Graddy (counsel for the Quarles Objectors) by email on November 16, 2023.

3. On November 2, 2023, the Quarles Objectors acknowledged the filing of a status report for fiscal year 2023 and requested “two weeks to respond to this status report, particularly with regard to the net loss carryover.” The Co-op’s counsel agreed to this request, but it has now been five weeks and no response on behalf of Mr. Quarles or other Objectors has been provided. In addition to sharing the Blue & Co. letter, on November 16, 2023, counsel for the Co-op

¹ No Co-op member ever made any equity contribution or paid dues to constitute a tax basis in their Co-op membership, so basic tax understanding suggests no Class member could likely use a Co-op NOL to offset personal income.

² All but approximately \$11,700 of the remaining Co-op NOL is allocated to “patronage.”

emailed to Mr. Graddy the only two articles found about a cooperative's losses, neither of which supported any ability of the Co-op to allocate and pass-through a share of its unused NOL to any group of former patronage members or Class members (most of whom were never patronage members).

4. The due date for BTGCA to file its last tax return is January 15, 2024, and it is time for the remaining net dissolution proceeds of the Co-op to be determined and a final share net distribution to Class members to be calculated. Speculation that the Co-op's NOL might be distributed in-kind to Class members or to former patronage members of the Co-op should not delay taking these steps to achieve the third and final distribution, and closure of the dissolution thereafter.

5. No feasible theory or method for the transfer of remaining Co-op NOL to Class members has been advanced. There is no obvious basis to pass-through to Class members any shares of unused Co-op NOL; any such pass-through would need to be validated by a Private Letter Ruling request by a tax lawyer, involving significant expense and delay, which the 2,603 Class members should not bear. Further effort expended on the question will waste money that otherwise would be distributed to the Settlement Class. To the extent that the NOL remaining on the Co-op's books can be considered an "asset" or "property," the Co-op should be permitted to abandon it as unlikely to benefit the Settlement Class.

WHEREFORE, Plaintiffs / Settlement Class Representatives and the BTGCA / Dissolution Committee respectfully request an order that the Dissolution Committee may proceed with timely filing of the Co-op's final tax return and abandon any remaining Co-op net operating loss without further delay or expense, so as to be able to proceed to calculate the third and final distribution to Class members in early 2024.

Respectfully submitted,

/s/ Katherine K. Yunker

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served this 8th day of December 2023, upon counsel via the e-filing system and electronic mail and upon unrepresented persons via first class U.S. Mail, postage prepaid, as shown on the attached Service List.

/s/ Katherine K. Yunker

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