

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
	:	
of	:	
	:	DECISION
STEWART’S SHOPS CORPORATION	:	DTA NO. 825745
	:	
for Redetermination of a Deficiency or for	:	
Refund of Corporation Franchise Tax under	:	
Article 9-A of the Tax Law for the Years	:	
2006 through 2009. _____	:	

Petitioner, Stewart’s Shops Corporation, filed an exception to the determination of the Administrative Law Judge issued on March 10, 2016. Petitioner appeared by McDermott Will & Emery LLP (Scott M. Susko, Richard C. Call, and Peter L. Faber, Esqs., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Clifford Peterson and Bruce Lennard, Esqs., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard on November 10, 2016 in Albany, New York. Following oral argument, the parties filed simultaneous supplemental briefs by February 13, 2017, which date began the six-month period for the issuance of this decision.

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

ISSUE

Whether the Division of Taxation properly disallowed petitioner’s reduction of its entire net income by amounts it paid as premiums to Black Ridge Insurance Corporation, its wholly-owned, captive insurance subsidiary.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified findings of fact 40, 41, 183 and 184 and we have added an additional finding of fact, numbered 196 herein. We make these changes to more fully reflect the record. The Administrative Law Judge's findings, the modified findings and the additional finding appear below.

1. Stewart's Shops Corporation (petitioner) is a corporation formed under the laws of New York and has its principal place of business in Saratoga Springs, New York.

2. Petitioner is an employee-owned and family-owned business that owns and operates convenience stores and gas stations in upstate New York and Vermont. Petitioner and its predecessor entities (Stewart's Dairy, Saratoga Dairy and Stewart's Ice Cream Co., Inc.) have been in business since 1945, and started as a family-owned ice cream business that eventually expanded into the current convenience store and gasoline businesses.

3. Petitioner currently owns and operates 330 convenience stores in New York and Vermont, 276 of which have gas stations. During the years 2006 through 2009 (the years at issue), the number of convenience stores operated by petitioner ranged from 318 to 326 and the number of gas tanks at petitioner's gas stations ranged from 820 to 1,000.

4. During the years at issue, petitioner owned and operated an extensive warehousing and distribution center.

5. During the years at issue, petitioner owned and operated a fleet of automobiles, trucks, and gas tankers. During the years at issue, the number of vehicles petitioner owned ranged from 165 to 195, approximately 10 to 15 of which were gas tankers, which each carried up to 12,500 gallons of gasoline.

6. Petitioner employed 4,000 to 4,500 individuals during the years at issue.

7. The stock of petitioner is owned approximately one-third by its employees through an employee stock ownership plan (ESOP) and approximately two-thirds by members of the Dake family, including William Dake, who was one of petitioner's witnesses at the hearing in this matter.

8. During the years at issue Black Ridge Insurance Corporation (BRIC), NC PSC Corp., and Texstar Holdings, Inc., were wholly-owned direct subsidiaries of petitioner.

9. BRIC was a pure captive insurance company licensed by the New York State Insurance Department (Insurance Department) and authorized to do business in New York during the years at issue.

10. NC PSC Corp. operates a nonqualified income security plan whose primary purpose is to pay death and optional cash or retirement benefits to former employees of Pine State Creamery Company.

11. Texstar Holdings, Inc., operates a nonqualified income security plan whose primary purpose is to pay death and optional cash or retirement benefits to former employees of Star Textile Company.

12. During the years at issue, members of the Dake family also owned Stewart's Processing Corporation (SPC), which owns the processing plants that are used to produce the Stewart's-branded food, ice cream, and other dairy products sold by Stewart's convenience stores.

13. SPC was treated as an S corporation for federal and New York income tax purposes.

14. Petitioner timely filed forms CT-3-A, general business corporation combined franchise tax returns for the years at issue. In 2010, petitioner filed amended forms CT-3-A for

tax years 2006 and 2007. Attached to petitioner's CT-3-A combined franchise tax returns were its federal consolidated forms 1120, U.S. corporation income tax returns for the years at issue.

15. Petitioner included Texstar Holdings, Inc., and NC PSC Corp. in its CT-3-A combined franchise tax returns for the years at issue.

16. BRIC was not included on petitioner's CT-3-A combined franchise tax returns for the years at issue.

17. During the years at issue, petitioner paid BRIC the following amounts:

Year	Payment Amount
2006	\$10,049,125.00
2007	\$10,854,918.00
2008	\$10,434,985.00
2009	\$10,906,356.00

18. On petitioner's CT-3-A combined franchise tax returns for the years at issue, in computing its entire net income (ENI), petitioner deducted the amounts listed in finding of fact 17 that it paid to BRIC.

19. For the years at issue, petitioner filed federal consolidated forms 1120, U.S. corporation income tax returns.

20. Petitioner included BRIC in its consolidated forms 1120 filed for the years at issue.

21. On its consolidated forms 1120 for the years at issue, petitioner showed deductions for insurance and payments received by BRIC on its schedule of combined income and deductions. On the consolidated forms 1120 for the years at issue, petitioner eliminated these amounts as intercompany transactions and the payments were not deducted in calculating its federal taxable income (FTI).

22. During the hearing, petitioner submitted into the record pro forma consolidated forms 1120 for the years at issue (pro forma returns). The pro forma returns were not filed with the Internal Revenue Service (IRS) or submitted to the Division during the audit. On the pro forma returns, petitioner took deductions for “premium” amounts it paid to BRIC when computing FTI.

23. From approximately January 2010 to December 2011, the Division of Taxation (Division) conducted a general verification field audit of petitioner’s CT-3-A combined franchise tax returns for the years at issue.

24. The audit of petitioner’s CT-3-A combined franchise tax returns for the years at issue was the first audit of petitioner that focused on its payments to BRIC.

25. As a result of the audit, for tax year 2006, the Division disallowed petitioner’s claimed insurance expense deduction of \$7,990,638.00, which was the amount petitioner paid BRIC minus losses paid by BRIC. The Division similarly disallowed petitioner’s claimed insurance expense deductions for 2007, 2008 and 2009 for New York State tax purposes. The Division disallowed petitioner’s claimed insurance expense deductions for the years at issue, concluding that these expenses were not allowable deductions for federal tax purposes in computing FTI. The Division determined that the payments were not premiums paid for bona fide insurance, because it found that there was no risk-shifting or risk distribution.

26. Based on the disallowance, the Division calculated revised FTI amounts and revised combined ENI amounts for petitioner for the years at issue.

27. These computations led to the determination of the additional tax due in this matter.

28. At the conclusion of the audit of petitioner, the Division issued a notice of deficiency (assessment number L-037074405-6) dated December 23, 2011, asserting that petitioner owed additional corporation franchise tax under Article 9-A of the Tax Law in the amount of

\$1,988,142.00, plus interest in the amount of \$510,315.27 and penalties in the amount of \$198,811.00 for the years at issue. This additional tax consisted of tax on entire net income in the amount of \$1,963,460.00 plus additional metropolitan transportation business tax under Tax Law § 209-B (MTA surcharge) in the amount of \$24,682.00.

29. In computing the additional tax reflected on the notice, the Division disallowed the deductions taken by petitioner for payments made to BRIC as indicated in finding of fact 17 (net of any claims paid by BRIC to petitioner)¹ in computing its combined entire net income for the years at issue.

30. No materials examined during the audit indicated that there was any compensation of officers paid by BRIC in 2006, 2007 or 2008.

31. No materials examined during the audit indicated that there were any salaries or wages paid to employees of BRIC in 2006, 2007 or 2008.

32. No materials examined during the audit indicated that any rents were paid for BRIC in 2006, 2007 or 2008.

33. During the audit, petitioner conceded that the alleged insurance contracts between it and BRIC did not qualify as insurance contracts for federal income tax purposes.

34. Petitioner also conceded that its payments made on such contracts did not constitute insurance premiums for federal income tax purposes.

35. Before the audit, petitioner never sought an informal opinion from the Division or requested the Division to issue an advisory opinion on the deductibility of its payments to BRIC.

36. Petitioner never provided the Division with a letter from a tax advisor that predated

¹ During the years at issue, BRIC paid petitioner the following amounts: \$2,058,487.00 in 2006; \$2,335,262.00 in 2007; \$2,578,440.00 in 2008; and \$5,302,047.00 in 2009.

its filing of its tax returns in which the advisor opined that its payments to BRIC were deductible for federal income tax purposes.

37. Petitioner never provided the Division with a letter from the Insurance Department opining that petitioner's payments to BRIC were deductible for purposes of computation of its combined ENI.

38. The Division's primary contact for petitioner during the audit was Michael Cocca, petitioner's assistant treasurer, who did not testify during the hearing.

Captive Insurance Background

39. In 1997, as part of the 1997 - 1998 budget bill, the New York State Legislature enacted Article 70 of the Insurance Law (captive insurance laws), which allows captive insurance companies to be created in and to operate in New York State, and amended Article 33 of the Tax Law (franchise taxes on insurance corporations) to impose a tax on gross direct premiums and assumed reinsurance premiums of captive insurance companies licensed in New York (captive premiums tax).

40. In 2003, the Insurance Department² created a separate captive insurance group (the Captive Unit) within the Insurance Department, which was responsible for the licensing, oversight, and financial examination of captive insurance companies.

41. The Insurance Department, through the Captive Unit, receives and reviews applications for licensure for New York captive insurance companies and reviews annual reports filed by captives. After review of license applications is completed and satisfactory, the

² Subsequent to the period at issue, the Insurance Department was abolished and its functions and authority were transferred to the Department of Financial Services.

Superintendent of Insurance³ issues final approval of license applications based on the recommendations from the Captive Unit.

42. All insurance companies licensed in New York, including New York captive insurance companies, are subject to ongoing oversight by the Insurance Department.

43. All insurance companies licensed in New York, including New York captive insurance companies, are required to file annual statements with the Insurance Department.

44. New York captive insurance companies are required to file a New York captive insurance company annual statement form (annual statement) and are required to report their assets, liabilities, capital, income, expenses, lines of insurance, premiums, and losses, among other information, on those annual statements.

45. The Captive Unit reviews the annual statements that are filed by New York captive insurance companies. The annual statements are subject to at least a desk audit by the Captive Unit.

46. The Insurance Department is authorized to conduct quinquennial examinations of New York captive insurance companies, but did not start conducting those examinations until after 2007. The quinquennial examinations involve a review of the New York captive insurance company's books and records and other documentation supporting the information reported on the captive insurance company's annual statements.

47. Petitioner called Gregory V. Serio, former general counsel and superintendent of the Insurance Department, as a witness. Mr. Serio was among the drafters of the captive insurance laws, when he served as First Deputy Superintendent of Insurance.

³ Upon creation of the Department of Financial Services, the Superintendent of Insurance became the Superintendent of Financial Services.

48. The Captive Unit considered the capitalization of captive insurance companies when reviewing license applications.

49. In reviewing license applications and annual statements, the Captive Unit reviews and ensures that there is enough money in the financial plan of a captive insurance company to support the risks that are being insured by that company.

50. If a captive insurance company does not hear from the Insurance Department following the filing of its annual statement, it means only that the statement did not seem to have a problem that came to the department's attention.

51. The Insurance Department regulates captive insurance companies to ensure they have sufficient financial resources to take care of the claimants who make claims against the insured.

52. A captive insurance company is a separately incorporated entity that has a separate and distinct regulatory relationship with the Insurance Department.

53. Captive insurance companies operate as insurance companies and adjust claims that are made against the coverage they provide.

54. The Insurance Department does not set premium rates of policies issued but reviews proposed premiums to see, in part, if the insurance company is bringing in enough money to cover the risks it insures against and determine if the premiums are too low or too high.

55. Petitioner called Peter J. Molinaro, former Senior Deputy Superintendent of the Insurance Department, as a witness. Mr. Molinaro was among the drafters of the captive insurance laws when he served as Associate Counsel to the Insurance Department.

56. Mr. Molinaro testified that the Captive Unit would only allow businesses with \$100 million dollars of net worth to set up a captive insurance company in New York because these

businesses were presumed to be highly sophisticated entities that would hire and have access to the professional expertise it takes to run a captive insurance company.

57. When serving as the Senior Deputy Superintendent of the Insurance Department, Mr. Molinaro met with individuals from petitioner in 2003.

58. Several other members of the Insurance Department's Captive Unit were present at the meeting with petitioner.

59. The members of the Captive Unit discussed the premium tax under Article 33 of the Tax Law and the New York Insurance Law § 332 assessment with representatives of petitioner at the meeting.

60. Mr. Molinaro testified that he does not recall discussing deductibility for federal income tax purposes of premiums while promoting the formation of captive insurance companies.

61. The Captive Unit did not review captive insurance companies' premiums for deductibility for federal income tax purposes.

62. Mr. Molinaro does not recall ever representing that premiums paid to a captive insurance company would be deductible for federal income tax purposes.

63. When a corporation asked the Captive Unit about the deductibility for federal tax purposes of premiums paid to a captive insurance company, it was told to consult its tax advisor.

64. The Captive Unit was not charged with providing tax advice about captive insurance companies.

Petitioner's Business Risks and Historic Insurance Programs

65. Petitioner called William P. Dake, petitioner's chairman of the board, as a witness.

66. Mr. Dake was the president of petitioner from the early 1970s until 2003. In 2003, Mr. Dake's son, Gary Dake, became president of petitioner and Mr. Dake became petitioner's chairman of the board of directors. As the president and chairman of the board, Mr. Dake was involved in all aspects of petitioner's operations.

67. In his capacity as president and chairman of the board, Mr. Dake has overseen and managed the risks that petitioner faces in its business operations.

68. Mr. Dake supervised the activities of Mary Ann Macica, who has been the risk manager for petitioner from 1990 to present and who manages petitioner's risks by monitoring, reviewing and managing claims from third parties and by evaluating and managing petitioner's insurance needs. Ms. Macica acted simultaneously as petitioner's vice president and risk manager, and vice president of BRIC during its existence.

69. In 1991, petitioner hired Harry Bucciferro of Marshall & Sterling (an insurance agency) as its insurance broker. Mr. Bucciferro has over 40 years of experience in the insurance industry and has assisted petitioner with its insurance and risk financing needs from 1991 through the present.

70. Petitioner faces a number of risks in its business, including customers and employees suffering personal injuries on its premises (e.g., "slip and fall" accidents), crime (e.g., theft) by third parties and employees, pollution resulting from gasoline leaks or spills, property damage or personal injuries caused by vehicle accidents, and product liability claims.

71. In the early 1990s and prior to the formation of BRIC, petitioner purchased multiple lines of insurance from non-captive insurance companies, including property and casualty insurance, general liability insurance, workers' compensation insurance, automobile insurance,

large truck insurance, employee disability insurance, crime insurance, and umbrella insurance.

72. From 1992 to 2003, petitioner (specifically, Mr. Dake and Ms. Macica, in consultation with Mr. Bucciferro) began exploring alternative forms of risk financing, such as self-insurance (including noninsurance and large self-insured retentions and deductibles), because its insurance premiums had grown significantly and it wanted to reduce the cost of its risk financing and wanted greater control over its claims management. For example, petitioner wanted more control over whether its claims should be paid or settled.

73. Mr. Serio explained that “self-insurance” is when a company pays its own claims and losses as they arise, and described two types of self-insurance arrangements: 1) noninsurance, where a company does not purchase insurance from third parties and is responsible for all of its own claims and losses; and 2) self-insured retentions and deductibles, where a company is responsible for paying losses up to a certain threshold amount (referred to as either the deductible amount or self-insured retention amount) and where losses over that threshold amount are covered by an insurance policy with a third-party insurance company. A company using self-insurance may or may not put funds aside in a designated account from which it will pay future losses.

74. Self-insurance arrangements are not regulated by the Insurance Department.

75. In 1993, petitioner became a qualified self-insurer with the New York State Workers’ Compensation Board for workers’ compensation and disability insurance purposes.

76. Starting around 1994, petitioner started increasing its use of self-insured retentions as part of its plan to migrate to more self-insurance arrangements.

77. In 1994, petitioner purchased its first insurance policy with a self-insured retention.

78. For several years prior to forming BRIC, petitioner also self-insured several risks using noninsurance (meaning it had no third-party insurance policies covering those risks). For example, petitioner self-insured its pollution risks (such as losses due to gasoline spills or leaks at its gas stations that might require environmental clean-up) through noninsurance because petitioner had controls in place that led it to believe that the cost of third-party insurance was too expensive relative to its risks.

79. In the early 2000s, petitioner became self-insured for its crime risks after its then crime insurance carrier, The Hartford, refused to renew petitioner's crime insurance policy after a large claim was made by petitioner for an incident involving a former employee who embezzled approximately \$1,900,000.00 from petitioner. After The Hartford refused to renew its crime policy, petitioner tried to obtain crime insurance from other insurance carriers, but petitioner felt the cost was too high relative to its anticipated future risks due to controls petitioner had put in place following the embezzlement incident.

80. Following the embezzlement incident described above and due to increasing costs, petitioner (specifically, Mr. Dake and Ms. Macica in consultation with Mr. Bucciferro) again began exploring how petitioner could increase its use of alternative risk financing arrangements.

81. Petitioner considered going without insurance but felt that option did not work due to regulatory requirements.

82. At the suggestion of Mr. Bucciferro, petitioner also considered forming a captive insurance company in Vermont, New York or Bermuda. Petitioner dismissed the idea of forming a captive insurance company in Bermuda because it did not have any business operations there and thus narrowed its captive insurance options to a New York or Vermont captive insurance company.

Formation of BRIC

83. Mr. Dake was involved in petitioner's decision to form a New York captive insurance company in 2003.

84. Mr. Bucciferro arranged a meeting in March 2003 with members of the Captive Unit and petitioner to discuss the possibility of petitioner forming a New York captive insurance company.

85. At the March 2003 meeting, Mr. Dake and Mr. Bucciferro met with Mr. Molinaro, Mr. Scala, and Jody Wald from the Insurance Department's Captive Unit to discuss the option of forming a captive insurance company. The members of the Captive Unit explained the regulatory requirements for New York captive insurance companies, the benefits of forming a New York captive insurance company, and the formation and licensure process and provided Mr. Dake with a copy of the Captive Unit's marketing brochure.

86. At the March 2003 meeting, the members of the Captive Unit encouraged petitioner to form a New York captive insurance company and represented that the benefits included providing petitioner with increased control of risk, increased control of claims, and increased incentive for risk management.

87. Mr. Dake described the "sell" of having a captive insurance company was primarily that petitioner would have a fair amount of control.

88. The idea of maintaining control of its risk management program was appealing to petitioner.

89. Mr. Dake described petitioner's decision to form BRIC as a New York captive insurance company as based, in part, on "a little bit of civic service" because it appeared to him that the Insurance Department wanted someone selling their captive insurance program.

90. Petitioner also expected an economic benefit from forming a captive insurance company by offsetting some expenses, the biggest one being claims expenses. Mr. Dake believed that the offset of claims expenses would come partially by some tax savings realized by putting money aside to build a strong balance sheet within BRIC. The idea of tax savings was one of several factors in deciding whether to form BRIC but was not the only factor.

91. After meeting with members of the Captive Unit, it was Mr. Dake's understanding that premiums paid to a New York captive insurance company would be deductible under Article 9-A of the Tax Law. However, Mr. Molinaro did not recall ever representing to petitioner that the payments would be deductible.

92. Mr. Dake believed that BRIC could function intelligently as a logical business vehicle.

93. Mr. Dake believed that he could not create a stable entity with an effective balance sheet without deducting the payments made to BRIC.

94. After the March 2003 meeting, Mr. Dake, after further consultations with Ms. Macica and Mr. Bucciferro, made the final decision for petitioner to form a New York captive insurance company instead of pursuing the other alternative risk financing arrangements it had been considering because a New York captive insurance company would allow petitioner to use a regulated form of insurance and gain greater control over its risks and claims.

95. Based on a recommendation by the Captive Unit, petitioner engaged Pricewaterhouse Coopers LLP (PWC) to prepare a feasibility and actuarial study (PWC study) and to assist with the formation of and license application for BRIC.

96. In preparing the PWC study, PWC reviewed petitioner's historic insurance policies and its loss history. Based on that historic information, the PWC study proposed the lines of

insurance that BRIC should provide to petitioner as well as the premiums that should be charged for those lines of insurance based on petitioner's projected losses.

97. PWC determined that premiums for "traditional" risks (specifically, general liability, garage and garage keepers liability, auto liability, property liability, boiler and machinery liability, employment practices liability [EPLI], umbrella liability, motor carrier [tanker] liability, and workers' compensation liability) and crime risks should be computed at 135% of the projected losses and determined premiums for "non-traditional" risks (specifically, pollution, product recall, business interruption, reputation risk, identity theft, excess directors and officers liability coverage, and excess umbrella coverage) based on a review of market conditions, including discussions with several insurance brokers who were aware of current pricing.

98. Based on the information in the PWC study, Ms. Macica prepared a license application for BRIC that was then reviewed by PWC.

99. Ms. Macica filed a license application for BRIC (which included a copy of the PWC study) with the Captive Unit on November 19, 2003.

100. Upon receipt, the Captive Unit reviewed BRIC's license application.

101. Over the course of the next several weeks, the Captive Unit engaged in discussions and correspondence with Ms. Macica and PWC regarding BRIC's license application.

102. In BRIC's initial license application, it was proposed that BRIC would be owned 95% by petitioner and 5% by SPC. However, Mr. Wald suggested that BRIC be wholly-owned by petitioner. As a result of that suggestion, petitioner changed the proposed ownership structure of BRIC so that BRIC was wholly-owned by petitioner.

103. The Captive Unit also examined the workers' compensation coverage to be provided by BRIC to petitioner and it was agreed that because petitioner was a qualified self-

insurer for workers' compensation purposes, BRIC would indemnify petitioner for its workers' compensation claims, meaning that petitioner would continue to pay any workers' compensation claims directly to the claimants and BRIC would indemnify petitioner for those claims.

104. Ms. Macica also conferred with Mr. Wald regarding a plan for BRIC to provide indemnity coverage to petitioner for its unasserted workers' compensation claims for the 1992 through 2003 years in exchange for a one-time \$6,000,000.00 premium (portfolio transfer) and the Captive Unit did not object to that plan.

105. BRIC was incorporated on December 30, 2003.

106. After completing its review of BRIC's license application and the subsequent amendments and revisions to that application, the Insurance Department issued a license to BRIC effective January 1, 2004 authorizing BRIC to conduct a captive insurance business in New York as a pure captive insurance company.

107. The Insurance Department documented its conclusions regarding BRIC's license application in a memorandum dated January 22, 2004.

BRIC's Operations

108. Mr. Bucciferro was the manager of BRIC during the years at issue. As manager, Mr. Bucciferro worked with the Insurance Department in order to meet regulatory requirements, prepared BRIC's insurance policies, helped BRIC procure and review its annual actuarial reports, and helped BRIC file its annual statements with the Insurance Department.

109. Mr. Bucciferro was paid \$5,000.00 for his services as manager in 2009.

110. After BRIC was licensed as a captive insurance company, Mr. Bucciferro and Ms. Macica consulted and finalized the lines of insurance BRIC would provide to petitioner as of January 1, 2004, based on recommendations from PWC and petitioner's historic insurance needs

and loss history, and the premiums that BRIC would charge for those lines of insurance.

111. After the creation of BRIC, petitioner no longer purchased crime insurance from third parties. Petitioner also increased the deductible and self-insurance retention amounts on its non-captive insurance policies.

112. BRIC provided petitioner with the following three categories of coverage: 1) excess follow form insurance; 2) deductible buy-back insurance; and 3) “other” insurance.

113. The excess follow form insurance provided by BRIC to petitioner was umbrella insurance that covered losses incurred by petitioner that exceeded the maximum losses covered by the following insurance policies that petitioner had with non-captive insurance companies:

1) directors and officers liability and EPLI policies; 2) umbrella insurance policies; and 3) property insurance (including business interruption and flood) policies.

114. Although petitioner had never incurred a loss in excess of its existing non-captive insurance policies, petitioner concluded that it had a business need for excess follow form insurance because it faced risks that could result in losses in excess of those covered by its non-captive insurance policies, for example due to the proximity of its seven-acre facility to the Kesselring nuclear power plant and due to the large volume of gasoline that it transported on public roads on a daily basis.

115. The deductible buy-back coverage provided by BRIC to petitioner provided first dollar insurance coverage for losses incurred by petitioner within the deductible and self-insured retention amounts (i.e., coverage for the first dollar of liability through the deductible and self-insured retention amounts) that petitioner had under the following insurance policies with non-captive insurance companies: 1) general liability (including liquor and employee benefits liability) insurance; 2) property liability insurance; 3) boiler and machinery liability insurance;

4) directors and officers and EPLI insurance; 5) automobile (including gas tanker and garage keepers) liability insurance; and 6) umbrella insurance. If a claim exceeded the deductible or self-insured retention amounts, a non-captive insurer would pay petitioner the excess up to a specified maximum. The deductible buy-back insurance also provided insurance coverage for any New York workers' compensation losses that petitioner incurred in its capacity as a qualified self-insurer.

116. Petitioner concluded that it had a business need for the deductible buy-back insurance described above because it had incurred losses in the seven specified areas in its business operations.

117. Mr. Bucciferro testified that the combined annual aggregate limit for the deductible buy-back coverage on the insurance policies between petitioner and BRIC for the years at issue was \$5 million.

118. Petitioner's workers' compensation loss portfolio transfer was a one-time transaction in which petitioner wanted to remove loss reserves from its books by transferring the responsibility for its self-insured workers' compensation claims from 1993 to 2003 to BRIC in exchange for a payment to BRIC.

119. Prior to the formation of BRIC, petitioner maintained a \$6 million reserve to pay workers' compensation claims arising from the 1993 - 2003 period.

120. In 2004, BRIC charged petitioner \$2.5 million for workers' compensation deductible buy-back coverage.

121. In 2004 and 2005, the policies indicate that the deductible buy-back line of coverage provided by BRIC to petitioner was subject to a \$5 million combined annual aggregate limit.

122. During the audit, in response to the Division's information document request, Mr.

Cocca stated that the \$5 million figure for the combined annual aggregate limit on BRIC's deductible buy-back coverage listed on the insurance policies was a typographical error and should have been \$10 million for the years at issue.

123. The Division's auditor concluded that Mr. Cocca's assertion that the figure for the combined annual aggregate limit on BRIC's deductible buy-back coverage was a typo was incorrect based on her review of the policies and declaration pages.

124. The 2004 policy between BRIC and petitioner indicates that for 2004, petitioner paid BRIC \$3,850,308.00 for deductible buy-back coverage with a \$5 million combined annual aggregate limit.

125. The 2005 policy between BRIC and petitioner indicates that for 2005, petitioner paid BRIC \$5,558,000.00 for deductible buy-back coverage with a \$5 million combined annual aggregate limit.

126. The 2006 policy between BRIC and petitioner indicates that for 2006, petitioner paid BRIC \$5,880,925.00 for deductible buy-back coverage with a \$5 million combined annual aggregate limit.

127. The 2007 policy between BRIC and petitioner indicates that for 2007, petitioner paid BRIC \$6,524,918.00 for deductible buy-back coverage with a \$5 million combined annual aggregate limit.

128. The 2008 policy between BRIC and petitioner indicates that for 2008, petitioner paid BRIC \$6,495,922.00 for deductible buy-back coverage with a \$5 million combined annual aggregate limit.

129. The 2009 policy between BRIC and petitioner indicates that for 2009, petitioner

paid BRIC \$6,841,231.00 for deductible buy-back coverage with a \$5 million combined annual aggregate limit.

130. In addition to the deductible buy-back coverage, petitioner purchased the following coverage from BRIC, as indicated in the policies for the years at issue:

Year	Coverage	Limits	Premium
2006	Excess Follow Form Insurance		
	i. Excess D&O/EPLI Including Fiduciary Liability	\$ 9,000,000.00 XS \$ 1,000,000.00	\$225,000.00
	ii. Excess umbrella	\$30,000,000.00 XS \$20,000,000.00	\$270,200.00
	iii. Excess property	\$20,000,000.00	\$195,000.00
	Other Coverages		
	i. Pollution: Sudden & Accidental: 1 st party	\$10,000,000.00/occ. & agg.	\$2,000,000.00
	ii. Pollution: Sudden & Accidental: 3 rd party	Included above	Included
	iii. Gradual Pollution	Included	Included
	iv. Product Withdrawal	\$10,000,000.00	\$ 178,000.00
	v. Reputation Risk: 1 st party	\$10,000,000.00	\$ 100,000.00
	vi. Crime	\$10,000,000.00	\$ 800,000.00
	vii. Identity Theft Risk	\$10,000,000.00	\$ 100,000.00
	viii. Accounts Receivable	\$10,000,000.00	\$ 100,000.00
	ix. Kidnap, Ransom, Extortion	\$10,000,000.00	\$ 100,000.00
	x. EDP/CYBER Liability	\$10,000,000.00	\$ 100,000.00

2007	Excess Follow Form Insurance ⁴		
	i. Excess D&O/EPLI Including Fiduciary Liability	\$10,000,000.00 XS \$ 1,000,000.00	\$250,000.00
	ii. Excess umbrella	\$10,000,000.00 XS \$20,000,000.00	\$250,000.00
	iii. Excess property	\$10,000,000.00	\$195,000.00
	Other Coverages ⁵		
	i. Pollution: Sudden & Accidental: 1 st party	\$10,000,000.00/occ. & agg.	\$2,025,000.00
	ii. Pollution: Sudden & Accidental: 3 rd party	Included above	Included
	iii. Gradual Pollution	Included	Included
	iv. Product Withdrawal	\$10,000,000.00	\$ 180,000.00
	v. Reputation Risk: 1 st party	\$10,000,000.00	\$ 100,000.00
	vi. Crime	\$10,000,000.00	\$ 900,000.00
	vii. Identity Theft Risk	\$10,000,000.00	\$ 100,000.00
	viii. Accounts Receivable	\$10,000,000.00	\$ 100,000.00
	ix. Kidnap, Ransom, Extortion	\$10,000,000.00	\$ 100,000.00
x. EDP/CYBER Liability	\$10,000,000.00	\$ 100,000.00	
xi. Key Man Replacement	\$ 100,000.00	\$ 30,000.00	

⁴ For 2007, the excess follow form insurance coverage was subject to a \$10,000,000.00 combined annual aggregate limit.

⁵ For 2007, the other coverages were subject to a \$10,000,000.00 combined annual aggregate limit.

2008	Excess Follow Form Insurance ⁶		
	i. Excess D&O/EPLI Including Fiduciary Liability	\$10,000,000.00 XS \$ 1,000,000.00	\$250,000.00
	ii. Excess umbrella	\$10,000,000.00 XS \$20,000,000.00 \$10,000,000.00 XS \$10,000,000.00 AL only	\$250,000.00
	iii. Excess property	\$10,000,000.00	\$213,000.00
	Other Coverages ⁷		
	i. Pollution: Sudden & Accidental: 1 st party	\$10,000,000.00/occ. & agg.	\$2,025,000.00
	ii. Pollution: Sudden & Accidental: 3 rd party	Included above	Included
	iii. Gradual Pollution	Included	Included
	iv. Product Withdrawal	\$10,000,000.00	\$ 200,000.00
	v. Reputation Risk: 1 st party	\$10,000,000.00	\$ 100,000.00
	vi. Crime	\$10,000,000.00	\$ 900,000.00
	vii. Identity Theft Risk	\$10,000,000.00	\$ 100,000.00
	viii. Accounts Receivable	\$10,000,000.00	\$ 100,000.00
	ix. Kidnap, Ransom, Extortion	\$10,000,000.00	\$ 100,000.00
	x. EDP/CYBER Liability	\$10,000,000.00	\$ 100,000.00
xi. Key Man Replacement	\$ 100,000.00	\$ 30,000.00	

⁶ For 2008, the excess follow form insurance coverage was subject to a \$10,000,000.00 combined annual aggregate limit.

⁷ For 2008, the other coverages were subject to a \$10,000,000.00 combined annual aggregate limit.

2009	Excess Follow Form Insurance ⁸		
	i. Excess D&O/EPLI Including Fiduciary Liability	\$10,000,000.00 XS \$ 1,000,000.00	\$250,000.00
	ii. Excess umbrella	\$10,000,000.00 XS \$25,000,000.00 \$10,000,000.00 XS Tanker \$10,000,000.00 AL	\$250,000.00
	iii. Excess property	\$10,000,000.00	\$258,410.00
	Other Coverages ⁹		
	i. Pollution: Sudden & Accidental: 1 st party	\$10,000,000.00/occ. & agg.	\$2,025,000.00
	ii. Pollution: Sudden & Accidental: 3 rd party	Included above	Included
	iii. Gradual Pollution	Included	Included
	iv. Product Withdrawal	\$10,000,000.00	\$ 200,000.00
	v. Reputation Risk: 1 st party	\$10,000,000.00	\$ 100,000.00
	vi. Crime	\$10,000,000.00	\$ 900,000.00
	vii. Identity Theft Risk	\$10,000,000.00	\$ 100,000.00
	viii. Accounts Receivable	\$10,000,000.00	\$ 100,000.00
	ix. Kidnap, Ransom, Extortion	\$10,000,000.00	\$ 100,000.00
	x. EDP/CYBER Liability	\$10,000,000.00	\$ 100,000.00
xi. Key Man Replacement	\$ 100,000.00	\$ 30,000.00	

131. The “other” insurance coverage provided by BRIC to petitioner provided coverage for losses incurred by petitioner in the following areas and for which petitioner did not have any non-captive insurance at the time BRIC was formed: 1) pollution (including first-party sudden and accidental pollution, third-party sudden and accidental pollution, and gradual pollution);¹⁰ 2) product withdrawal (for losses resulting from petitioner having to withdraw products from the

⁸ For 2009, the excess follow form insurance coverages was subject to a \$10,000,000.00 combined annual aggregate limit.

⁹ For 2009, the other coverages were subject to a \$10,000,000.00 combined annual aggregate limit.

¹⁰ First-party pollution coverage is for losses incurred with respect to petitioner’s own property, while third-party pollution coverage is for losses incurred with respect to property owned by a third-party.

market); 3) reputation risk (for losses resulting from negative publicity or damage to petitioner's public reputation); 4) crimes; 5) identity theft risk; and 6) the workers' compensation loss portfolio transfer.

132. Similar to the reasons why petitioner did not have pollution insurance coverage and crime insurance coverage, petitioner did not have coverage from non-captive insurance companies for product withdrawal, reputation risk, or identity theft risk because petitioner felt that those types of policies were not readily available at affordable rates in the early 2000s.

133. With respect to the "other" insurance coverages, petitioner concluded that it had a business need for pollution, crime, product withdrawal, and workers' compensation coverage (specifically, the loss portfolio transfer) because it had incurred losses in those areas in its business operations.

134. Although petitioner had never incurred a loss due to reputation risk, it concluded that it had a business need for reputation risk coverage based on losses that similar convenience stores had suffered due to reputation damage. Petitioner's witness gave an example of a convenience store chain in the mid-west that suffered losses due to reputation damage after it sold contaminated tomatoes to consumers, and testified that petitioner was concerned that it faces similar risks in its business operations.

135. Although petitioner had never incurred a loss due to identity theft, petitioner concluded that it had a business need for identity theft insurance because it was concerned about potential losses that might result from the theft of social security numbers and credit card numbers that it maintained in its business operations.

136. All of the lines of insurance that were ultimately provided by BRIC to petitioner for

2004 were included in BRIC's license application that was reviewed and approved by the Insurance Department.

137. After the lines of insurance were finalized, Mr. Bucciferro determined the insurance premiums that BRIC charged petitioner by comparing the rates recommended in the PWC study with market rates and industry standards for similar insurance lines provided by non-captive insurance companies.

138. At the end of each year, BRIC engaged AON Risk Consultants, Inc. (AON), an independent actuarial firm, to conduct an actuarial review of BRIC's operations.

139. Each year during BRIC's existence, Mr. Bucciferro and Ms. Macica reevaluated the lines of insurance to be provided by BRIC to petitioner and the premiums to be charged for those lines of insurance based on BRIC's experience during the prior year, the actuarial reports prepared by AON, and market rates and industry standards for similar insurance lines provided by non-captive insurance companies.

140. As a result of that annual review, BRIC added: 1) electronic data processing (EDP)/cyber liability insurance coverage; 2) kidnap, ransom, and extortion insurance coverage; and 3) accounts receivable insurance coverage to the "other" coverages sections of the policies beginning in 2005, and added key man insurance to the "other" coverages section of the policies beginning in 2007.

141. Although petitioner had never incurred a loss due to EDP/cyber liability, it concluded that it had a business need for this coverage because it was concerned about potential losses it might incur if it had an issue with its extensive online data processing system, which manages inventory orders for petitioner's convenience stores.

142. Although petitioner had never incurred a loss due to kidnap, ransom or extortion or due to the loss of a key individual, it concluded that, as a family-owned and operated business, it has a business need for this coverage, based on petitioner's belief that the size and wealth of the Dake family could make members of the family a potential target.

143. Although petitioner had never incurred a loss related to accounts receivables, it concluded that it had a business need for this coverage because of potential risks relating to receivables from its vendors.

144. As a result of the annual review, BRIC occasionally adjusted its premiums based on the AON reports and to account for its loss history; for example, if claims exceeded anticipated levels.

145. The lines of insurance provided by BRIC to petitioner and premiums charged by BRIC for those lines of insurance were memorialized in insurance policies that BRIC issued to petitioner for the years at issue (policies).

146. Mr. Bucciferro prepared the policies for each year at issue.

147. Each December, BRIC submitted copies of its policies for the upcoming year to the Insurance Department.

148. Petitioner paid the premiums set forth in the policies to BRIC by a cash wire transfer to one of BRIC's bank accounts or investment accounts.

149. When petitioner incurred a loss covered by the policies, it filed a claim with BRIC.

150. For general liability claims, petitioner handled all the claims with the claimant and then, at the end of each month, petitioner prepared a bill and submitted it to BRIC.

151. Petitioner's in-house claims adjuster was Joanne McDermott.

152. Petitioner investigated claims made against it. After investigation, petitioner paid

claims against it and submitted invoices to BRIC for payment. BRIC's claimant would be petitioner.

153. Ms. McDermott paid the general liability claims for petitioner.

154. With respect to general liability claims, petitioner interfaced directly with the third-party claimant (e.g., a store customer) and then submitted monthly claims to BRIC for any claims paid during the preceding month (general liability invoices). The general liability invoices were prepared by Ms. McDermott and were submitted to Ms. Macica (in her capacity as the Vice President of BRIC) for review and approval. If Ms. Macica had any questions about the general liability invoices, she would discuss them with Ms. McDermott. Once any issues were resolved, Ms. Macica would approve the general liability invoice for payment.

155. With respect to pollution claims, petitioner submitted any pollution claims to BRIC on a yearly basis (remediation invoices). The remediation invoices were prepared by Kim White, who was in charge of gasoline contamination clean-up and remediation situations and worked at the processing plant. The remediation invoices were submitted to Ms. Macica (in her capacity as the Vice President of BRIC) for review and approval. If Ms. Macica had any questions, she discussed them with Ms. White and, in some instances, went to her office to review her files relating to specific claims. Once any issues were resolved, Ms. Macica would approve the remediation invoices for payment.

156. With respect to all other types of claims (other than general liability and pollution), petitioner submitted monthly claims to BRIC for any claims paid by petitioner during the preceding month (other invoices). The other invoices were prepared by Ms. McDermott, who would compile the information from the various departments within petitioner's operations (e.g., crime-related claims originated in the internal auditing and security department) and were

submitted to Ms. Macica (in her capacity as the Vice President of BRIC) for review and approval. If Ms. Macica had any questions, she would discuss them with Ms. McDermott. Once any issues were resolved, Ms. Macica would approve the other invoices for payment.

157. Detailed records regarding the claims reflected on the general liability invoices, remediation invoices, and other invoices were maintained by petitioner and submitted to BRIC upon request.

158. BRIC did not approve all claims submitted by petitioner.

159. After a claim was approved for payment, BRIC paid the claim with cash via a wire transfer to petitioner.

160. During the years at issue, BRIC paid petitioner the following amounts for claims filed by petitioner with BRIC:

Year	Claims Paid
2006	\$2,058,487.00
2007	\$2,335,262.00
2008	\$2,578,440.00
2009	\$5,302,047.00

161. A third-party administrator handled workers' compensation claims for petitioner.

162. Petitioner's workers filed workers' compensation claims with petitioner directly, and petitioner paid those claims up to a \$400,000.00 self-insured retention amount. Petitioner paid the claims through the third-party administrator. In turn, petitioner was indemnified by BRIC.

163. For workers' compensation claims brought by an employee of petitioner, the third-party administrator investigated the claim to determine if it was legitimate. Petitioner

would pay the claim through the third-party administrator and would then, in turn, submit a claim to BRIC, which would then review the third-party administrator's reports, discuss any questions with the third-party administrator, and determine whether to approve the claim.

164. Ms. Macica does not believe that BRIC was necessarily obligated to investigate, adjust, and adjudicate claims.

165. BRIC filed annual statements with the Insurance Department that disclosed, among other information, the lines of insurance provided by BRIC to petitioner and the premiums charged by BRIC for that insurance.

166. The Insurance Department never contacted BRIC with any concerns about its annual statements.

167. The Insurance Department renewed BRIC's license each year during its existence.

168. BRIC had its own officers and directors.

169. BRIC conducted annual board of directors meetings and annual shareholders meetings in New York.

170. Petitioner did not cross-guarantee any of BRIC's debts or any other liabilities. When petitioner cross-guaranteed the debts of its subsidiaries, it executed a written cross-guaranty document with its lending institution or vendor seeking the guarantee and no such documents were executed by petitioner with respect to BRIC.

171. BRIC did not make any loans to petitioner and petitioner did not make any loans to BRIC.

172. BRIC did not make any distributions or dividends to petitioner.

173. Petitioner did not make any contributions to BRIC following the initial formation of BRIC.

174. BRIC had its own bank account.

175. BRIC invested its capital and premium income in various brokerage and investment accounts and held those accounts in its own name.

176. BRIC maintained its own books and records and kept those books and records in BRIC's offices in Ballston Spa, New York. Ms. Macica's office is located at this address. Ms. Macica kept copies of BRIC's books and records in the audit department area at her desk.

177. BRIC and petitioner have the same address and are in the same building.

178. BRIC reported to the Division captive premiums tax under Article 33 of the Tax Law totaling \$211,226.00 on the payments it received from petitioner pursuant to the policies for the years at issue as follows:

Year	Captive Premiums Tax Paid
2006	\$50,245.00
2007	\$54,275.00
2008	\$52,175.00
2009	\$54,531.00

179. In 2005, BRIC sought a refund of the captive premium tax paid on the \$6,000,000.00 payment received from petitioner in connection with the loss portfolio transfer (the 2004 refund claim).

180. In a letter dated November 9, 2005, the Division denied the 2004 refund claim and stated that it had "determined that \$6,000,000.00 received from parent company to indemnify them for workers' compensation losses fits the definition of 'premium' as defined under Section 1510(c) and 1502b(c)" of Article 33.

181. BRIC was assessed New York Insurance Law § 332 assessments by the Insurance

Department totaling \$265,333.04 for the years at issue based on the payments it received from petitioner as follows:

Year	§ 332 Assessment Amount
2006	\$40,581.44
2007	\$38,855.60
2008	\$89,563.70
2009	\$96,332.30

182. In addition to the audit of petitioner at issue herein, the Division simultaneously conducted an audit of the captive premiums tax returns filed by BRIC under Article 33 of the Tax Law for the years at issue.

183. At the time of the audit, the Division concluded that BRIC was properly subject to the captive premiums tax under Article 33 of the Tax Law.

184. Also at the time of the audit, the Division determined that BRIC could not be included in the combined Article 9-A returns filed by petitioner for the years at issue because BRIC was an insurance corporation.

185. The Division has not issued a refund to BRIC of the captive premiums taxes paid by BRIC for the years at issue. In the Division's draft schedule of taxes due for BRIC, the Division indicated it would refund the taxes on premiums paid by BRIC under Article 33 of the Tax Law for the years at issue.

186. BRIC was dissolved in 2010.

187. BRIC filed a final tax return for the year 2010.

188. Petitioner decided to cease BRIC's operations due to the increasing cost of business resulting from a rise in Insurance Law § 332 assessments, the annual fees that were paid to AON

to conduct actuarial reviews of BRIC's business, and the Division's position with respect to the deductibility of the payments petitioner made to BRIC.

189. Throughout the existence of BRIC, no claim was paid against any of the excess follow form insurance coverage provided by BRIC to petitioner.

190. With the exception of crime coverage, petitioner maintained third-party insurance company policies throughout the lifetime of BRIC. After the creation of BRIC, petitioner changed the deductible and self-insured retention amounts on its third-party policies.

191. After BRIC was dissolved, petitioner maintained its third-party insurance company policies.

192. In 2006, BRIC had no costs of adjusting claims.

193. BRIC did not pay Ms. Macica a salary as vice president of the company.

194. BRIC did not buy any reinsurance at any time.

195. BRIC filed a protective claim requesting a refund for all taxes it paid under Article 33 of the Tax Law.

196. Petitioner used a 52-53 week accounting period for purposes of reporting its federal income and Article 9-A franchise taxes. Accordingly, petitioner's 2009 tax year began on December 29, 2008 and ended on January 3, 2010. During the audit, the Division determined that amendments to the Tax Law applicable to tax years beginning on or after January 1, 2009 (discussed *infra*) did not apply to petitioner until its tax year beginning on January 4, 2010.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that, during the period at issue, petitioner paid Article 9-A franchise tax based on its entire net income (ENI). She noted further that, pursuant to relevant statutory and case law, ENI is federal taxable income (FTI) as modified pursuant to

various adjustments contained in Tax Law § 208 (9).

The Administrative Law Judge rejected petitioner's contention that, given the legislative history of the captive insurance laws, federally-established criteria determining the existence of insurance, and hence the deductibility of amounts paid as premiums, do not control whether petitioner's payments to BRIC may be deducted from its ENI.

Additionally, the Administrative Law Judge disagreed with petitioner's argument that subsequent amendments to the Tax Law regarding "overcapitalized" captive insurance companies and "combinable" captive insurance companies support petitioner's position that federal case law should not apply in determining whether its payments to BRIC may be subtracted from its ENI.

The Administrative Law Judge also rejected petitioner's contention that Tax Law § 208 (9), Article 33 of the Tax Law, the Insurance Law and the legislative history of the captive insurance regime are in *pari materia* and thus intended to be read together. The Administrative Law Judge noted that this rule of construction may be invoked only where the relevant statute is ambiguous. The Administrative Law Judge determined, however, that the relevant statute here, Tax Law § 208 (9), unambiguously defines ENI as FTI with statutorily specified modifications. The Administrative Law Judge also noted that the exclusions from ENI provided in Tax Law § 208 (9) (a) make no reference to insurance premiums.

Next, noting that FTI is the starting point for the calculation of ENI, the Administrative Law Judge thoroughly reviewed federal case law to determine whether the payments to BRIC were deductible in calculating FTI. The Administrative Law Judge concluded that, although the risks covered by the arrangement between petitioner and BRIC were insurable and the arrangement met commonly accepted notions of insurance, the arrangement lacked risk-shifting

and risk distribution, two essential elements of insurance under federal case law. The Administrative Law Judge observed that the arrangement between petitioner and BRIC lacked these features because of its parent-subsidary structure. Accordingly, the Administrative Law Judge concluded that petitioner's payments were not deductible from its federal taxable income and therefore must be included in its ENI.

Petitioner also made an equal protection argument before the Administrative Law Judge. Upon review, the Administrative Law Judge determined that petitioner's argument was a facial challenge to the constitutionality of Tax Law § 208 (9) and that, accordingly, the Division of Tax Appeals lacks jurisdiction to consider it.

Additionally, the Administrative Law Judge rejected petitioner's contention that the Division should be estopped from denying the deductibility of its payments to BRIC. The Administrative Law Judge found that, while the Division denied petitioner's refund request with respect to the 2004 loss portfolio transfer and indicated that the claimed amount was a premium for purposes of Article 33 (*see* findings of fact 179 and 180), the Division did not represent that the payment was a premium for purposes of calculating FTI and ENI under Article 9-A. The Administrative Law Judge also found that the Division's denial of deductibility in the present matter does not indicate a change in any longstanding policy. Rather, she observed that petitioner did not show that the Division ever had policy to allow as a deduction from ENI any amounts that are not deductible in determining FTI beyond those modifications specifically provided for by the statute. The Administrative Law Judge also determined that petitioner failed to show that it detrimentally relied on statements made by Insurance Department employees. Specifically, the Administrative Law Judge found no evidence to indicate that such employees advised petitioner that its payments to BRIC would be deductible from ENI. The Administrative

Law Judge thus concluded that petitioner failed to establish any misrepresentation by the government or detrimental reliance by petitioner as would be necessary for estoppel.

Finally, the Administrative Law Judge found that, considering all of the facts and circumstances of this matter, petitioner acted reasonably and in good faith in treating its payments to BRIC as deductible premiums for purposes of calculating its ENI for the years at issue.

The Administrative Law Judge thus sustained the additional tax, but canceled the penalties asserted in the notice of deficiency.

ARGUMENTS ON EXCEPTION

Petitioner contends that the 1997 captive insurance laws (*see* L 1997 c 389), and not federal case law, should control in defining insurance for purposes of the franchise tax on business corporations under Article 9-A of the Tax Law. Specifically, petitioner contends that, by the enactment of these laws, the Legislature intended to provide favorable regulatory and tax treatment for captive insurance companies. According to petitioner, one intended benefit for a previously self-insured corporation that created a captive was the deduction of captive insurance premiums. Petitioner finds support for this assertion in the overall structure of the captive insurance laws and in statements contained in the laws' legislative history. Petitioner contends that the legislative intent as expressed in these laws will be frustrated if petitioner is not permitted to deduct the payments to BRIC in computing its ENI.

Petitioner also contends that the Administrative Law Judge's interpretation of the law leads to an absurd result. That is, according to petitioner, its payments to BRIC are treated as premiums for purposes of the Insurance Law and the franchise tax on insurance corporations under Article 33 of the Tax Law, but are not treated as such under Article 9-A of the Tax Law.

Petitioner contends that the Administrative Law Judge's erroneous interpretation may be remedied by reading the Insurance Law and Tax Law in pari materia and by applying the relevant provisions harmoniously and consistently.

Petitioner acknowledges the general principle that FTI is the starting point in computing ENI, but contends that this rule does not apply where, as in the present matter, it would contradict the clear intent of the Legislature in enacting the captive insurance laws. Petitioner asserts that, pursuant to those laws, the amounts it paid to BRIC were "premiums" for "insurance" under both the Insurance Law and Article 33 of the Tax Law. In support of its position, petitioner cites a decision of this Tribunal that permitted a deviation from the amount of a federal net operating loss deduction in the calculation of ENI.

As noted, under petitioner's statutory interpretation, captive premiums are taxed once, under Article 33 and not Article 9-A. Petitioner contends that its interpretation, and not the Division's, may be harmonized with subsequent amendments to the captive insurance laws in 2009 and 2014. Petitioner asserts that such amendments evince an intent to tax captive insurance premiums only once, either under Article 9-A or Article 33. Petitioner further asserts that a 2014 amendment to the Tax Law expressly ties the taxability of a captive insurance company to the status of its insurance arrangements for federal income tax purposes. Petitioner argues that, in order for this change to have meaning, it must be read as a change from the prior law.

Petitioner contends also that the Administrative Law Judge's interpretation would result in different treatment for captive insurance companies depending on their treatment under federal law. Petitioner notes that some brother-sister captive arrangements have been found to be valid insurance under federal case law, while parent-subsidiary arrangements have not. If the Legislature had intended for such different treatment, petitioner argues, the 1997 captive

insurance laws would have subjected parent-subsidary arrangements to tax under Article 9-A and not Article 33.

Petitioner also renews its argument that the notice of deficiency should be barred by equitable estoppel. In support, petitioner contends that the Insurance Department encouraged it to form BRIC, issued BRIC a license and represented to petitioner that the arrangement would result in favorable tax treatment. Petitioner asserts that the Division consistently treated BRIC like an insurance corporation by its acceptance of BRIC's returns and BRIC's payments of captive premiums taxes under Article 33 (*see* finding of fact 178). Petitioner also asserts that the Division represented that the payments to BRIC were insurance premiums by its denial of petitioner's refund request with respect to the 2004 loss portfolio transfer (*see* findings of fact 179 and 180). Petitioner thus contends that the Division previously treated BRIC like an insurance company and treated petitioner's payments to BRIC like insurance premiums, but now claims that those same payments are not deductible from its ENI because they were not insurance premiums. Under such circumstances, petitioner argues, the Division's conduct in denying the deduction of petitioner's payments to BRIC amounts to a retroactive change in the Division's position and should be rejected.

Petitioner did not raise its equal protection argument on exception.

The Division asserts that the Administrative Law Judge correctly determined that petitioner may not deduct its payments to BRIC in calculating its ENI. The Division agrees with the Administrative Law Judge's conclusion that deductions for insurance expenses are taken, if at all, in the calculation of a taxpayer's FTI. The Division thus further agrees with the Administrative Law Judge's conclusion that federal case law interpreting whether a captive arrangement constitutes insurance for federal income tax purposes controls in determining

whether the payments to BRIC were deductible in calculating petitioner's ENI. The Division notes that Tax Law § 208 (9) contains no specific provision for the deduction of insurance premiums. The Division disagrees with petitioner's contention that the Legislature intended that premium payments from a corporate parent to a captive insurance subsidiary be deductible in calculating ENI. The Division finds no such intent in either the relevant statutes or legislative history.

The Division also opposes petitioner's estoppel argument. It contends that no New York State employee ever explicitly represented to petitioner that its payments to BRIC were deductible insurance premiums. Even if such a statement was made, the Division contends that petitioner could not detrimentally rely on such advice because it created BRIC for several non-tax business reasons. Accordingly, the Division contends, estoppel is not warranted in this matter.

OPINION

Article 9-A of the Tax Law imposes a franchise tax on all domestic and foreign corporations doing business, employing capital, owning or leasing property, or maintaining an office in New York State (Tax Law § 209 [1]). During the years at issue, New York corporate taxpayers reported their tax liability based on their computation of the highest of four income bases, one of which was ENI (Tax Law former § 210 [1] [a-d]). For each of those years, petitioner's Article 9-A franchise tax liability was based on its ENI.

Tax Law § 208 (9) defines ENI, in relevant part, as "total net income from all sources, which shall be presumably the same as the entire taxable income . . . which the taxpayer is required to report to the United States treasury department . . . except as hereinafter provided." This means that FTI is "the starting point in computing entire net income" (20 NYCRR 3-2.2 [b]) and that "federal law controls for the purpose of defining 'entire net income'" (*Matter of Dreyfus*

Special Income Fund, Inc. v New York State Tax Commn, 126 AD2d 368, 372 [1987] *affd* 72 NY2d 874 [1988]). The use of the term “presumably” in Tax Law § 208 (9) is not intended to indicate that the starting point in calculating ENI may vary from FTI (*id.* at 876).

There is no dispute on exception that petitioner’s payments to BRIC were not deductible for federal income tax purposes.¹¹ The Administrative Law Judge thoroughly analyzed federal case law on this question and properly concluded that such payments were not deductible in calculating petitioner’s FTI. We summarize that analysis below.

Premium payments for insurance may be deducted from gross income in the calculation of FTI as an ordinary and necessary business expense pursuant to Internal Revenue Code (26 USCA) § 162 (a) (*see also* Treas Reg [26 CFR] §1.162-1 [a]). Such a payment is not deductible per se, however, as the existence of insurance for federal tax purposes and the consequent deductibility of a premium payment is contingent on, among other things, the presence of risk-shifting and risk distribution in the insurance arrangement (*see e.g. Helvering v Le Gierse*, 312 US 531 [1941]; *Securitas Holdings, Inc. v Commr.*, TC Memo 2014-225 [2014]). These two factors are typically present when insurance is provided by a third-party commercial insurer. Such traditional insurance shifts the risk of loss from the insured to the insurer, who, in turn, distributes the risk among the insurer’s many policy holders. These factors are not present when a captive insurance company accepts premium payments only from its parent, as in the present matter. Under such circumstances, there is no shift in the risk of loss, as it remains, in economic reality, with the parent, and there is no distribution of the risk among other insureds, as there are no other insureds (*see e.g. Stearns-Roger Corp. v US* 774 F2d 414 [10th Cir 1985]; *Humana Inc.*

¹¹ Petitioner conceded this point during the audit (*see* findings of fact 33 and 34) and does not contest it on exception.

v Commr., 881 F2d 247 [6th Cir 1989]).¹² Petitioner's payments to BRIC, therefore, were not deductible for federal income tax purposes.

There is also no dispute in the present matter that Tax Law § 208 (9), as in effect during the period at issue, contained no deduction for insurance premiums among the enumerated modifications to be made to FTI in calculating ENI (*see* Tax Law former § 208 [9] [a] - [q]).

Nevertheless, petitioner argues that authorization for the claimed deduction may be inferred from the structure of the captive insurance laws enacted in 1997 and the Legislature's intent to provide favorable tax treatment for captive insurance companies through those laws. Petitioner observes that, pursuant to those laws, BRIC was a captive insurance company doing a captive insurance business pursuant to a license granted by the Superintendent of Insurance under Article 70 of the Insurance Law. As such a captive insurance company, BRIC was an insurance corporation as defined in Tax Law § 1500 (a) and therefore subject to franchise tax measured by direct gross premiums under Tax Law § 1502-b (a) (captive premiums tax). "Premiums" for purposes of the tax under Tax Law § 1502-b (a) includes consideration for insurance provided by a captive to its parent (Tax Law § 1502-b [c]). Additionally, petitioner notes that, as an insurance corporation subject to tax under Article 33, BRIC was not permitted to file on a combined basis with petitioner (*see* 20 NYCRR 6-2.5 [b]). Petitioner observes that BRIC filed returns under Article 33 and paid the captive premiums tax during the years at issue (*see* finding of fact 178). Petitioner also notes that the amounts BRIC received as premiums were considered premiums for purposes of Insurance Law § 332 assessments and that BRIC paid such assessments during the years at issue (*see* finding of fact 181). Petitioner thus argues that

¹² The risk-shifting and risk distribution requirements remain even where, as in the present matter, the captive insurer is authorized to operate as such under state law (*see e.g. Clougherty Packing Co. v Commissioner* (811 F2d 1297 [9th Cir 1987]; *Humana Inc. v Commr.*). Hence, insurance for state licensing and regulatory purposes is not necessarily insurance for federal tax purposes.

payments to a captive are considered to be premiums throughout the captive regime and that, accordingly, captive premium payments should be treated as deductible premiums for purposes of Article 9-A.

As additional support for its position, petitioner cites a statement in the legislative history that “self-insured[s] that set up captives will recognize a tax benefit due to the earlier deduction of loss costs” (*see* Governor’s Program Bill 1997 Mem, Bill Jacket Supplement p. 33 L 1997 c 389).¹³ According to petitioner, the “earlier deduction” for a formerly self-insured corporation results from deducting insurance costs at the time premiums are paid, rather than at the time a loss is actually incurred. Petitioner contends that the legislative intent as expressed in this statement will be frustrated if petitioner is not permitted to deduct the payments to BRIC in computing its ENI.

We disagree with petitioner’s contention. In our view, the captive insurance laws do not authorize a deduction from ENI for captive premium payments. “Tax deductions and exemptions depend upon clear statutory provisions and the burden is on the taxpayer to establish a right to them” (*Matter of Scholastic Bus Serv. v State Tax Commn.*, 116 AD2d 915, 916-917 [1986]). “Obviously, therefore, a taxpayer seeking a deduction must be able to point to an applicable statute and show that he comes within its terms.” (*New Colonial Ice Co. v Helvering*, 292 US 435, 440 [1934]). Indeed, to establish entitlement to a deduction, petitioner must prove that the Division’s interpretation is irrational and that its interpretation of the statute is the only reasonable construction (*see Matter of TD Holdings II, Inc.*, Tax Appeals Tribunal, April 7, 2016). Petitioner has failed to meet this burden in the present matter. As noted previously, Tax

¹³ The Division objects to any consideration of the Governor’s program bill memorandum because it was not introduced into evidence at the hearing. We disagree. Legislative history, of which the memorandum is a part, is an extrinsic aid in statutory construction (*see* McKinney’s Statutes §§ 124, 125). Accordingly, we may, if we deem it appropriate, consider such history in addressing the issue presented.

Law § 208 (9) makes no “clear statutory provision[s]” for the deduction of captive premium payments from ENI (*Matter of Scholastic Bus Serv. v State Tax Commn.*, 116 AD2d at 916). Indeed, the fact that an inference is necessary to find such a deduction via petitioner’s captive regime argument runs contrary to the rule expressed in the above-cited cases and in others that a deduction “must clearly appear” in a taxing statute (*Matter of Grace v New York State Tax Commn.*, 37 NY2d 193, 196 [1975], *reargument denied* 37 NY2d 816 [1975], *appeal denied* 338 NE2d 330 [1975] quoting *People ex rel. Savings Bank of New London v Coleman*, 135 NY 231, 234 [1892]). Petitioner’s argument also runs contrary to the fundamental rule of statutory construction that the Legislature is “aware of the existing state of the law at the time it enacts new legislation” (*Matter of Delese v Tax Appeals Trib. of State of N.Y.*, 3 AD3d 612, 614 [2004], *appeal dismissed* 2 NY3d 793 [2004]). As applied here, this rule means that, at the time the captive insurance laws were passed, the Legislature knew that “Federal law controls for the purpose of defining ‘entire net income’” (*Matter of Dreyfus Special Income Fund, Inc. v New York State Tax Commn.*, 126 AD2d at 372) and that premiums paid in a parent-subsiary captive insurance arrangement would not be deductible from FTI (*see e.g. Stearns-Roger Corp. v US; Humana Inc. v Commr.*). The Legislature was thus necessarily aware that an express provision would be required to permit the deduction of captive premiums from ENI. Accordingly, the absence of any such provision in either Article 9-A or Article 33 compels the straightforward conclusion that the Legislature did not intend to permit the deduction.

We note also that we do not agree with petitioner’s assertion that the statement in the program bill memorandum regarding tax benefits due to the earlier deduction of loss costs for formerly self-insureds indicates a legislative intent to provide the claimed deduction. “The statutory text is the clearest indicator of legislative intent . . .” (*Matter of DaimlerChrysler Corp.*

v Spitzer, 7 NY3d 653, 660 [2006]). In this case, the absence of express statutory language granting the deduction where the rules of statutory construction plainly require it indicates that the Legislature did not intend to create a deduction from ENI for captive insurance premiums.

Petitioner also contends that the Administrative Law Judge's interpretation reaches an absurd result because, according to petitioner, its payments to BRIC are insurance premiums under Article 33, but not under Article 9-A. Petitioner suggests that Articles 9-A and 33 are in pari materia and that, accordingly, the terms "insurance" and "premium" should be accorded the same meaning under both articles.

We disagree. As the Administrative Law Judge noted, the rule that permits the meaning of a statute to be determined from its construction in connection with another statute in pari materia may be invoked only where the statute under consideration is ambiguous (*see 73 Warren St., LLC v State of N.Y. Div. of Hous. and Community Renewal*, 96 AD3d 524, 530 [2012] *citing* McKinney's Cons. Laws of N.Y., Book 1, Statutes § 221 [a], Comment at 376). Here, as may be gleaned from our previous discussion of Tax Law § 208 (9), we see no ambiguity in the language of Tax Law § 208 (9) applicable to the deductibility of insurance premiums in the calculation of ENI. Furthermore, we see no language in the captive insurance laws indicating an intent to amend Article 9-A to permit the deduction of captive insurance premiums in the calculation of ENI.

Additionally, we find that the tax on ENI under Article 9-A does not mirror the captive premiums tax under Article 33. The cases cited by petitioner in support of its argument on this point hold that Tax Law sections dealing with the taxation of insurance companies and certain Insurance Law provisions are in pari materia (*see Guardian Life Ins. Co. of Am. v Chapman*, 302 NY 226, 231 [1951]; *Matter of First Fortis Life Ins. Co.*, Tax Appeals Tribunal, June 11,

1998). Such cases are distinguishable from the present matter, as neither provides that the ENI provisions under Article 9-A should be construed in pari materia with the captive premiums tax under Article 33.

The “absurd result” to which petitioner refers is the apparent inconsistent treatment of the captive premiums payments. As noted, BRIC paid Article 33 captive premiums tax on the payments (as well as Insurance Law § 332 assessments) because it considered the payments to be premiums. During the audit, the Division agreed with this position (*see* finding of fact 183). At the same time, the Division denied petitioner a deduction for the payments in the computation of ENI because they were not considered premiums for that purpose.

Whether an absurd result or not, this inconsistency is resolved in the present matter by the Division’s indication that, notwithstanding its contrary position during the audit, “it would refund the taxes on premiums paid by BRIC under Article 33 of the Tax Law for the years at issue” (*see* finding of fact 185).¹⁴ Accordingly, the Division’s present position is that the payments are not premiums under either Article 9-A or Article 33. Given the Division’s change of position, its inconsistency in the treatment of the payments is no longer an issue.¹⁵

In arguing against the application of federal law to determine the deductibility of premiums, petitioner analogizes the present matter to this Tribunal’s decision in *Matter of Brooke-Bond Group (U.S.), Inc.* (Tax Appeals Tribunal, December 28, 1995). The issue in *Brooke-Bond* was whether a taxpayer’s New York net operating loss (NOL) deduction must equal its federal NOL deduction (the starting point for the New York NOL deduction pursuant to

¹⁴ We note that the Division expressly reaffirmed in its brief on exception (at pp 26 and 27 thereof) that it would grant BRIC’s claim for refund of all taxes it paid under Article 33 with respect to the years at issue.

¹⁵ Petitioner also contends that the Administrative Law Judge’s determination results in the payments from petitioner to BRIC being subject to the captive premiums tax as premiums. While we disagree with petitioner, given the Division’s change of position with respect to BRIC’s Article 33 liability, this contention is moot.

Tax Law § 208 [9] [f]) where application of this rule would result in negative ENI (and the accompanying loss of a portion of the NOL deduction). The taxpayer in *Brooke-Bond* argued that its New York NOL deduction should be limited to the amount required to bring its ENI to zero, consistent with federal law that limits the amount of a federal NOL deduction to the amount required to bring FTI to zero (*see* IRC [26 USCA] § 172 [b] [2] [B]). As this Tribunal agreed with the taxpayer in *Brooke-Bond*, petitioner here asserts that it similarly seeks a departure from a rule of federal conformity.

We disagree with petitioner that our holding in *Brooke-Bond* is analogous to the present circumstances. Unlike the present matter, there was no question in *Brooke-Bond* that the petitioner therein was entitled to a New York NOL deduction in some amount because, unlike the present matter, a specific section of the Tax Law actually provided for such a deduction. Here, as discussed previously, the arrangement between petitioner and BRIC lacks the character of insurance under federal case law and there is simply no provision in the Tax Law that permits the claimed deduction from ENI. Hence, the nondeductibility of the payments in the calculation of petitioner's FTI necessarily results in their nondeductibility in the calculation of petitioner's ENI. We conclude, therefore, that *Brooke-Bond* is inapposite.

Petitioner also contends that its interpretation of the law herein, and not the Division's, may be harmonized with subsequent amendments to the captive insurance laws in 2009 and 2014 (*see* L 2009 c 57 and L 2014 c 59). Specifically, effective for taxable years commencing on or after January 1, 2009, the captive laws were changed to distinguish "overcapitalized" captive insurance companies from other captives. Such overcapitalized captives were defined as captives having 50% or less of gross receipts from "premiums" as defined in Article 33 (Tax Law § 1510 [c] [1]), but not including payments for insurance contracts that do not provide "bona fide

insurance” (*see* Tax Law former § 2 [11]). Overcapitalized captives were excluded from the definition of insurance corporation under Article 33 (Tax Law § 1500 [a]) and thus were not subject to the captive premiums tax (Tax Law § 1502-b [a]). Instead, such entities were required to be part of a combined report under Article 9-A (Tax Law § 211 [4] [a] [7]). Effective for taxable years commencing on or after January 1, 2015, the overcapitalized captives were replaced by “combinable” captives, defined as a captive with gross receipts consisting of 50% or less of premiums from “arrangements that constitute insurance for federal income tax purposes” (Tax Law § 2 [11]). Similar to the treatment of overcapitalized captives, combinable captives are not considered insurance corporations under Article 33; are not subject to the captive premiums tax; and must be combined under Article 9-A (*see* Tax Law §§ 1500 [a], 1502-b [a], 210-C [2] [b]).

Petitioner contends that these amendments evince a legislative intent to tax captive premiums once, either as premiums under Article 33 or via combination under Article 9-A. As noted, under petitioner’s interpretation of the 1997 captive insurance laws and Tax Law § 208 (9), captive premiums are similarly taxed only once, under Article 33, and, according to petitioner, such premiums may be deducted from ENI. Petitioner argues that its construction of Tax Law § 208 (9) and the captive laws as in effect during the years at issue similarly result in the taxation of captive premiums only once, i.e., to the captive subsidiary under Article 33. Noting that the 2014 change to Tax Law § 2 (11) ties the definition of premiums to the federal definition, petitioner contends that federal law did not apply to the definition of premiums prior to that amendment (*see* McKinney’s Cons. Laws of N.Y., Book 1, Statutes § 193 [“The Legislature, by enacting an amendment of a statute changing the language thereof, is deemed to have intended a material change in the law.”])).

We disagree with petitioner’s contention that the 2009 and 2014 amendments to the captive insurance regime indicates that the Tax Law authorized a deduction from ENI for

petitioner as claimed with respect to the years at issue. First, we observe that, while a subsequent act may aid in the construction of an earlier act, such later statute must be in pari materia with the earlier statute (*see Nelson v Hanna*, 67 AD2d 820 [1979] citing McKinney's Cons. Laws of N.Y., Book 1, Statutes § 223). As we have previously determined that the tax on ENI under Article 9-A is unambiguous and not comparable to the captive premiums tax under Article 33, the later amendments to the captive insurance laws provide little support to petitioner's position. Second, as noted previously, a deduction "must clearly appear" in a taxing statute (*Matter of Grace v New York State Tax Commn.*, 37 NY2d at 196). No clear deduction appears here, as neither the 2009 nor the 2014 legislation contains language that modifies the computation of ENI to allow the deduction of captive insurance premiums.

Noting that brother-sister captive insurance structures have been found to constitute valid insurance for federal income tax purposes (*see e.g. Humana Inc. v Commr.*), petitioner also contends that different captive insurance companies may receive different tax treatment under the Administrative Law Judge's interpretation. Petitioner asserts that the 1997 captive laws were not intended to result in such differences. We disagree. Consistent with our previous discussion, the Legislature was aware of the state of the law with respect to the deductibility of premium payments under various captive structures at the time it enacted the captive insurance laws in 1997. It did not, however, choose to make any changes to the Tax Law to provide for the deduction of captive premium payments in the calculation of ENI. Any disparate tax consequences to captives resulting from their organizational structure thus necessarily reflects legislative intent.

In their briefs, and for the first time in this matter, the parties discussed the specific

impact of the 2009 amendments to the captive laws on petitioner's 2009 tax year.¹⁶ The parties disputed whether the payments from petitioner to BRIC were for insurance contracts that did not provide "bona fide insurance" pursuant to Tax Law former § 2 (11) as in effect during that year. As discussed previously, if the payments were not for bona fide insurance, then, under the law as in effect for that year, BRIC would be an overcapitalized captive not subject to Article 33 tax, but subject to combination with petitioner.

As BRIC is not the petitioner in this matter, its proper tax liability is not directly at issue. Accordingly, we need not determine whether BRIC provided bona fide insurance within the meaning of Tax Law former § 2 (11) and thus we need not determine whether BRIC was an overcapitalized insurance company during 2009. In any event, such unresolved questions are academic, as the Division has conceded that BRIC was not subject to the captive premiums tax during the years at issue and has, accordingly, agreed to refund BRIC its payments of such tax. Additionally, though it argues in its brief that BRIC was an overcapitalized captive, the Division has not sought to combine petitioner and BRIC for the 2009 year. Considering that petitioner has not contested this non-action by the Division, we make no finding as to its propriety.

Petitioner also contends that the Division should be estopped from denying the deductibility of petitioner's premium payments to BRIC. Estoppel may be invoked against a government agency charged with the administration of taxes only where exceptional circumstances are present and application of the doctrine is necessary to prevent a "manifest injustice" (*see Matter of Suburban Restoration Co. v Tax Appeals Trib. of State of N.Y.*, 299 AD2d 751, 753 [2002]). Additionally, in order for the doctrine to apply in a specific case, it

¹⁶ The Division's audit report states that the 2009 captive insurance amendments were not applicable to petitioner's 2009 tax year. This conclusion appears based on petitioner's use of a 52-53 week reporting period. Although this conclusion may be erroneous (*see* 20 NYCRR 2-1.4 [b]), it may explain why combination was not required on audit and why the "bona fide insurance" issue was not raised below.

must be established that:

- “(1) there was a misrepresentation made by the government to a party and the government had reason to believe that the party would rely upon the misrepresentation;
- (2) the party’s reliance on the government’s misrepresentation was reasonable; and
- (3) prior to the party discovering the truth, the party acted to its detriment based upon the misrepresentation” (*Matter of Ryan*, Tax Appeals Tribunal, September 12, 2013).

The rationale underlying petitioner’s estoppel claim is that the Division previously treated BRIC like an insurance company and treated petitioner’s payments to BRIC like insurance premiums, but now takes a contrary position. In support, petitioner notes the Division’s denial of its refund request with respect to the 2004 loss portfolio transfer, wherein the Division indicated that the payment to BRIC was a premium under Article 33 (*see* findings of fact 179 and 180). Petitioner also notes that the Division accepted BRIC’s returns and BRIC’s payments of captive premiums taxes under Article 33 (*see* finding of fact 178). Additionally, petitioner observes that the Insurance Department encouraged petitioner to form BRIC (*see* finding of fact 86). On this last point, citing *Matter of Howard Johnson Co. v State Tax Commn.*, 65 NY2d 726 (1985) and *Hilton Hotels Corp. v Commissioner of Fin. of City of N.Y.*, 219 AD2d 470 (1995), petitioner notes that a taxpayer may rely on a longstanding policy of the Division and that the Division may not retroactively change such a policy.

We reject petitioner’s estoppel claim because petitioner has not shown that the Division changed its policy (or represented such a change) regarding the issue presented, i.e., whether insurance premiums paid to a captive insurance company are deductible in the calculation of ENI. As to the factors mustered in support of its position, the 2004 refund denial letter makes no reference to whether the payment would be deductible in calculating FTI or ENI; the Division’s

acceptance of BRIC's returns does not indicate approval or assent to the content of such returns (*see Matter of Davies Lake Hotel, Inc.*, Tax Appeals Tribunal, January 20, 1989 ["Mere acceptance of the returns by the Division cannot be construed as an expression by the Division as to the propriety of the reports."]); and the Insurance Department's encouragement regarding the formation of BRIC did not include any advice that its payments to BRIC would be deductible from ENI. We thus conclude that petitioner has not established the presence of exceptional circumstances necessary to invoke estoppel.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Stewart's Shops Corporation is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Stewart's Shops Corporation is granted to the extent indicated in conclusion of law F of the determination, but is otherwise denied; and
4. The notice of deficiency, dated December 23, 2011, as modified in accordance with conclusion of law F of the determination, is sustained.

DATED: Albany, New York
July 27, 2017

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner