STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **BTG PACTUAL NY CORPORATION** for Revision of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Period January 1, 2012 through December 31, 2013.	:	DECISION DTA NO. 827577

Petitioner, BTG Pactual NY Corporation, filed an exception to the determination of the Administrative Law Judge issued on March 7, 2019. Petitioner appeared by PricewaterhouseCoopers, LLP (Michael Zargari, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Jennifer L. Baldwin, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner filed a brief in reply. Oral argument was heard in Albany, New York, on September 26, 2019, 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.

ISSUES

I. Whether petitioner, as the sole member of two single-member limited liability companies, one of which is a registered broker-dealer, may use broker-dealer customer-based sourcing rules in computing its business allocation percentage to source its receipts from another limited liability company that is not itself a broker-dealer.

II. Whether Brazilian income withholding tax is required to be added back to federal taxable income in computing entire net income pursuant to Tax Law former § 208 (9) (b) (3).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except we have modified findings of fact 19 and 20 to better comport with the record. These findings of fact, together with the modified findings of fact, are set forth below.

1. Petitioner, BTG Pactual NY Corporation, is incorporated under the laws of the State of New York. Petitioner is a wholly-owned subsidiary of BTG Pactual Holding Internacional S.A. BTG Pactual Holding Internacional S.A., in turn, is a wholly owned subsidiary of Banco BTG Pactual S.A., a Brazilian investment bank.

2. Petitioner is the sole member of both BTG Pactual US Capital LLC (US BD) and BTG Pactual Asset Management US LLC (US AM). Both US BD and US AM are single member limited liability companies (SMLLC).

3. US BD commenced operations as a broker-dealer in 2009. US BD is an introducing broker-dealer providing execution of Latin American securities to investors.

4. US BD is registered as a broker-dealer with the Securities and Exchange Commission (SEC) (registration number 8-68148) under the Security Exchange Act of 1934.

5. US BD is also registered as a broker-dealer with the Financial Industry Regulatory Authority (FINRA) and maintains Central Registration Depository (CRD) number 149486.

6. US BD is subject to the SEC's Uniform Net Capital Rule, SEC Rule 15c3-1, which requires the maintenance of minimum net capital.

7. US BD, a resident of the United States for tax purposes, earned income on stock trades and underwriting activities from Brazilian sources, and was therefore subject to Imposto

de Renda Retido na Fonte, or withholding income tax, in Brazil (Brazilian withholding income tax).

8. US AM commenced operations in 2011. US AM is registered as an investment adviser with the SEC (registration number 8-0260014) under the Investment Advisers Act of 1940. US AM also maintains CRD number 152538. US AM earned fees for providing management and advisory services to BTG Pactual Global Asset Management Limited (GAM) and BTG Pactual Absolute Return Il Master Fund, L.P. (ARF Il). US AM also earned trading income or commissions from various third parties located outside of New York. GAM is the main investment adviser for BTG Pactual global hedge funds and sub-contracted US AM as sub-adviser to manage the United States' based trading strategies.

9. GAM is a wholly-owned subsidiary of BTG Pactual Holding Internacional S.A., which is a wholly-owned subsidiary of Banco BTG Pactual S.A.

10. GAM's address is Clarendon House 2 Church Street, Hamilton HM 11, Bermuda, and ARF II's address is Maples Corporate Services Ltd, Cayman Islands.

11. US AM is listed on US BD's FINRA BrokerCheck Report as an organizational affiliate of US BD because US AM and US BD are under the common ownership of petitioner.

12. For SEC and FINRA purposes, petitioner, US BD and US AM are separate legal entities.

13. As separate legal entities for SEC and FINRA purposes, neither petitioner nor US AM are registered as broker-dealers with the SEC or FINRA, nor are they are subject to the SEC's Uniform Net Capital Rule, SEC Rule 15c3-1.

14. As separate legal entities for SEC purposes, neither petitioner nor US BD are registered as investment advisers with the SEC.

15. Pursuant to an expense sharing agreement, US AM furnished US BD with office space, certain personnel, information technology support, and shared services, such as human resources, legal, operations and finance.

16. Except for the services described in the expense sharing agreement, US BD does not perform services on behalf of US AM and US AM does not perform services on behalf of US BD.

17. For federal income tax and New York State corporation franchise tax purposes, US BD and US AM are treated as disregarded entities.

18. For the 2012 and 2013 tax years, petitioner filed U.S. corporation income tax returns (form 1120) with the Internal Revenue Service and timely filed general business corporation franchise tax returns (form CT-3) and general business corporation MTA surcharge returns (form CT-3M/4M) with the Division.

19. In 2012, petitioner reported total receipts of $243,018,306.00 comprised of the following:

US BD Receipts

Commissions – ADR	$11,508,225.00
Equity Secondary – Brazil	$12,687,486.00
Fixed Income Referral Fee	$1,008,230.00
Placement Fees	$23,025,291.00
Research Income	$5,169,509.00
Trading Income	$747,906.00
Total	$54,146,647.00

US AM Receipts

Advisory Fees	$70,788,173.00
Management Fees	$30,989,206.00
Performance Fees	$85,698,158.00
Trading Income	$1,396,122.00
Total	$188,871,659.00

20. In 2013, petitioner reported total receipts of $179,806,361.00 comprised of the following:

US BD Receipts

Commissions - ADR	$10,683,599.00
Equity Secondary - Brazil	$13,839,028.00
Fixed Income Referral Fee	$1,168,853.00
Placement Fees	$40,401,607.00
Research Income	$3,402,473.00
Trading Income	$2,175,443.00
Dividends/Wire Fee	$892,013.00
Total	$72,563,016.00

US AM Receipts

Advisory Fees	$29,534,059.00
Management Fees	$39,529,365.00
Performance Fees	$35,175,362.00
Commissions - ADR	$1,538,782.00
Monetary Variation	$148,114.00
Total	$105,925,682.00

Petitioner also earned $1,317,663.00 in its own right.

21. On its originally filed forms CT-3 for 2012 and 2013, petitioner sourced US BD's receipts utilizing the registered broker-dealer sourcing rules of Tax Law former § 210 (3) (a) (9) and sourced the US AM receipts based on where its services were performed pursuant to Tax Law former § 210 (3) (a) (2) (b).

22. Petitioner deducted Brazilian withholding income tax in computing federal taxable income on its form 1120 in the amount of $2,838,840.00 for the tax year ending December 31, 2012 and $3,397,476.00 for the tax year ending December 31, 2013.

23. On its originally filed CT-3 return for 2012, petitioner reported the following items:

a. petitioner added back the Brazilian withholding Income Tax in the amount of $2,838,840.00 in computing entire net income; and

b. in computing its business allocation percentage (BAP), petitioner reported New York State receipts of $199,542,479.00, worldwide receipts of $243,018,306.00 and a New York State receipts factor of 82.1101%.

24. On its originally filed CT-3 return for 2013, petitioner reported the following items:

a. petitioner added back the Brazilian withholding income tax in the amount of $3,397,476 in computing entire net income; and

b. in computing its BAP, petitioner reported New York State receipts of $119,354,763.00, worldwide receipts of $179,755,526.00, and a New York State receipts factor of 66.3984%.

25. For the tax years ending December 31, 2012 and December 31, 2013, petitioner timely filed amended forms CT-3 and CT-3M/4M.

26. Petitioner amended its forms CT-3 for 2012 and 2013 to reflect the following changes:

b. the receipts factor of the BAP was modified as a result of sourcing the US AM receipts via the registered broker-dealer sourcing rules of Tax Law former § 210 (3) (a) (9); and

c. the Brazilian withholding income tax was no longer added-back in computing entire net income.

27. In computing its BAP on its amended 2012 CT-3, petitioner reported New York State receipts of $13,678,254.00, worldwide receipts of $243,120,662.00, and a New York State receipts factor of 5.6261%.

28. In computing its BAP on its amended 2013 CT-3, petitioner reported New York State receipts of $14,343,050.00, worldwide receipts of $178,931,450.00, and a New York State receipts factor of 8.0159%.[1]

29. The Division began an audit of petitioner's amended CT-3's for the tax years ending December 31, 2012 and December 31, 2013.

30. On March 23, 2016, petitioner filed a petition with the Division of Tax Appeals seeking a refund in the amount of $7,460,464.00 for the tax years ending December 31, 2012 and December 21, 2013, as six months had elapsed since the filing of the amended returns.[2]

31. After petitioner filed a petition with the Division of Tax Appeals, the Division continued auditing the claim for refund.

32. Subsequently, on August 2, 2017, the Division issued NYT-G-17(2)C, entitled "Receipts Factor Methodology For The Owners Of Single Member Limited Liability Companies That Are Registered Broker-Dealers."

33. Petitioner presented the testimony and report of Kathleen K. Malone, Esq., a managing director at Duff & Phelps, LLC. Ms. Malone was qualified as an expert in broker-dealer compliance and regulatory matters. Ms. Malone previously was a staff accountant with the SEC, where she led numerous examinations of broker-dealer and registered investment advisers, and worked for approximately three years as a securities compliance examiner at

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[1] The everywhere receipts of the 2012 and 2013 BAPs varied slightly between the original and amended Forms CT-3 due to certain de minimis adjustments that are not at issue here.

[2] ***See*** Tax Law § 1089 (c).

FINRA, where she examined broker-dealers for compliance with FINRA rules and regulations.

34. Ms. Malone testified that petitioner's structure is prevalent throughout the securities industry. The majority of firms in the financial services industry structure their broker-dealers and investment advisers in separate legal entities in order to reduce compliance and regulatory costs and burdens. Approximately 5% of registered investment advisers were also registered as broker-dealers, and approximately 18% of registered broker-dealers were also registered as investment advisers. Ms. Malone opined that the majority of financial services firms separate their broker-dealers and investment advisers into separate legal entities because of the burdensome regulatory requirements imposed on broker-dealers by the Securities Exchange Act of 1934. For example, broker-dealers are subject to stringent recordkeeping requirements and net capital requirements (e.g., they must maintain sufficient net capital at all times prior to, during and after purchasing or selling securities). Broker-dealers also have strict requirements regarding the licensing and supervision of their personnel and customers (including strict gift thresholds, continuing education, anti-money laundering, and electronic communication review requirements), which do not apply to investment advisers.

35. The parties have stipulated that if it is determined that petitioner may use the registered broker-dealer sourcing rules of Tax Law former § 210 (3) (a) (9) to source the US AM receipts, and it is determined that the Brazilian withholding income tax is not required to be added back to its federal taxable income pursuant to Tax Law § 208 (9) (b) (3) for the tax years ending December 31, 2012 and December 31, 2013, the amount of petitioner's refund will be $7,460,464.00, plus interest.

36. The parties have stipulated that if it is determined that petitioner may use the registered broker-dealer sourcing rules of Tax Law former § 210 (3) (a) (9) to source the US AM receipts, and it is determined that the Brazilian withholding income tax is required to be added back to its federal taxable income pursuant to Tax Law § 208 (9) (b) (3) for the tax years ending December 31, 2012 and December 31, 2013, the amount of petitioner's refund will be $7,427,310.00, plus interest.

37. The parties have stipulated that if it is determined that petitioner may not use the registered broker-dealer sourcing rules of Tax Law former § 210 (3) (a) (9) to source the US AM receipts, and it is determined that the Brazilian Withholding Income Tax is not required to be added back to its federal taxable income pursuant to Tax Law § 208 (9) (b) (3) for the tax years ending December 31, 2012 and December 31, 2013, the amount of petitioner's refund will be $395,845.00, plus interest.

38. Petitioner and the Division have stipulated that if it is determined that petitioner may not use the registered broker-dealer sourcing rules of Tax Law former § 210 (3) (a) (9) to source the US AM Receipts, and it is determined that the Brazilian withholding income tax is required to be added back to its federal taxable income pursuant to Tax Law § 208 (9) (b) (3) for the tax years ending December 31, 2012 and December 31, 2013, petitioner will not be entitled to any refund.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began his determination by citing the sections of the Tax Law relevant to the calculation of corporation franchise tax under article 9-A as in effect for the tax years at issue. The Administrative Law Judge observed that the determination of what

receipts were allocable to New York for purposes of calculating petitioner's business allocation percentage (BAP) was at issue in this matter.

The Administrative Law Judge next described the method for calculating a corporate taxpayer's BAP, including the customer-based receipts sourcing rule available to registered brokers or dealers. The Administrative Law Judge contrasted this with the sourcing rule for non-broker-dealer investment advisors, which would source their receipts to New York to the extent that their services are performed in New York. Noting that petitioner initially sourced US AM's receipts to New York, the Administrative Law Judge observed that petitioner sought a refund for the years at issue via amended corporate franchise returns based on applying the broker-dealer sourcing rules to US AM's receipts. According to the Administrative Law Judge, petitioner argues for its entitlement to such treatment of all of its receipts, including US AM's, because US BD's status as a registered broker-dealer should be imputed to petitioner, its single member, as US BD is a disregarded entity for federal tax purposes and its activities are treated in the same manner as a sole proprietorship, branch, or division of the owner.

After observing that petitioner correctly sourced the receipts for US BD, a registered broker-dealer with the SEC, according to the location of its customers, the Administrative Law Judge rejected petitioner's argument that all of its receipts were entitled to such treatment. The Administrative Law Judge reasoned that even a disregarded entity that is not a registered broker-dealer is not disregarded under the check-the-box regulations in determining where its receipts are sourced for New York State corporate franchise tax purposes. Citing federal case law, the Administrative Law Judge found that the check-the-box regulations merely determine the tax consequences for that particular entity, not the tax consequences to its owner-member. The Administrative Law Judge agreed with the Division that the plain meaning of the statutory

language is the best indicator of legislative intent and concluded that if the Legislature had intended for customer-based sourcing rules to apply to the financial services industry as a whole, as petitioner asserts, it would have stated so in the language of the statute.

The Administrative Law Judge then addressed petitioner's argument that the Division's position violates the equal protection clause of the United States Constitution by claiming the Division has treated it differently than it would a corporation that is a registered broker-dealer. The Administrative Law Judge rejected this argument, finding that petitioner had failed to make a showing of uneven treatment, much less that such treatment was palpably arbitrary or an invidious discrimination.

Finally, the Administrative Law Judge addressed petitioner's argument that it should not be required to add back the Brazilian withholding income tax to its federal adjusted income in determining its entire net income. Finding that the statute requires the add back of taxes on or measured by profits or income paid to the United States or to any foreign country, the Administrative Law Judge examined the text of the translation of the Brazilian withholding income tax and found that it was subject to the add back provision. The Administrative Law Judge concluded that petitioner had not met its burden of showing that the Brazilian withholding income tax was not a tax on, or measured by, profits or income. Consequently, the Administrative Law Judge denied the petition and sustained the Division's denial of petitioner's refund claims.

ARGUMENTS ON EXCEPTION

Petitioner argues that because its single-member limited liability companies (LLCs), US BD and US AM, are disregarded entities for purposes of federal income tax, all of its receipts should be sourced according to the broker-dealer sourcing rules under Tax Law former

§ 210 (3) (a) (9). Petitioner's basis for this argument is New York's long-standing policy of conformity of the Tax Law with federal tax law. According to petitioner, Treasury regulation (26 CFR) § 301.7701-2 eliminates any distinction of identity between petitioner and its LLCs because US BD and US AM are treated as branches or divisions of petitioner for purposes of federal taxation. Petitioner maintains that, as US BD was a registered broker or dealer with the SEC, petitioner would be deemed to be a registered broker or dealer under Tax Law former § 210 (3) (a) (9), thereby enabling it to source all its receipts, including those earned by US AM, based on customer location when calculating its business allocation percentage (BAP) under article 9-A of the Tax Law. Petitioner argues that US AM's receipts should be sourced according to the broker-dealer sourcing rules because the advisory and management services it offered qualified for such treatment under the Tax Law. Petitioner also alleges violations of equal protection as provided under the United States and New York State Constitutions as applied to the facts of its case. Petitioner claims that the Division erred in denying its refund claim based on its amended returns reporting a recalculated BAP for the tax years at issue.

Petitioner's second argument posits that the Division erred in requiring petitioner to add back the Brazilian withholding income tax to its federal taxable income in determining its ENI under Tax Law former § 208 (9) (b) (3). According to petitioner, the true nature of the Brazilian withholding income tax is that of a tax on gross proceeds rather than a net income tax, and as such, is not required to be added back pursuant to Tax Law former § 208 (9) (b) (3). Petitioner claims that merely because the translation of the Brazilian withholding income tax offered into evidence stated that such a tax was based on the "income and proceeds of any nature located in the country," it should not be presumed that such a label is determinative of how the tax actually operates.

The Division argues in opposition that petitioner properly sourced its receipts earned by US AM on its original tax returns. While admitting that New York follows federal tax treatment of disregarded entities, the Division posits that the sourcing of receipts and allocation of income for New York State corporate franchise tax purposes is not a concern for federal tax purposes. As such, according to the Division, the federal tax treatment of US AM plays no role in determining how its receipts should be sourced. The Division denies that the rationale given in advisory opinions that concluded that receipts earned by a registered broker-dealer single-member LLC should be sourced according to the broker-dealer sourcing rules under Tax Law former § 210 (3) (a) (9) extends to the receipts of any other LLC reported on the single member's tax return. The Division maintains that where, as here, the statutory language is unambiguous, its plain meaning must be given effect and petitioner's argument must fail.

The Division states that petitioner's claims of violations of equal protection under the New York State and United States Constitutions must fail as petitioner has failed to prove uneven treatment.

The Division also argues that petitioner's claim that Tax Law former § 208 (9) (b) (3) did not require an add-back of Brazilian withholding income tax was incorrect. The Division states that petitioner failed to show that its interpretation that the Brazilian withholding income tax was not an income tax within the meaning of the statute was the only reasonable interpretation. The Division observed that there was simply no basis in either statute to conclude that Brazilian withholding income tax was not a tax measured by income or profits that would be required to be added back in determining petitioner's entire net income (ENI).

OPINION

Article 9-A of the Tax Law imposes a franchise tax on domestic and foreign corporations

for the privilege of doing business in the state (Tax Law § 209 [1]). During tax years at issue, the tax was based on the highest of four possible bases, including ENI, which was based on the corporate taxpayer's investment and business income (Tax Law former §§ 208 [6], [8]; 210 [1]). The investment and business components of the corporate taxpayer's income were then allocated to New York State based on the taxpayer's investment and business allocation percentages (Tax Law former § 210 [3]). The resulting amounts were totaled to arrive at the corporation's ENI base. The proper calculation of petitioner's BAP forms the basis of petitioner's protest of the Division's denial of its refund claims here at issue.

During the tax years at issue, a corporation's BAP was computed by dividing the corporation's New York business receipts by its total business receipts (Tax Law former § 210.3 [a] [10]). Such New York receipts included sales of tangible personal property shipped to points within the state, services performed within the state, rents from properties situated within the state, royalties from use of patents or copyrights within the state and all other business receipts earned within the state (Tax Law former § 210 [3] [a] [2] [A-D]). In addition, and in contrast to the place of performance allocation rule for services generally, registered securities or commodities brokers or dealers were permitted to use customer-based sourcing rules for fees for, inter alia, management and advisory services (Tax Law former § 210 [3] [a] [9]).

As detailed in the findings of fact, petitioner originally computed its franchise tax liability by sourcing US BD's receipts based on the broker-dealer rules in Tax Law former § 210 (3) (a) (9) and US AM's receipts based on where its services were performed (Tax Law former § 210 [3] [a] [2] [B]). Petitioner's amended corporate franchise tax returns for the periods at issue reported US AM's receipts using the broker-dealer sourcing rules based on the theory that, because US BD is a disregarded entity and treated as a branch or division under the federal

treasury regulations (Treas Reg [26 CFR] §§ 301.7701-1 to 301.7701-3), petitioner itself is deemed a registered broker or dealer for purposes of sourcing US AM's receipts as well as US BD's.

Single-member LLCs may elect to be classified as an association taxable as a corporation or to be disregarded as an entity separate from its owner-member (Treas Reg [26 CFR] § 301.7701[a]). If no election is made, a single-member LLC is disregarded as a separate entity for federal tax purposes and its activities are treated in the same manner as a sole proprietorship, branch or division of the owner (***id.***). Here, petitioner chose disregarded entity treatment for its single-member LLCs, US BD and US AM.

Petitioner's primary argument in support of its position that the Division improperly denied the refunds petitioner claimed on its amended returns for the periods at issue is New York's policy of conformity of the Tax Law with federal tax law (***see e.g. Burton v New York State Dept. of Taxation & Fin.***, 25 NY3d 732, 737 [2015]). Petitioner cites ***Matter of Shell Gas Gathering Corp. #2 & Shell Gas Pipeline Corp. #2*** (Tax Appeals Tribunal, September 23, 2010) in support of its argument that this Tribunal has implicitly held that New York conforms to the federal treatment of single-member LLCs and views them as indistinguishable from their owners. Petitioner also cites advisory opinions issued by the Division in support of its argument that it should be entitled to source its receipts under the broker-dealer sourcing rules by virtue of its single-member LLCs being disregarded entities for federal tax purposes (***see*** TSB-A-13[11]C [December 20, 2013]; TSB-A-16[1]C [January 11, 2016]).

We agree with petitioner that the courts of New York have long employed a policy of adopting the federal construction of substantially similar Tax Law provisions under the doctrine of federal conformity (***Matter of Delese***, Tax Appeals Tribunal, August 8, 2002, ***confirmed*** 3

AD3d 612 [3d Dept 2004], ***appeal dismissed*** 2 NY3d 793 [2004]; ***Matter of Karlsberg v Tax Appeals Trib. of the State of N.Y.***, 85 AD3d 1347 [3d Dept 2011], ***appeal dismissed*** 17 NY3d 900 [2011]; ***Matter of Astoria Fin. Corp. v Tax Appeals Trib. of State of N.Y.***, 63 AD3d 1316 [3d Dept 2009]; ***see also Matter of Marx v Bragalini***, 6 NY2d 322 [1959]). The doctrine is in furtherance of the legislative policy of maintaining uniformity in the administration of the federal and state tax laws (***Matter of Delese***). The Court of Appeals has stated that arguments in favor of applying the doctrine are particularly strong and persuasive where "the State act and regulations were modeled upon the Federal law and regulations and both statutes and regulations closely resemble each other" (***Matter of Marx***, 6 NY2d at 333-334). However, where state tax law diverges from federal law, there is no requirement that a court strain to read the federal and state tax provisions as identical (***Matter of CoData Corp. v Commissioner of Taxation & Fin.***, 163 AD2d 755 [3d Dept 1990]).

While the doctrine of federal conformity is strongly persuasive where a provision of the Tax Law is modeled on federal tax law, there are limits to its application (***see e.g. Matter of Astoria Fin. Corp.***). We agree with the Division that in the absence of ambiguity, "the statutory text provides clearest indication of legislative intent, and should be construed 'to give effect to its plain meaning'" (***Matter of United Parcel Serv., Inc. v Tax Appeals Trib. of the State of N.Y.***, 98 AD3d 796 [3d Dept 2012], ***lv denied*** 20 NY3d 860 [2013], ***quoting Matter of DaimlerChrysler Corp. v Spitzer***, 7 NY3d 653 [2006]; ***see also*** Statutes § 232, ["[w]ords of ordinary import used in a statute are to be given their usual and commonly understood meaning, unless it is plain from the statute that a different meaning is intended"]).

We concur with the Administrative Law Judge that the statutory text of Tax Law former § 210 (3) (a) (9) is unambiguous in that it applies only to registered brokers or dealers. Further

illustrating this point is the clause that follows, wherein the statutory text makes clear that a registered securities or commodities broker or dealer means “a broker or dealer registered as such by the securities and exchange commission or the commodities futures trading commission . . .” (Tax Law former § 210 [3] [a] [9] [B]). It is undisputed that US AM was not registered as a broker or dealer with the SEC during the periods here at issue. As such, we conclude that petitioner is not entitled to source US AM’s receipts under the broker-dealer sourcing rules of Tax Law former § 210 (3) (a) (9).

Next, we consider petitioner’s constitutional claims. Petitioner states that the Administrative Law Judge’s determination has the effect of violating its right to equal protection under the United States and New York State constitutions. Petitioner claims that Tax Law former § 210, as applied, results in disparate treatment of petitioner due to its single-member LLC compared to its treatment of taxpayers doing business without a single-member LLC and has no rational basis. However, the equal protection clause does not prevent state legislatures from drawing lines that treat one class of entities differently from others unless the difference in treatment is “palpably arbitrary” or amounts to an “invidious discrimination” (***see Trump v Chu***, 65 NY2d 20, 25 [1985]). A statute enjoys a presumption of constitutionality which can only be overcome by demonstrating that classification amounts to discrimination against particular persons and classes (***id.***). In such a case, the taxpayer bears the heavy burden of demonstrating that there are no conceivable set of facts to uphold the classification (***Merit Oil of N.Y., Inc. v State Tax Commn.***, 111 Misc 2d 118 [1981]).

Petitioner has not met this burden. As discussed by the Division in its brief, the Legislature added the registered broker-dealer sourcing rules to the Tax Law in 2000 (L 2000, ch 63, Pt K; ***see also*** TSB-M-00[5]C, December 27, 2000). It was not until 2014 that the

Legislature decided to extend customer-based sourcing to service receipts to provide a more competitive taxing scheme for New York-based service providers (L 2014, ch 59; ***2014-2015 New York State Executive Budget***, Revenue Article VII Legislation, Memorandum in Support, Pt A). We agree with the Administrative Law Judge that petitioner has not made a showing of uneven treatment compared with a similarly-situated taxpayer as it has only alleged differing treatment of the receipts as between its two single-member LLCs for purposes of New York corporation franchise tax. We do not find such a showing to rise to the level of palpably arbitrary treatment or invidious discrimination as would be required to demonstrate a violation of the equal protection clauses of the United States and New York State constitutions.

Finally, we address petitioner's argument that the Division erred in denying that portion of its claimed refunds stemming from not adding back the Brazilian withholding income tax from its federal taxable income in determining its ENI. Under Tax Law former § 208 (9) (b) (3), corporate taxpayers determined their ENI without the exclusion, deduction or credit of "taxes on or measured by profits or income paid or accrued to the United States, any of its possessions or to any foreign country, including taxes in lieu of any of the foregoing taxes otherwise generally imposed by any foreign country or by any possession of the United States." According to petitioner, the add-back provision of Tax Law former § 208 (9) (b) (3) only applies to net income taxes, not taxes on gross profits or gross income. In effect, petitioner argues that the add-back provision should not apply because it is evident that Tax Law § 208 (9) (b) (3) does not contemplate a tax on gross income. In support, petitioner argues that it is evident from the common dictionary meanings of the terms "profits" and "income" as well as their uses within the Internal Revenue Code and Tax Law that the Legislature did not intend for the add-back to apply to the tax like the Brazilian withholding income tax.

At the hearing, petitioner requested that the Administrative Law Judge hold the record open for submission of an English translation of the Brazilian withholding income tax, which petitioner submitted on March 26, 2018. Although this translation stated that the Brazilian withholding income tax was based on the "income and proceeds of any nature," petitioner argues that it should not be presumed that such a label is determinative of how the tax is actually administered. However, petitioner has not shown that the tax is actually administered differently than the translated language indicates.

Pursuant to Tax Law § 1089 (e), unless otherwise provided, a petitioner bears the burden of proof for any issue in a case before the Division of Tax Appeals (***see also*** Tax Law § 1080 [a], applying administrative and procedural provisions of article 27 to article 9-A; ***Matter of Park Swift Parking Corp. v New York State Tax Commn.***, 92 AD2d 970 [3d Dept 1983], ***lv denied*** 59 NY2d 604 [1983]. In our view, petitioner has not met this burden. This is because petitioner has not shown by substantial evidence that the tax in question is not a tax on or measured by profits or income (***see*** Tax Law former § 208 [9] [b] [3]; SAPA § 306 [a]; Matter of ***Ridge Rd. Fire Dist. v Schiano***, 16 NY3d 494 [2011] [holding that substantial evidence means "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact"]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of BTG Pactual NY Corporation is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of BTG Pactual NY Corporation is denied; and,

4. The Division's denial of petitioner's refund claims is sustained.

DATED: Albany, New York
March 24, 2020

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner