

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
BARCLAYS GROUP, INC. (USA) & AFFILIATES	:	DECISION
	:	DTA NO. 818789
for Redetermination of a Deficiency or for Refund of	:	
Franchise Tax on Banking Corporations under Article 32	:	
of the Tax Law for the Years 1995, 1996, 1997, and the	:	
Short Period Ended March 31, 1998.	:	

Petitioner Barclays Group, Inc. (USA) & Affiliates f/k/a Barclays Bank of New York & Affiliates, c/o Group Tax, 222 Broadway, New York, New York 10038, filed an exception to the determination of the Administrative Law Judge issued on December 11, 2003. Petitioner appeared by McDermott, Will & Emery (Richard A. Leavy, Esq. and Arthur R. Rosen, Esq., of counsel). The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Nicholas A. Behuniak, Esq., of counsel).

Petitioner filed a brief in support of its exception and the Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on July 29, 2004 in New York, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether, on its amended returns for the period at issue, petitioner properly reported, on a net basis, the assets of a member of its combined group, a wholly-owned subsidiary engaged in business as a primary dealer in United States government securities, for purposes of the tax as measured by assets pursuant to Tax Law §1455(b)(1), thereby establishing entitlement to a refund of the franchise tax on banking corporations under Article 32.

II. Whether, on its amended returns for the period at issue, petitioner properly modified the receipts factor of its asset allocation percentage (thereby decreasing such allocation percentage) by netting the receipts of a member of its combined group, a wholly-owned subsidiary engaged in business as a primary dealer in United States government securities.

III. Whether the Division of Taxation improperly failed to consider, as an alternative basis for the granting of petitioner's claimed refund, adding petitioner's corporate parent, a foreign banking corporation with a branch operating in the United States, to petitioner's combined group, thereby violating the Foreign Commerce Clause contained in Article I, section 8, clause 3 of the United States Constitution.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Barclays Group, Inc. (USA) & Affiliates,¹ was a wholly-owned indirect subsidiary of Barclays Bank PLC. Barclays Bank PLC was a foreign bank carrying on various

¹ During the period at issue herein, petitioner was known as Barclays Bank of New York & Affiliates.

banking and non-banking business enterprises, both directly and through subsidiaries, throughout the world, including the operation of a banking branch in the United States.

For the calendar years 1995, 1996, 1997, and the quarter ended March 31, 1998 (“the period at issue”), petitioner filed combined banking corporation franchise tax returns under Article 32 of the Tax Law (Form CT-32-A). Petitioner also filed corresponding banking corporation MTA surcharge returns (Form CT-32-M) for the same period. Several subsidiaries of petitioner were joined in the group of corporations included in petitioner’s combined returns. Barclays Capital, Inc. (“Barclays Capital”)² was among the subsidiaries included in petitioner’s combined returns.

During the period at issue petitioner and its combined group were subject to the alternative minimum tax under Article 32 as measured by taxable assets allocable to New York pursuant to Tax Law § 1455(b)(1). Petitioner computed, reported and paid its tax liability accordingly.

Subsequently, in February 2001, petitioner filed amended banking corporation combined franchise tax returns and amended banking corporation MTA surcharge returns for the years 1995, 1996, 1997, and the quarter ended March 31, 1998. These amended returns reflected two changes to the banking corporation returns previously filed and claimed refunds of tax previously paid with respect to the period at issue.

The first change reflected in the amended returns was the netting of Barclays Capital’s assets against liabilities for the purpose of computing petitioner’s taxable assets. The second change was the adjustment of the receipts factor by netting the interest expense and interest

² During 1995 and through July 1996, this corporation was known as Barclays de Zoete Wedd Securities, Inc. In July 1996 this corporation changed its name to BZW Securities, Inc. In March 1998, this corporation changed its name to Barclays Capital, Inc. This determination shall refer to this corporation at all times as “Barclays Capital.”

income of Barclays Capital for the purpose of computing petitioner's taxable asset allocation percentage. Approximately 99 percent of petitioner's refund claim is attributable to the asset netting issue.

The amount of petitioner's refund claim as set forth in the amended returns is summarized below:

Tax Year	NYS Tax	MTA Tax	Total
1995	\$1,240,535.00	\$196,178.00	\$1,436,713.00
1996	1,111,224.00	184,300.00	1,295,524.00
1997	1,396,667.00	237,433.00	1,634,100.00
Qtr. ended 3/31/98	498,971.00	84,825.00	583,796.00
Total	\$4,247,397.00	\$702,736.00	\$4,950,133.00

By letter dated September 14, 2001, the Division of Taxation ("Division") denied petitioner's refund claim with respect to the netting of assets. The Division requested additional information with respect to the portion of the refund claim attributable to the recomputation of the receipts factor.

During the period at issue Barclays Capital operated as a securities broker-dealer pursuant to a grant of authority by the Federal Reserve Board under the provisions of section 20 of the Glass-Steagall Act. Barclays Capital carried on business throughout that period almost exclusively as a primary dealer in United States government securities.

As a "Section 20 subsidiary" Barclays Capital and petitioner were subject to strict Federal Reserve Board restrictions, both legal and operational, designed to prevent the intermingling of banking and nonbanking activities and assets. The purpose of such separation is to insulate the banking business from the broker-dealer business.

A primary dealer in United States government securities is a broker-dealer authorized by the Federal Reserve to purchase United States securities and make a market for them by offering to resell them to the public. Banking institutions and broker-dealers registered with the Securities and Exchange Commission may operate as primary dealers of United States government securities.

When a broker-dealer engages in business as a primary dealer of United States government securities, its trading usually takes the form of entering into offsetting long and short positions in the securities, which together may be referred to as an integrated trading position. Such a position is a two-part transaction whereby each part of the transaction contributes to an overall “flat” position entered into by the primary dealer that allows the primary dealer to produce trading income without subjecting itself to the risks that accompany long and short positions that are not offset.

In the context of Barclays Capital’s business, an integrated trading position arises when (i) a long position is taken in a United States government security through a purchase or reverse repurchase agreement and (ii) that long position is principally financed by entering into a short position in the same security through an agreement to sell a United States government security, such as a repurchase agreement.

In the instant context, a repurchase agreement is a financing agreement whereby a party sells United States government securities and simultaneously agrees to repurchase the same or substantially identical securities at the end of a specified repurchase term. A reverse repurchase agreement is an agreement whereby a party purchases a security and simultaneously agrees to sell the security back to the seller at the end of a specified term.

In a typical integrated trading position transaction a primary dealer purchases United States government securities from a party while simultaneously agreeing to sell equivalent or the same securities back to the seller at a future date under a reverse repurchase agreement. After entering into the reverse repurchase agreement, the primary dealer then sells the identical or nearly identical United States government securities pursuant to a repurchase agreement. The proceeds from the repurchase agreement are used to finance the reverse repurchase agreement.

Primary dealers in United States government securities do not invest their own capital to purchase securities. Such purchases, or long positions, are financed by the sale of the same security or a similar offsetting security. These are the aforementioned reverse repurchase and repurchase agreements. From the perspective of the primary dealer, a repurchase agreement is a borrowing transaction and a reverse repurchase agreement is a lending transaction. The goal of the primary dealer is to enter into a short position (repurchase agreement) at a better price. Or to use the borrowing/lending analogy, to lend at a higher rate than they borrow. Although the spreads on such trades are generally very small, such spreads are one of the ways that primary dealers make money.

Absent the use of the integrated trading positions described above (reverse repurchase and repurchase agreements), primary dealers would necessarily lose money. This is because the cost of funds to purchase the government securities would exceed the return on the securities during the period they are held before the required redelivery under the reverse repurchase obligation. Given the ability of the United States government to borrow money at the lowest rates, the only way for a business to borrow money at a cost low enough to profit on the purchase of United States securities is to borrow money as cheaply as the United States government does. Primary

dealers accomplish this by using the United States government securities as collateral to borrow the funds used to purchase the security in the first place. Thus, given the liquidity of the United States government securities, such securities effectively finance themselves and provide the necessary financing for their acquisition.

Together, the long position and the short position constitute the integrated trading position discussed above. During the term of the integrated trading position, the primary dealer will realize trading gain or loss on the long position, incur expenses on the short position, and earn income from the long position. Depending on price fluctuations in the underlying security, the prevailing repurchase rate, and the yield on the security, the primary dealer will recognize net income or expense and trading gain or loss on the integrated trading activity. The primary dealer seeks to have trading gain and net income exceed trading loss and net expense.

Primary dealers do not hold securities for investment, but rather generate income from trading the securities. By combining long and short positions in an integrated trading position the primary dealer seeks to eliminate the investment element from each side of the integrated position. The primary dealer selects a corresponding long or short position not for its individual attributes, but for its ability to match the corresponding position. The primary dealer takes a corresponding position almost immediately after entering into an initial position.

Due to the nature of United States government securities, the trading returns from a single integrated trading position are small as compared to the size of the component long and short positions. This is because price changes that occur in the United States government securities markets over relatively short periods are very small. Accordingly, a primary dealer in United States government securities depends upon a high trading volume to generate significant income.

Since the primary dealer seeks to fund its long positions by taking corresponding short positions, the dealer's ratio of net assets to gross assets is generally less than one percent. In contrast, a traditional bank maintains a typical ratio of net assets to gross assets of approximately eight to ten percent.

During the period at issue, there were three aspects to Barclays Capital's business of being a primary dealer in United States government securities: matched book business, inventory funding, and firm funding.

The matched book business consisted of entering into offsetting long and short positions in United States government securities primarily through repurchase and reverse repurchase transactions. Barclays Capital thus sought to enter into integrated trading positions in its matched book business.

The initial transaction, either repurchase or reverse repurchase, and the corresponding subsequent transaction are separate legal obligations. The initial and corresponding matched transaction do not have to be entered into at the same time, with the same party, for the same dollar amount, or for the same settlement dates.

Barclays Capital and other primary dealers generally use the matched book transaction model not because of any legal requirement but because this model serves to advance the dealers' business goals. That is, to make money not from investing in securities but from trading securities. This goal is served by the matched transactions, or as referred to earlier, integrated trading positions. As noted, Barclays Capital attempts to keep its overall long positions (reverse repurchase) and short positions (repurchase) equal and thereby the remove the investment component from its integrated trading positions.

Barclays Capital's inventory funding business involved funding Barclay Capital's purchase of United States government securities for sales to customers by entering into repurchase transactions with third parties. The inventory funding business also involved selling inventory that Barclays Capital did not yet own (selling short) through reverse repurchase transactions with third parties.

The firm funding aspect of Barclays Capital's business involved the use of repurchase and reverse repurchase transactions to fund petitioner's long and short positions in United States government securities.

Barclays Capital sought to offset, in the aggregate, its long and short positions in the inventory funding and firm funding components of its business.

Barclays Capital's profit or loss was generated by trading spreads from each transaction plus interest income less interest expense. Although the primary dealer is not holding the securities for investment it does seek to profit from trading spreads, that is, to buy low and sell high.

The Securities and Exchange Commission requires Barclays Capital to prepare annual audited financial statements, including balance sheets, in accordance with generally accepted accounting principles ("GAAP") and to file such reports with the SEC. Primary dealers not owned by banks are subject to the same requirements.

GAAP allows the above-the-line netting of an asset on a balance sheet where there are asset and liability positions with the same counter-party. Where there are different counter-parties the transactions are not permitted to be netted under GAAP. Accordingly, GAAP permits Barclays Capital to net certain matched book repurchase and reverse repurchase transactions and

precludes Barclays Capital from netting certain other matched book repurchase agreements with other reverse repurchase agreements on its balance sheet.

The computation of the tax on assets on petitioner's original returns reflects above-the-line netting of Barclays Capital's assets where permitted under GAAP.

The separation of gross assets and liabilities under GAAP reflects counter-party risk, that is, the risk that the other side of the transaction will not fulfill its obligation. In the context of the United States government securities market, counter-party default is extremely infrequent.

Virtually all banks that have chosen to enter the business of being a primary dealer in United States government securities have done so through wholly-owned subsidiaries.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge found that during the period at issue, Barclays Capital was a banking corporation within the meaning of Tax Law § 1452(a)(9). As discussed, during the relevant period, Barclays Capital was a primary dealer in United States government securities. Section 16 of the Glass-Steagall Act (12 USC § 24)³ expressly permits banks to underwrite and deal in United States government securities. Accordingly, the Administrative Law Judge found, contrary to the testimony of expert witnesses proffered by petitioner, Barclays Capital's business as a primary dealer in United States government securities was an activity which might be lawfully conducted by a bank.

The Administrative Law Judge noted that petitioner and the members of its combined group, all banking corporations under Tax Law § 1452(a), filed franchise tax returns under Article 32 and were required to file on a combined basis pursuant to Tax Law § 1462(f)(2)(i).

³Those provisions of the Banking Act of 1933 that separated the commercial and investment banking industries are known as the Glass-Steagall Act.

During the subject period, the Administrative Law Judge pointed out, petitioner and the members of its combined group paid tax as measured by taxable assets pursuant to Tax Law § 1455(b)(1).

The term “taxable assets” shall mean the average value of total assets Total assets are those assets which are properly reflected on a balance sheet the income or expenses of which are properly reflected (or would have been properly reflected if not fully depreciated or expensed or depreciated or expensed to a nominal amount) in the computation of alternative entire net income for the taxable year or in the computation of the eligible net income of the taxpayer’s international banking facility for the taxable year (Tax Law § 1455[b][1][v][A]).

The Division’s regulations define “balance sheet” as used in Tax Law § 1445(b)(1)(v)(A), in relevant part, as follows:

The term *balance sheet* . . . shall mean the balance sheet of the taxpayer prepared from the books and records of the taxpayer in accordance with generally accepted accounting principles and used for purposes of preparing the taxpayer’s financial statements (20 NYCRR 18-5.2[d]).

On its originally filed returns, the Administrative Law Judge noted, petitioner calculated its combined tax liability as measured by taxable assets in accordance with the relevant statutes and regulations. That is, except where netting was permitted under generally accepted accounting principles, petitioner’s calculation of Barclays Capital’s assets (and the assets of all members of the combined group) was a calculation of gross assets. The Administrative Law Judge found such calculation was consistent with generally accepted accounting principles and was consistent with Tax Law § 1455(b)(1) and section 18-5.2(d) of the Division’s regulations (20 NYCRR 18-5.2[d]).

However, by its filed amended returns, petitioner sought an adjustment to its liability for the tax on assets. Specifically, the Administrative Law Judge noted, petitioner attempted to net

the assets of Barclays Capital in its calculation of petitioner's taxable assets in a manner similar to the calculation of tax as measured by the capital base pursuant to the franchise tax on business corporations under Article 9-A of the Tax Law.⁴ Petitioner argued that Barclays Capital's business of purchasing long positions in securities while financing such positions with the creation of short positions increases Barclays Capital's taxable assets with each transaction, but does not increase its wealth or otherwise improve its financial condition. Petitioner claimed that the calculation of taxable assets in accordance with Tax Law § 1455(b)(1) and section 18-5.2(d) of the Division's regulations (20 NYCRR 18-5.2[d]) distorts Barclays Capital's asset picture and that the netting of Barclays Capital's assets will better measure the taxable assets of Barclays Capital within New York State.

The Administrative Law Judge held that the Division, acting for the Tax Commissioner, properly declined to exercise the discretion granted under Tax Law § 1462(g) because petitioner's assets were neither inaccurately nor improperly reflected on the combined returns as originally filed. The Administrative Law Judge noted that Barclays Capital is a banking corporation within the meaning of Tax Law § 1452(a)(9) and petitioner's original returns were consistent with Tax Law § 1455(b)(1) and section 18-5.2(d) of the Division's regulations (20 NYCRR 18-5.2[d]) in computing tax due as measured by the asset base. There is no dispute herein, the Administrative Law Judge observed, that the "taxable assets" of Barclays Capital, as that term is defined in Article 32 and relevant regulations, were accurately reflected on that

⁴Tax Law § 210(1)(b) imposes a franchise tax on business corporations measured by a capital base. Tax Law § 210(2) provides that the amount of subsidiary, investment and business capital subject to tax shall be determined by taking the average value of the assets included therein less liabilities deductible therefrom. Article 9-A thus permits the netting of assets in computing tax as measured by the capital base. In addition, and in contrast to the tax on assets under Article 32, the amount of tax imposed under Tax Law § 210(1)(b) is subject to an annual cap of \$350,000.00.

return. Accordingly, the Administrative Law Judge concluded that there is no justification for a discretionary adjustment.

The Administrative Law Judge found that the Division's regulations (20 NYCRR 18-1.3), promulgated under Tax Law § 1462(g), supports the conclusion that there is no distortion and, therefore, no justification for a discretionary adjustment in the present matter. The Administrative Law Judge stated that subsection (c) of that regulation lists the following factors to be considered in determining whether distortion exists under Tax Law § 1462(g): 1) whether one of the parties to the "agreement, understanding or arrangement" giving rise to the alleged distortion controls the other; 2) whether the "agreement, understanding or arrangement" reflects arms-length dealing despite the presence of control by one party; or 3) whether the "agreement, understanding or arrangement" has an arbitrary or tax-avoidance purpose (*see*, 20 NYCRR 18-1.3[c]). The Administrative Law Judge pointed out that the regulation considers whether the factor of control distorts the "agreements, understandings or arrangements" between the taxpayer and other parties. Here, the Administrative Law Judge observed, the putative "agreements, understandings or arrangements" giving rise to a claim of distortion are Barclays Capital's long and short transactions with its customers. The Administrative Law Judge determined that these were arms-length transactions between unrelated parties for a reasonable business purpose. The Administrative Law Judge found that the factors listed in the regulation as indicative of distortion are not present in any of these transactions.

Petitioner also argued that the discretionary adjustment is necessary to correct the disparate treatment afforded to Barclays Capital as similarly situated to a corporation engaged in business as a primary dealer in government securities but taxable under Article 9-A. Petitioner

urged that Article 32 was intended to apply to corporations engaged in traditional banking activities and that the activities of Barclays Capital are not the type contemplated by the Legislature to be subject to tax.

The Administrative Law Judge noted that negative consequences in the form of higher tax liability relative to primary dealers subject to tax under Article 9-A is not an indication that the assets of Barclays Capital were improperly or inaccurately reflected on petitioner's original returns. Moreover, the Administrative Law Judge determined that changes in the financial services industry and concomitant changes in the Federal regulatory landscape since the enactment of Article 32 were not grounds for a discretionary adjustment under Tax Law § 1462(g).

The Administrative Law Judge turned next to petitioner's constitutional claim. Petitioner contended that, but for the matter of ownership, Barclays Capital and all primary dealers in United States government securities not owned by banks are similarly situated. Notwithstanding such similarity, petitioner claims that Barclays Capital and such other entities face disparate tax burdens under Article 32's tax on assets and Article 9-A's capital base tax, respectively. Petitioner's constitutional arguments rested upon its claim that corporate classification for tax purposes based upon corporate ownership is improper. The Administrative Law Judge noted that while one effect of such classification is the disparate tax burden imposed by Tax § 1455(b) as compared with Tax Law § 210(1)(b), it is the classification itself which is at issue. The Administrative Law Judge pointed out that, logically, if Barclays Capital and such other corporations are similarly situated, they should be subject to the same tax treatment in all respects - not merely the same tax on assets. Accordingly, it would be improper, the

Administrative Law Judge observed, to determine simply, as petitioner frames the issue, whether Tax Law § 1455(b) is unconstitutional as applied. As petitioner's own arguments against ownership as a basis of classification suggest, the question of whether the treatment under Tax Law § 1455(b) is unconstitutional as applied depends upon whether Barclays Capital is properly classified as a banking corporation. If Barclays Capital's status as a banking corporation is constitutional, then it must be subject to all tax consequences under Article 32 flowing from such classification.

Regarding petitioner's adjustment of the receipts factor of its asset allocation percentage, the Administrative Law Judge noted that petitioner failed to provide documentation in response to requests by the Division. Further, the Administrative Law Judge found that the documentation provided at hearing on this issue, a summary of the calculations resulting in the proposed adjustment, did not establish that the proposed asset allocation percentage would "effect a fair and proper allocation of . . . assets reasonably attributable to New York" (*see*, 20 NYCRR 19-8.4[b]). Accordingly, the Administrative Law Judge denied the proposed receipts factor adjustment.

The Administrative Law Judge found that the Division of Tax Appeals lacked jurisdiction to consider petitioner's argument that the Division failed to consider the alternative basis for allowing the refund of adding Barclays Bank PLC's United States branch to the combined return filed by petitioner and thereby violating the Foreign Commerce Clause contained in article I, section 8, clause 3 of the United States constitution. This claim, the Administrative Law Judge pointed out, was made pursuant to an amendment to the petition, and is unrelated to petitioner's refund claim (i.e., amended returns) by which petitioner seeks to net the liabilities of Barclays

Capital. The Administrative Law Judge noted that petitioner's refund claim makes no reference to adding Barclays Bank PLC to its combined return and the amended returns do not seek to add Barclays Bank PLC to the combined group. Thus, the Administrative Law Judge found that with respect to this basis for considering the refund there is, in fact, neither a refund claim nor a refund claim denial. Accordingly, the Administrative Law Judge determined the Division of Tax Appeals lacks jurisdiction to consider this question (*see*, Tax Law §§ 1089[c]; 2006[4]).

The Administrative Law Judge pointed out that even if the Division of Tax Appeals had such jurisdiction, the proposed combination of foreign with domestic corporations is specifically precluded by Tax Law § 1462(f)(4)(ii). Further, the Administrative Law Judge noted, petitioner's contention, that the statutory prohibition is based solely on Barclays Bank PLC's status as a foreign corporation, is a challenge to the facial validity of Tax Law § 1462(f)(4)(ii). The jurisdiction of the Division of Tax Appeals, the Administrative Law Judge noted, does not encompass such a constitutional challenge (*see, Matter of Fourth Day Enterprises*, Tax Appeals Tribunal, October 27, 1988).

For these reasons, the Administrative Law Judge denied the petition and sustained the denial of petitioner's refund claim.

ARGUMENTS ON EXCEPTION

Petitioner's arguments on exception are substantially the same as were presented below.

Petitioner claims that the calculation of taxable assets in accordance with Tax Law § 1455(b)(1) and applicable regulations of the Division (20 NYCRR 18-5.2[d]) distorts Barclays Capital's asset picture. Petitioner urges that the Commissioner improperly declined to exercise

his discretion granted under Tax Law § 1462(g) to correct this alleged improper reflection of petitioner's assets.

Petitioner urges that the Commissioner should have exercised his discretion by correcting the claimed disparate tax treatment afforded to Barclays Capital, as a securities broker-dealer operating under section 20 of the Glass-Steagall Act and taxable under Article 32 of the Tax Law.

Assuming the Division's interpretation of the Tax Law is correct and the Tax Law does not permit a discretionary adjustment as urged by petitioner, petitioner asserts that the Division improperly enforced provisions of the Tax Law that facially discriminate against securities broker-dealers that operate under section 20 of the Glass-Steagall Act and are taxable under Article 32 of the Tax Law, when compared to similarly situated securities broker-dealers taxable under Article 9-A of the Tax Law, in violation of the Equal Protection Clause contained in the Fourteenth Amendment of the United States Constitution and the Equal Protection Clause contained in section 11 of article 1 of the New York State Constitution.

Petitioner also asserts that the adjustment to the receipts factor of its asset allocation percentage in its amended returns by netting the receipts of Barclays Capital was proper for the same reasons that the netting of Barclays Capital's assets was proper.

Petitioner alleged below that the Division failed to consider the alternative basis for allowing the refund of adding the Barclays Bank PLC's United States branch to the combined return filed by petitioner. This, petitioner argues, resulted in an unfair apportionment of income in violation of the Foreign Commerce Clause contained in article I, section 8, clause 3 of the United States Constitution. The Administrative Law Judge found that since there had been no

refund claim to the Division and no refund denial by the Division with respect to Barclays Bank PLC's United States Branch, the Division of Tax Appeals lacked jurisdiction to consider the question. Nevertheless, on exception petitioner states that it "reserves its rights" to challenge Tax Law § 1462(f)(4)(ii) as unconstitutional, both facially and as applied (Attachment to the exception, p. 2).

In opposition, the Division asserts that Barclays Capital is a banking corporation under Tax Law § 1452(a) and that petitioner properly reported its liability under Article 32 on its original returns. Petitioner's assets were neither inaccurately nor improperly reflected on its originally filed combined returns. Under these facts, the Division argues it does not have discretion under Tax Law § 1462(g) to make the adjustment to the assets of Barclays Capital (and thereby adjust petitioner's taxable assets) sought by petitioner. The Division further claims that the disparate treatment accorded broker-dealers of United States government securities that are banking corporations under Article 32 and other broker-dealers taxable under Article 9-A of the Tax Law does not violate the Equal Protection Clause of the United States Constitution.

The Division also contends that petitioner has failed to prove that the adjustments to the receipts factor in the amended returns is warranted.

OPINION

Petitioner urges that the Commissioner improperly declined to exercise his discretion granted under Tax Law § 1462(g) to correct the alleged improper reflection of Barclays Capital's assets. Tax Law § 1462(g) provides, in part, as follows:

In case it shall appear to the tax commission that any agreement, understanding or arrangement exists between the taxpayer and any other corporation or any person or firm, whereby the activity, business, income or assets of the taxpayer within the state is *improperly or inaccurately reflected*, the

tax commission is authorized and empowered, in its discretion and in such manner as it may determine, to adjust items of income or deductions in computing entire net income or alternative entire net income and to adjust assets, and to adjust wages, salaries and other personal service compensation, receipts or deposits in computing any allocation percentage, provided only that entire net income or alternative entire net income be adjusted accordingly and that any asset directly traceable to the elimination of any receipt be eliminated from assets so as to accurately determine the tax . . . (emphasis added).

It is clear from this language, contrary to petitioner's argument, that Tax Law § 1462(g) does not grant the Commissioner authority to make the adjustments requested by petitioner in the absence of a showing by the taxpayer that its assets are "improperly or inaccurately reflected."

Petitioner does not dispute that the "taxable assets" of Barclays Capital, as that term is defined in Article 32 and applicable regulations, were accurately reflected on its originally filed combined returns. We agree with the Administrative Law Judge that the Division's regulation (20 NYCRR 18-1.3) promulgated under Tax Law § 1462(g) supports the conclusion that there is no distortion of assets and, therefore, no justification or legal authority for a discretionary adjustment in this case.

Petitioner argues that the discretionary adjustment is necessary because Barclays Capital, a primary dealer in United States government securities and wholly owned by a bank taxable under Article 32 of the Tax Law, carries a heavier tax burden (the tax being a tax on assets) than a primary dealer in United States government securities owned by a business corporation taxed under Article 9-A of the Tax Law (measured by the capital base). We find no merit in this argument. The fact that the franchise tax on business corporations (Article 9-A) is computed differently or may be more or less than the franchise tax on banking corporations (Article 32) does not give rise to a discretionary adjustment under Tax Law § 1462(g) in the absence of a showing that the taxpayers assets are improperly or inaccurately reflected. As the

Administrative Law Judge noted, negative consequences in the form of higher tax liability when compared to primary dealers subject to tax under Article 9-A is not an indication that the assets of Barclays Capital were improperly or inaccurately reflected on petitioner's original returns.

We also reject petitioner's argument that this difference in treatment of Article 9-A corporations when compared to Article 32 banking corporations deprives petitioner of its rights under the equal protection clause. Petitioner is comparing apples to oranges. If petitioner demonstrated that Barclays Capital was carrying a heavier tax burden than other primary dealers in United States Government securities than similarly situated primary dealers *owned by banks*, it might have a better equal protection argument. As it is, petitioner speaks in terms of being similarly situated to Article 9-A business corporations engaged as primary dealers in United States Government securities. It is not, and, for that reason, petitioner's constitutional argument is not persuasive.

After a thorough review of the facts, the applicable law, and the party's arguments thereon, we affirm the determination of the Administrative Law Judge for the reasons stated therein. Petitioner has offered no evidence below, and no arguments on exception, that would justify our disturbing the determination below in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Barclays Group, Inc. (USA) & Affiliates is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Barclays Group, Inc. (USA) & Affiliates is denied; and

4. The Division of Taxation's denial of petitioner's claim for refund dated September 14, 2001 is sustained.

DATED: Troy, New York
January 27, 2005

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner