STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition

of

**LENDLEASE AMERICAS HOLDINGS, INC.
& SUBSIDIARIES**

for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Tax Years ended June 30, 2007, June 30, 2008 and June 30, 2009.

DECISION
DTA NO. 829540

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on July 27, 2023. The Division of Taxation appeared by Amanda Hiller, Esq. (David Markey, Esq., of counsel). Petitioner appeared by Lowenstein Sandler, LLP (Edmund S. Cohen, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a brief in opposition. The Division of Taxation filed a reply brief. Oral argument was heard on July 25, 2024, in Albany, New York, which date began the six-month period for issuance of this decision.

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

ISSUES

I. Whether the Division of Taxation properly determined that petitioner should have filed on a combined basis with Yarmouth Lend Lease KOP, Inc. for the tax years ended June 30, 2008 and June 30, 2009.

II. If so, whether penalties imposed herein should be sustained.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except findings of fact 86 and 87, which consisted of the Administrative Law Judge's rulings on the parties' proposed findings of fact. As so modified, these facts are set forth below.

1. Lendlease Corporation Limited (formerly, Lend Lease Corporation Ltd.) (LL Limited) is a publicly traded Australian corporation that conducts business operations in numerous countries through its direct and indirect subsidiaries. LL Limited and all its subsidiaries are collectively "Lend Lease Worldwide Group." Lendlease Americas Holdings, Inc. (formerly, Lend Lease [U.S.] Inc.) (LLAH), a Delaware corporation, wholly owns a group of subsidiaries (collectively, petitioner or Lendlease U.S. Group).

2. Since the late 1950s, LL Limited has been a leading real estate services business. LL Limited's entry into the United States (U.S.) real estate investment management business began in 1993 with the acquisition of the Yarmouth Group. The Yarmouth Group was a real estate investment advisory company. In 1996, it had approximately $5 billion in commercial real estate under management in the U.S. The Yarmouth Group had an operating subsidiary that was in the business of providing retail property management and leasing services for approximately 12 malls in the U.S. The Yarmouth Group did not own properties, but rather served as an advisor to third party investors in real estate.

3. One of LLAH's subsidiaries was Yarmouth Lend Lease Properties, Inc. (YLLP), a Delaware corporation. YLLP wholly owned all the shares of Yarmouth Lend Lease Acquisition, Inc. (YLLA), a Delaware corporation. YLLA wholly owned all the shares of Yarmouth Lend Lease KOP, Inc. (YLL KOP), a Delaware corporation. All the shares of YLLP, YLLA and YLL KOP were ultimately owned by LLAH.

4. YLL KOP was a single-purpose investment entity and was formed to hold only one asset, a 50% partnership interest in King of Prussia Associates (KOP), a Pennsylvania partnership that owned the King of Prussia Mall (KOP Mall) in Pennsylvania.

5. KOP had owned the KOP Mall since January 27, 1967. Located on approximately 125.46 acres of land in Upper Merion Township, Montgomery County, Pennsylvania, the KOP Mall was one of the largest shopping malls in the U.S. and the largest mall on the East Coast, with approximately 2.7 million square feet of space and four hundred tenants comprising retail stores and food establishments.

6. On December 19, 1996, YLL KOP acquired its 50% general partnership interest in KOP from an unrelated third party, NLI Properties Inc., which had owned the 50% general partnership interest since March 31, 1988. At the time of NLI Properties, Inc.'s sale of its 50% general partnership interest, the total valuation of KOP was approximately $451,000,000.00. The total purchase price for the 50% general partnership interest in KOP was $225,500,000.00.

7. A mortgage of $240,000,000.00 was also placed on the KOP Mall at or around the time of YLL KOP's acquisition of the 50% general partnership interest. Total costs to YLL KOP to acquire the interest in KOP were approximately $109,700,000.00, comprised of $105,500,000.00 (50% of the $211,000,000.00 value of KOP [$451,000,000.00 valuation for the entire partnership less the $240,000,000.00 mortgage]), plus some additional closing costs, legal fees, and capital requirements. YLL KOP financed the acquisition through an approximately $22,000,000.00 capital contribution from YLLA and an intercompany loan of $87,500,000.00 provided by Lend Lease US Finance, Inc., a Delaware corporation formed in fiscal year 1997.[1]

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[1] Lend Lease Corporation Limited, the Australian corporate parent, provided a $109,700,000.00 capital contribution to LLAH, which provided the same to its subsidiaries.

8. On December 19, 1996, YLL KOP entered into a "Joint Venture Agreement" with Kingmak Associates (Kingmak), a Pennsylvania partnership, unrelated to the Lendlease U.S. Group, that owned the other 50% general partnership interest in KOP (KOP Partnership Agreement).[2] The KOP Partnership Agreement provided that

> "[T]he respective interests of [YLL KOP and Kingmak] in and to all real and personal property, monies and profits of [KOP] and their respective shares of all losses, expenses, obligations and liabilities of [KOP] shall be 50% for YLL [KOP] and 50% for Kingmak."

9. Based upon representations in the KOP Partnership Agreement, Kingmak had owned its partnership interest in the KOP Mall since the inception of KOP in 1967. In 1996, Kingmak was owned by members of the Powell, Shaffer and Frost families. No member of the Lendlease Worldwide Group ever owned an interest in Kingmak.

10. The principal place of business of KOP was located at the KOP Mall, and at least initially was located at Kingmak's address: c/o Kravco Company (Kravco), 234 Mall Boulevard, King of Prussia, Pennsylvania. In 1996, Kravco, a Pennsylvania partnership, was owned by members of the Powell family and other parties, unrelated to the Lendlease U.S. Group.

11. Pursuant to Article VII of the KOP Partnership Agreement, Kingmak served as the "Administrative Venturer" of KOP. While decisions as to KOP's business generally required the unanimous decision of both partners, i.e., the "Co-managing Venturers," Kingmak, as the Administrative Venturer, was "responsible for the implementation of the decisions of the Co-managing Venturers and for conducting the ordinary and usual business and affairs of [KOP]" as established and approved by the partners. As the Administrative Venturer, Kingmak had the

[2] The Joint Venture Agreement, dated December 19, 1996, was amended by the Amendment to the Joint Venture Agreement dated as of August 24, 1998. The Joint Venture Agreement as amended will be referred to as the KOP Partnership Agreement. The KOP Partnership Agreement remained in effect for the fiscal years ended June 30, 2007 through June 30, 2009.

authority to, among other acts: (i) negotiate and enter into contracts in the name of KOP; (ii) maintain all funds of KOP in bank accounts; (iii) distribute funds of KOP as authorized under the agreement; and (iv) prepare a proposed agenda of topics to be covered at meetings held by the KOP partners.

12. Kingmak had rights under the KOP Partnership Agreement that YLL KOP did not have. As Administrative Venturer, Kingmak could, without YLL KOP's consent or approval, enter into contracts for terms of up to a year for utilities and other services that Kingmak "shall deem advisable [and that are] normally furnished in regional shopping centers similar to the [KOP Mall]." Any acts taken by Kingmak consistent with its authority as Administrative Venturer under the KOP Partnership Agreement bound both YLL KOP and KOP itself.

13. Pursuant to § 8.03 of the KOP Partnership Agreement, Kingmak engaged Kravco to "assist Kingmak in the performance of its duties and responsibilities as Administrative Venturer." Kingmak engaged Kravco pursuant to an Amended and Restated Management Agreement, dated March 31, 1988, (Kravco Management Agreement), that placed the responsibility on Kravco for nearly all aspects of the day-to-day operations of the KOP Mall, and provided Kravco with an arm's length fee as remuneration for its services.

14. Under the Kravco Management Agreement, Kravco's responsibilities included, among others:

(a) Negotiating leases, renewals, extensions, and modifications to leases for tenants of the KOP Mall, enforcing performance by the tenants of all requirements under those leases, and collecting the rents of the tenants of the KOP Mall.

(b) "To cause the [KOP Mall] to be maintained in a first class operating condition and repair consistent with the highest standards of shopping center management procedures used by major developers . . . and to supervise the maintenance and operation thereof."

(c) Monitoring and upkeep of the physical condition of the KOP Mall, including janitorial services and repairs.

(d) Hiring employees, "including without limitation a [KOP Mall] manager and public relations, security, and maintenance personnel."

(e) Participating on behalf of KOP in any local merchants' associations.

(f) Advising KOP of the due dates of applicable taxes, mortgage payments, and similar obligations.

(g) Keeping the books and records and submitting monthly financial statements, statements of cash receipts and disbursements, and accounts receivable analyses.

(h) Preparing quarterly cash flow reports and marketing reports.

(i) Procuring insurance coverage at the request of KOP.

15. Pursuant to Article XVIII of the KOP Partnership Agreement, "neither YLL [KOP], nor [Lend Lease Corporation Limited], nor any subsidiary of [Lend Lease Corporation Limited] shall become involved, directly or indirectly, in a Competitive Venture without first affording Kingmak an opportunity to participate in such Competitive Venture on reasonable commercial terms."[3] Pursuant to the KOP Partnership Agreement, a "Competitive Venture" was defined, subject to limited exceptions, as:

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[3] Article XVIII also provided that so long as YLL KOP or any affiliate thereof "shall remain a Venturer, neither Arthur L. Powell, Harold G. Schaeffer, or John L. Frost, individually, nor the trustees of their respective families, acting in their capacity as trustees, shall become involved, directly or indirectly," in a Competitive Venture without first affording YLL KOP the opportunity to participate in such Competitive Venture on reasonable commercial terms.

> "the acquisition or development of any real property located in whole or in part in Upper Merion Township, Montgomery County, Pennsylvania, for the purpose of owning, leasing, operating or selling or leasing real property to, any retail commercial establishment or enterprise which real property will be competitive with the [KOP Mall]."

16. The KOP Partnership Agreement also provided, among other things, for monthly distributions of "Net Cash Flow" to YLL KOP and Kingmak, quarterly meetings of the Co-managing Venturers, and the right of first refusal that required any offer made by a third party to purchase all or part[4] of a general partner's interest be subject to a 90-day period in which the other general partner had the right to acquire the selling partner's interest on the same terms as the third-party offer.

17. As required under the terms of the KOP Partnership Agreement, KOP held quarterly meetings in the months of March, June, September and December during the tax years ended June 30, 2007 through June 30, 2009 to discuss the management and operation of the KOP Mall.

18. The KOP Mall owners' meeting notes for the fourth quarter of 2007 through the third quarter of 2009 establish that during tax years ended June 30, 2008 and June 30, 2009, each quarterly meeting was held at Kravco's offices in Pennsylvania, with between two and four representatives from YLL KOP in attendance, and between twelve and fifteen representatives from Kingmak and/or Kravco in attendance. Kingmak prepared the agendas for the quarterly meetings, and the presentations at the meetings were made predominantly by Kingmak and Kravco personnel. YLL KOP's role at the quarterly meetings "was predominantly to listen . . . to what the Administrative Venture[r] and the property manager presented."

19. KOP incurred substantial expenses during the calendar years 2006, 2007 and 2008 in operating the KOP Mall. KOP's form 1065, U.S. return of partnership income (KOP US

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[4] A minimum of 5% of a partnership interest could be offered for sale; however, the selling partner must retain at least 5% of its partnership interest or offer to sell its entire interest.

partnership tax return), for each of the calendar years 2006, 2007 and 2008 report expenses in the total amount of $46,708,272.00, $46,026,678.00, and $47,941,535.00, respectively, on form 8825, rental real estate income and expenses of a partnership or an S corporation, with respect to the operation of the KOP Mall. During the calendar years 2006, 2007 and 2008, the expenses included: (i) advertising expenses (average of $2,639,219.67); (ii) cleaning and maintenance (average of $1,922,847.00); (iii) insurance (average of $1,164,733.33); (iv) legal and other professional fees (average of $262,559.00); (v) interest (average of $3,845,273.67); (vi) taxes (average of $5,897,570.67); (vii) utilities (average of $6,094,317.67); (viii) depreciation (average of $12,315,126.33); and (ix) landscaping, maintenance support, management fees, security, and other expenses (average of $12,750,515.33).

20. KOP's tax returns and the schedules K-1 issued to YLL KOP were prepared by Kingmak as the tax managing partner of KOP. KOP's audited financial statements were prepared by Kravco on behalf of KOP.

21. At the hearing, petitioner provided the testimony of John Allman, an Australian certified practicing accountant, who began working for the Lendlease Worldwide Group in March 1991. From January 1996 until October 2015, Mr. Allman worked for the Lendlease U.S. Group, in various roles.

22. From January 1996 until June 1997, Mr. Allman was the chief financial officer (CFO) of the Yarmouth Group. Mr. Allman testified that YLL KOP acquired its interest in KOP in 1996 as part of a strategy "to accumulate a portfolio of high quality . . . retail mall assets, and form a fund." The Yarmouth Group, comprising the Lendlease U.S. Group's entire investment management business at the time, would serve as a manager and advisor and earn fees for its services.

23. The Lendlease U.S. Group made several other significant acquisitions in the late 1990s and early 2000s in efforts to grow its investment management business. In June 1997, the Lendlease U.S. Group acquired Equitable Real Estate Investment Management, Inc. (ERE). In 1999, the Lendlease U.S. Group acquired "the Boston Financial Group, and its affordable housing syndication business was transformed into Housing and Community Investing (HCI)." In addition, on March 20, 2000, a Lendlease U.S. Group subsidiary, Lend Lease Real Estate Investments, Inc. (LL REI), acquired five of Amresco, Inc.'s (AMRESCO) commercial mortgage businesses: AMRESCO Capital Limited Partnership, Holliday Fenoglio Fowler, Real Estate Structured Finance, AMRESCO Services Limited Partnership, and Asset Management. The total value of these investment management acquisitions was over $800,000,000.00. At its peak in or about March 2000, LL REI had approximately 2,000 employees.

24. In June 1997, Mr. Allman became a senior vice president with the Lendlease U.S. Group. From June 1997 until early 2004, Mr. Allman worked in the Lendlease U.S. Group's mergers and acquisitions team. Mr. Allman explained that the Lendlease U.S. Group's investment management business provided a wide variety of services to investor clients, including monitoring and directing the operation of a real estate asset already owned by a client. The investment management business also participated in acquiring, divesting, and/or financing real estate assets on behalf of investor clients. In addition, it created investment funds, participated in these funds as an investor, and attracted other third-party investors to the funds, in order to acquire different types of real estate. Depending upon the fund and the strategy, the Lendlease U.S. Group's investment management business made co-investments as the general partner of a fund and supervised the management of the investment funds. The investment

management business did not typically buy interests in real estate directly, but instead generally acquired interests in real estate through participation as a general partner of a real estate fund.

25. YLL KOP's 50% general partnership interest in KOP could not be contributed to a real estate investment fund as part of the Lendlease U.S. Group's investment management business due to legal issues arising from the acquisition of ERE in 1997. Specifically, following the acquisition of ERE in 1997, YLL KOP's interest in KOP could not be used in a real estate investment fund due to conflict of interest prohibitions under the Employee Retirement Income Security Act (ERISA). Because of those ERISA conflicts, "the fund idea was terminated, closed down" as of 1997. The Lendlease U.S. Group sold the ERE Compass property management business at a small premium to Jones Lang LaSalle in 1998.

26. Ultimately, the Lendlease U.S. Group's investment management business was not successful, and the Lend Lease Worldwide Group's Australian senior management made the decision to exit the investment management business entirely in the U.S. In its "2003 Annual Report to Shareholders," the Lend Lease Worldwide Group's senior management announced, in part, as follows:

> "This year Lend Lease resolved to exit the Real Estate Investments business in the US following a strategic review. . . .
>
> **Investment management in the US**
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> The real estate investment management business was clearly unsuccessful for Lend Lease in the US. With the benefit of hindsight, the strategy was a flawed undertaking and contained many deficiencies. The most telling factors were the lack of a well thought through business model and the failure of management to integrate the businesses and execute the business plans.
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> * * *
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> After the strategic review, Lend Lease resolved to exit the Real Estate Investments (REI) business in the US, and entered into a series of agreements to sell various parts of the business, including CapMark Services, HCI, Holliday

> Fengolio Fowler, Lend Lease Mortgage Capital and most of the equity advisory business."

27. In 2003, Lend Lease Corporation Limited sold the majority of the investment management business to Morgan Stanley Realty Incorporated and Morgan Stanley Real Estate Advisor, Inc. (Morgan Stanley) for $1.00, pursuant to a purchase and sale agreement, dated June 16, 2003. In connection with the sale of the U.S. management business, the Lend Lease Worldwide Group recognized write downs in 2003 of A$945,000,000.00, the equivalent of approximately $630,000,000.00, using the exchange rate in effect on June 30, 2003.

28. One of the investment advisory contracts purchased by Morgan Stanley was a Real Estate Investment Advisory Agreement, dated January 1, 2003, between LL REI and YLL KOP (2003 Advisory Agreement). The terms of the 2003 Advisory Agreement did not change when it was assigned to Morgan Stanley. The 2003 Advisory Agreement provided for the same services and the same fees when Morgan Stanley rendered the services as it did when LL REI rendered the services to YLL KOP.

29. From early 2004 through June 2011, Mr. Allman was involved in winding down legacy investments and receivables and other assets and other legal entities left behind from Lendlease U.S. Group's sale of its U.S. investment management business. Mr. Allman testified that the large majority of the real estate related investments, aside from YLL KOP's 50% partnership interest in KOP, "had been liquidated by June of 2006, June of 2007." Excluding the 50% partnership interest in KOP, as of the tax year ended June 30, 2003, the Lendlease U.S. Group retained 32 co-investments of the former investment management business, which, along with certain receivables and other assets, had a book value of $313,500,000.00. As of the tax year ended June 30, 2007, the Lendlease U.S. Group had retained only three co-investments of the former investment management group, which, along with certain receivables and other

assets, had a book value of only $2,000,000.00. As of the tax year ended June 30, 2007, excluding the 50% partnership interest in KOP, the Lendlease U.S. Group retained only 0.63% of the former investment management business as measured by the book value of the assets.

30. Following the divestment of the U.S. investment management business, less than five employees of that business remained employed by the Lendlease U.S. Group as of the tax year ended June 30, 2006. That is, although the number of employees of the U.S. investment management business peaked at 2,000 around March 2000, less than one quarter of one percent of that workforce remained employed by the Lendlease U.S. Group as of the tax year ended June 30, 2006.

31. As provided in the Lend Lease "2007 Annual Report to Shareholders," the Lend Lease Worldwide Group operates three core businesses: project management and construction; real estate investment management; and real estate development. Its development business focuses on three key areas: retail, communities, and privatization. Its key markets are Asia Pacific, the Americas, the United Kingdom, Europe and the Middle East.

32. The Lend Lease "2009 Annual Report to Shareholders" states: "[i]n Asia Pacific, Lend Lease holds a direct ownership interest in two development opportunities and two operating retail centres. The business is currently undertaking master-planning and development management of six centres in Australia and one in Singapore." This annual report also states that "[i]n Europe, Lend Lease's Retail business includes an ownership interest in five retail centres in the UK." The Lend Lease 2009 Annual Report further states that "[i]n the Americas, Lend Lease's retail business comprises a 50% ownership interest in the partnership that owns the King of Prussia Mall in Pennsylvania."

33. The Lendlease U.S. Group engaged in the project management and construction business during the tax years ended June 30, 2007 through June 30, 2009. The Lendlease U.S. Group first entered this business in late 1999 following the acquisition of a group of international construction companies that generally operated under the brand name "Bovis." The Lendlease U.S. Group's project management and construction business provided construction services with respect to vertical projects that were typically high-rise multi-family or condominium properties. The project management and construction business also provided construction services on projects involving office buildings, hotels and hospitals.

34. The Lendlease U.S. Group also engaged in the communities business during the tax years ended June 30, 2007 through June 30, 2009, which provided construction, property management, and development services with respect to private residential and military housing projects. The Lendlease U.S. Group first entered the communities business in the early 2000s when it became a co-developer and provided construction management services on a condominium project in San Francisco. The Lendlease U.S. Group later expanded its communities business when it acquired a majority interest in a company called Actus. Actus was a military contractor, and the Lendlease U.S. Group acquired an interest in Actus to enter into the military family housing business following the U.S. Department of Defense's Military Privatization Initiative. Through Actus, the Lendlease U.S. Group bid on and won a series of projects to enter into ground leases with the military and provide development and construction management services for military family housing.

35. The Lendlease U.S. Group engaged in a retail real estate business before tax years ended June 30, 2007 through June 30, 2009, and had completely exited that business prior to those years. When it had been in operation prior to the tax years ended June 30, 2007 through

June 30, 2009, the retail real estate business had engaged in three main activities. First, the retail real estate business had engaged in retail property management through The Yarmouth Group, which managed several malls. Second, the retail real estate business had engaged in retail property development that was limited to one joint venture in California. Third, the retail real estate business had engaged in real estate investment management. The Lendlease U.S. Group exited the retail property management business in 1998 when it sold the business to Jones Lang LaSalle. The Lendlease U.S. Group exited the retail property development business in the early 2000s. The Lendlease U.S. Group exited the retail investment management business in 2003. The Lendlease U.S. Group did not conduct any retail real estate operating businesses in the U.S. during the tax years ended June 30, 2008 and June 30, 2009.

36. YLL KOP did not have or need employees. The officers of YLL KOP performed "administrative" functions, such as "compliance related activities for annual meetings and other sort of activities required as a corporation." Major decisions regarding YLL KOP's business, including the decision to acquire and dispose of the interest in KOP, were made by the Board of Directors of Lend Lease Corporation Limited in Australia, which as a corporation organized outside the U.S., was not required or permitted to file as part of a combined group under the Tax Law.[5]

37. Pursuant to a Real Estate Asset Management Agreement between LL REI and YLL KOP, dated July 1, 2007 (2007 Advisory Agreement), during the tax years ended June 30, 2008 and June 30, 2009, LL REI was engaged by YLL KOP to do the following: monitor Kingmak's compliance with the KOP Partnership Agreement; consult with Kingmak with regard to YLL KOP's rights under such agreement; and oversee Kravco's operation of the KOP Mall. The 2007

[5] Tax Law § 211 (5) provides that "[a] corporation organized under the laws of a country other than the United States shall not be required or permitted to make a report on a combined basis."

Advisory Agreement provided that the advisor was entitled to an annual asset management fee and a disposition fee in exchange for the asset management services that it provided under the agreement. LL REI received an annual asset management fee equal to 0.23% of the gross value of YLL KOP's share of KOP's interest in the KOP Mall. The disposition fee was equal to 0.5% of YLL KOP's share of the gross sales price of the KOP Mall.

38. The 2007 Advisory Agreement was entered into following the termination in October 2006 of the 2003 Advisory Agreement. The fee paid by YLL KOP to LL REI under the 2007 Advisory Agreement was identical to the fee paid by YLL KOP to Morgan Stanley for identical services under the 2003 Advisory Agreement. When LL REI entered into the 2007 Advisory Agreement, it provided the same services for the same fees as when Morgan Stanley rendered such services under the 2003 Advisory Agreement. The 2007 Advisory Agreement shows John Allman as president of both YLL KOP and LL REI.

39. Prior to entering into the 2007 Advisory Agreement, LL REI did not have the necessary staff to perform the services because the Lendlease U.S. Group had entirely exited the investment management business in the U.S. As of July 1, 2007, the only other businesses operating in the U.S. were the construction and development, and communities businesses, "and there was nobody with the requisite skills to oversee investment in a retail mall like [the KOP Mall]."

40. The Lendlease U.S. Group hired Tom Dodge and an assistant to perform services pursuant to the 2007 Advisory Agreement. Both Tom Dodge and his assistant were located in Atlanta, Georgia. Neither Mr. Dodge nor his assistant provided services to any entities other than YLL KOP, and the services provided to YLL KOP were Mr. Dodge and his assistant's sole job responsibilities. When Mr. Dodge passed away in August 2009, the Lendlease U.S. Group

hired a replacement who was not an existing Lendlease U.S. Group employee, because "there was nobody with the skills needed in the United States" to perform the necessary services under the 2007 Advisory Agreement. The replacement worked out of Chicago, Illinois.

41. During each of the tax years ended June 30, 2008, and June 30, 2009, YLL KOP paid an advisory fee to LL REI in accordance with the 2007 Advisory Agreement. For the tax year ended June 30, 2008, the fee paid to LL REI, in accordance with the 2007 Advisory Agreement, was $1,347,800.00; LL REI's total income was $12,829,858.00 for that period; approximately 10.5% of that income was from YLL KOP. For the tax year ended June 30, 2009, the fee paid to LL REI, in accordance with the 2007 Advisory Agreement, was $1,340,900.00; LL REI's total income was $3,038,534.00 for that period; approximately 44.1% of that income was from YLL KOP.

42. YLL KOP's ownership of assets and operations did not change from the time it acquired its interest in KOP through the tax years ended June 30, 2007 through June 30, 2009. The KOP Partnership Agreement remained in effect during the tax years ended June 30, 2007 through June 30, 2009.

43. During the tax years ended June 30, 2007 through June 30, 2009, Mr. Allman worked out of an office in Parsippany, New Jersey. Mr. Allman testified that the other officers of YLL KOP were located in Georgia, California, North Carolina, and New Jersey during the tax years ended June 30, 2007 through June 30, 2009.

44. YLL KOP's interactions with other members of the Lendlease U.S. Group during the tax years ended June 30, 2008, and June 30, 2009 were limited to: (i) an intercompany promissory note; (ii) a shared bank account; and (iii) the 2007 Advisory Agreement. The promissory note was for $87,500,000.00, dated July 15, 2005, made by YLL KOP to Lend Lease

(U.S.) Capital, Inc.[6] The promissory note bore the agreed-upon interest rate of 7.5% per annum. For July 2005, the applicable federal rate for a long-term obligation with an annual compounding period was 4.35%. The principal of the loan from Lend Lease (U.S.) Capital, Inc. remained unchanged during the tax years ended June 30, 2007 through June 30, 2009. YLL KOP made annual interest-only payments to Lend Lease (U.S.) Capital, Inc. during those years in the amount of $6,343,750.00 per annum, which translates to a 7.25% interest rate, based upon the loan amount of $87,500,000.00.

45. YLL KOP did not maintain its own bank account during the tax years ended June 30, 2007 through June 30, 2009. YLL KOP did not require its own bank account because it had very few bank transactions, and it was common in the Lendlease U.S. Group for only its main operating businesses to have their own bank accounts. YLL KOP's funds, as well as any distributions to YLL KOP from KOP, were deposited into the bank account of petitioner's affiliate, Actus Lend Lease LLC (Actus Lend Lease). To the extent YLL KOP held a positive cash balance in Actus Lend Lease's account, YLL KOP would record an intercompany receivable from Actus Lend Lease's bank account and a debit to the balance of the account with Actus Lend Lease. YLL KOP's balances held in the Actus Lend Lease account were credited with interest during the tax years ended June 30, 2008 through June 30, 2009 at the rate of interest earned by Actus Lend Lease on the account, which was held with a third-party financial institution. Mr. Allman testified that any interest credited to YLL KOP approximated the same interest that YLL KOP would have earned from a third-party financial institution had YLL KOP had its own bank account and provided the following example. If the Actus Lend Lease account held $300.00 in total funds, and $200.00 of that amount was YLL KOP's cash, and $100.00 was

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[6] Mr. Allman testified that Lend Lease (U.S.) Capital, Inc. was formed in 2005 and was the successor to Lend Lease U.S. Finance, Inc., which originally held the note in 1997 when it was first issued.

attributable to another affiliate, and the account earned $3.00 in interest, YLL KOP would earn $2.00 of that interest ($3.00 X $200.00/$300.00). The deposits held in the Actus Lend Lease account were swept daily into Lend Lease (U.S.) Capital, Inc.

46. Mr. Allman testified that apart from the promissory note, the shared bank account, and the 2007 Advisory Agreement, there were no other transactions between YLL KOP and other members of the Lendlease U.S. Group.

47. The business of YLL KOP was different from the business of the rest of the Lendlease U.S. Group. Mr. Allman testified that no other members of the Lendlease U.S. Group ever owned real estate where there was no other business motivation apart from the pure ownership of real estate. There was no relationship between YLL KOP and the project management and construction business conducted by the Lendlease U.S. Group through the Bovis entities. Although Bovis had the ability to provide services to the KOP Mall, and sought to do so in at least one instance, it was never hired to provide those services. The KOP Mall owners' quarterly minutes for December 2009 indicate that YLL KOP proposed that Bovis provide services to the KOP Mall; however, Mr. Allman testified that those services were never actually provided. There was also no relationship between YLL KOP and the communities business conducted by the Lendlease U.S. Group. Neither the project management and construction business, nor the communities business ever developed any retail malls similar to the KOP Mall.

48. The Lendlease U.S. Group received some unsolicited offers to sell its 50% interest in KOP. Shortly after YLL KOP's purchase of the partnership interest in 1996, it received a purchase offer for that partnership interest. On March 30, 2001, LL REI received an unsolicited written offer from Kingmak, in which Kingmak offered to purchase YLL KOP's 50%

partnership interest in KOP at a discounted price. In this written offer, the majority of the partners of Kingmak expressed to LL REI that they intended to retain their interest in KOP and the ownership of the KOP Mall indefinitely to preserve wealth for future generations of the families that owned interests in KOP.

49. YLL KOP attempted to sell its interest in KOP several times before and during fiscal years ended June 30, 2008, and June 30, 2009. In 1998, the Lendlease U.S. Group engaged a broker to sell YLL KOP's interest in KOP. In May 2003, the Lendlease Worldwide Group's Chief Executive Officer publicly announced in an Australian newspaper article that he planned to sell YLL KOP's interest in the KOP Mall. In 2008, the Lendlease U.S. Group again engaged a broker to actively try to sell YLL KOP's 50% partnership interest in KOP. Mr. Allman testified that these efforts reflected the fact that "for the longest time King of Prussia . . . had no other connection to the [Lendlease U.S. Group's] business . . . it was non-strategic to the Lendlease global business, there was no other type of operation going to come of it."

50. Mr. Allman explained that there were a number of reasons why it took so long to sell YLL KOP's 50% partnership interest. One reason was the KOP Partnership Agreement contained an "onerous" right of first refusal. In addition, there was no "buy/sell clause," in the KOP Partnership Agreement, and the pre-existing property manager, Kravco, would remain engaged due to the common ownership Kravco shared with Kingmak. There were also market cycles such as the global financial crisis in 2008 that impacted potential buyers.

51. In August 2011, YLL KOP's 50% partnership interest was sold to Kingmak after it exercised its right of first refusal based upon a third-party purchase agreement for YLL KOP's partnership interest in KOP. When YLL KOP finally sold its interest in KOP, both employees of the Lendlease U.S. Group responsible for providing services under the 2007 Advisory

Agreement left their jobs with the Lendlease U.S. Group. No employees of the Lendlease U.S. Group moved to either Kravco or Kingmak when YLL KOP sold its interest in KOP.

52. After the sale of YLL KOP's partnership interest in KOP was completed, the intercompany loan in the amount of $87,500,000.00 was paid in full.

53. In July 2011, Mr. Allman became the head of integrated solutions, where he "oversaw a team of analysts and transaction people who raised equity and debt capital for Lendlease's business."

54. YLL KOP was included in a combined New York State corporate franchise tax return with the Lendlease U.S. Group for every taxable year beginning with its incorporation through the taxable year ended June 30, 2007. YLL KOP was audited during this period and combined filing was accepted by the Division of Taxation (Division).

55. Petitioner filed a New York State form CT-3-A, general business corporation franchise tax return, and a form CT-3M/4M, general business corporation MTA surcharge return (collectively, combined returns), with all its U.S. affiliates, including YLL KOP, for the tax year ended June 30, 2007. For each of its tax years ended June 30, 2008 and June 30, 2009, petitioner filed combined returns with all of its U.S. affiliates, except YLL KOP.

56. As a 50% partner in KOP, YLL KOP received a 50% allocable share of the items of income and expense derived by KOP, with only one exception: a special allocation of depreciation was made to YLL KOP during the tax years ended June 30, 2007 through June 30, 2009 as a result of an election made pursuant to Internal Revenue Code (IRC) (26 USC) § 754. In all taxable years through the taxable year ended June 30, 2007, the income and expenses derived by YLL KOP through its partnership interest in KOP were included in YLL KOP's New York State taxable income or loss.

57. Because YLL KOP was included on petitioner's New York State combined returns through the tax year ended June 30, 2007, petitioner included YLL KOP's 50% share of KOP's gross receipts in the denominator of the receipts factor of the combined group's business allocation percentage (BAP) through the tax year ended June 30, 2007.

58. The only assets reflected on YLL KOP's balance sheet for the tax years ended June 30, 2007 through June 30, 2009 were (i) the book value of YLL KOP's interest in KOP and (ii) an intercompany receivable representing the right to receive cash generated from KOP. During the tax years ended June 30, 2007 through June 30, 2009, the book value of the KOP partnership interest calculated pursuant to U.S. Generally Accepted Accounting Principles (GAAP) represented approximately 75% to 80% of the book value of YLL KOP's total assets.

59. During the tax years ended June 30, 2007 through June 30, 2009, YLL KOP was a wholly owned subsidiary of YLLA; YLLA had no income or expenses for that period.

60. During the tax years ended June 30, 2007 through June 30, 2009, YLLA was a wholly owned subsidiary of YLLP; YLLP had no income or expenses for that period.

61. During the tax years ended June 30, 2007 through June 30, 2009, YLLP was a wholly owned subsidiary of Lend Lease Investments, Inc. (LLI); LLI had no income or expenses for the taxable year ended June 30, 2007; LLI had $15,685,165.00 of dividend income from subsidiaries and no expenses for the taxable year ended June 30, 2008; LLI had $675,394.00 of dividend income from subsidiaries and no expenses for the taxable year ended June 30, 2009.

62. During the tax years ended June 30, 2007 through June 30, 2009, LLI was a wholly owned subsidiary of Lend Lease (U.S.) Holdings, Inc. (LLH); LLH had no income but had $12,182,500.00 of interest expense for the taxable year ended June 30, 2007; LLH had $89,539,773.00 of dividend income from subsidiaries and $12,182,500.00 of interest expense for

the taxable year ended June 30, 2008; LLH had $47,000,000.00 of dividend income from subsidiaries and $12,249,284.00 of interest expense and $166,095.00 in state income tax expense for the taxable year ended June 30, 2009.

63. During the tax years ended June 30, 2007 through June 30, 2009, LLH was a wholly owned subsidiary of Lend Lease (U.S.) Inc. (LLUS); LLUS earned only $62.00 of interest income and incurred no expenses for the taxable year ended June 30, 2007; LLUS had $89,062,787.00 of dividend income from subsidiaries and no expenses for the taxable year ended June 30, 2008; LLUS had $55,000,000.00 of dividend income from subsidiaries and no expenses for the taxable year ended June 30, 2009.

64. During the tax years ended June 30, 2007 through June 30, 2009, the expenses incurred by YLL KOP to other members of the Lendlease U.S. Group were comprised of interest expense paid to Lend Lease (U.S.) Capital Inc. and advisory fees paid to LL REI. YLL KOP paid no rent expense and no wage expense during those tax years.

65. For the tax year ended June 30, 2007, LL REI, Bovis Lend Lease Holdings, Inc. (BLL Holdings), Bovis Lend Lease LMB, Inc. (BLL LMB), and Bovis Lend Lease, Inc. (BLL Inc.) were the only corporate entities with wage expenses in the combined franchise tax group that was reported to New York State on petitioner's combined returns. The other 29 entities in the group did not reflect any employee expenses.

66. For the taxable year ended June 30, 2008, LL REI, BLL Holdings, BLL LMB and BLL Inc. were the only corporate entities with wage expenses in the combined franchise tax group that was reported to New York State on petitioner's combined returns. The other 27 entities in the group did not reflect any employee expenses.

67. For the taxable year ended June 30, 2009, Lend Lease Americas, BLL Holdings, BLL LMB and BLL Inc. were the only corporate entities with wage expenses in the combined franchise tax group that was reported to New York State on petitioner's combined tax returns. The other 27 entities in the group did not reflect any employee expenses.

68. LL REI reported $879,698.00 in wage expenses on petitioner's federal form 1120, U.S. corporation income tax return (consolidated U.S. tax return), for the tax year ended June 30, 2007. On its consolidated U.S. tax returns, LL REI reported wage expenses in the amount of $140,628.00 and $0.00 for the tax years ended June 30, 2008 and June 30, 2009, respectively.

69. On March 28, 2011, the Division commenced a general field verification audit of petitioner's combined returns for the tax years ended June 30, 2007 through June 30, 2009 (audit years). By letter dated March 30, 2011, the auditor informed petitioner that its New York State tax returns for the period July 1, 2006 through June 30, 2009 were selected for audit. The letter also contained 10 detailed requests for information and documentation regarding, among other things, "intercompany transactions between Lend Lease Inc[.] [sic] and its affiliates including FTI, assets and liabilities eliminations."

70. In her letter dated July 18, 2011, to petitioner, the auditor indicated that based upon a review of information provided earlier, YLL KOP should be part of the "combined group reported in the FYE 06/30/08 and 06/30/2009." The letter stated the reason for combination was "that the company has more than 50% of intercompany transactions with Lend Lease (US) Holdings, Inc[.] [sic], a member of combined group. The company was part of the combined group in 2006 and facts did not significantly change since."

71. Subsequently, petitioner provided the auditor with its own substantial intercorporate transactions analysis for the tax years ended June 30, 2008 and June 30, 2009. Petitioner's

calculation of its substantial intercorporate transactions analysis for those years set forth: (i) YLL KOP's total revenues (both from its interest in KOP and, for the tax year ended June 30, 2009, from another member of the Lendlease U.S. Group); (ii) YLL KOP's total expenses (both from KOP on a flow-through basis and all other expenses); and (iii) identified the revenue or expense as "external," in which case it would not be considered to arise from an intercompany transaction, or "internal," in which case it would be considered to arise from an intercompany transaction. Petitioner's substantial intercorporate transactions analysis showed that YLL KOP's intercorporate receipts were 0.00% and 1.97% during the tax years ended June 30, 2008 and June 30, 2009, respectively, and YLL KOP's intercorporate expenses were 26.46% and 22.21% during the tax years ended June 30, 2008 and June 30, 2009, respectively.

72. During the course of the audit, the auditor issued information document requests (IDRs) that described the documents and information requested and detailed letters that responded to the information provided by petitioner and requested additional information and documentation.

73. Petitioner filed combined returns with the following affiliates for the taxable years ended June 30, 2007, June 30, 2008 and June 30, 2009: BLL Holdings; BLL LMB; and BLL Inc. The auditor noted that these entities lacked substantial intercorporate transactions with their affiliates and issued a letter, dated March 26, 2015 (March 26, 2015 letter). Subsequently, petitioner provided detailed information as to why those affiliates should be part of the combined group.

74. In the Report of Audit (audit report), the following findings, in relevant part, were made:

"Combined Reporting/Intercompany Activity:

The t/p filed a combined return with all US Affiliates for the period ended 6/30/07. For the periods ended 6/30/08 and 6/30/09 one company Yarmouth Lend Lease King of Prussia (YLL KOP) . . . was not a part of the combined return.
The requirements of combination, as set forth by TSB-M-08(2)C, were reviewed for FYE 6/30/08 and 6/30/09. It was determined that the YLL KOP should be a part of the combined return as it was in all prior years of filing.

Entire Net Income: [ENI]

Federal taxable income was verified with line 28 of the Federal 1120 and was correctly reported for all years under audit.
Adjustments to ENI include:
- Increase in ENI due to add back of YLL KOP FTI to reflect combination
- Increase in ENI due to add back of YLL KOP tax reported on Ln 17 of 1120
- Increase in ENI due to add back of income from the combined subsidiary
- Decrease in ENI due to removal of interest and non-interest expenses indirectly attributable to subsidiary t/p capital in FYE 6/30/08 and 6/30/09 since the only non-combined subsidiary t/p had was combined as part of this audit
- Decrease in ENI due to NOL adjustments.

Capital:

Average total assets and average total liabilities were reconciled with Schedule L of the Federal 1120 and were correctly reported in all years.

Adjustments in capital for the FYE 6/30 08 [sic] and 6/30 09 [sic] include:
- Increase in assets due to YLL KOP combination
- Increase in assets due to reduction in intercompany eliminations
- Increase in liabilities due to YLL KOP combination
- Decrease in liabilities due to increase in intercompany elimination
- Increase in business capital due to reduction of subsidiary capital to zero as a result of combination.

* * *

Business Allocation Percentage:

Property Factor was verified and accepted as filed in FYE 6/30/07.
Receipts Factor was increased in FYE 06/30/07 due to the interest disallowance and decreased in FYE 6/30/08 and 6/30/09 due to the inclusion of YLL KOP receipts into calculation.
Wage factor was increased in FYE 6/30/07 as a result of re-calculation based on t/p workpapers,

Minimum Taxable Income Base:

Minimum taxable income was adjusted to reflect the changes to ENI.

MTA Surcharge:

MTA tax was adjusted to reflect the audit changes.

* * *

Penalties:

The penalties have been imposed under 1085(K) [sic] Substantial Underpayment of Liability[.] [sic]"

75. The Division prepared and mailed to petitioner a Consent to Field Audit Adjustment, dated July 27, 2015, which included a computation of the additional tax due from petitioner, including interest and penalties, for each of the tax years ended June 30, 2007 through the tax year ended June 30, 2009. A review of schedules reflecting the details of the proposed audit adjustments indicates that the auditor concluded that the tax on capital base was the highest tax computed in each of the tax years ended June 30, 2007 through June 30, 2009. After adding the sum of fixed dollar minimum taxes from subsidiaries from form CT-3A to the highest tax computed for each of those years, the auditor computed total tax due in the amounts of $191,285.00, $302,154.00, and $233,179.00 for the tax years ended June 30, 2007, June 30, 2008 and June 30, 2009, respectively. After subtracting the tax paid with the returns from the computed tax due for each of those years, the auditor computed additional tax due in the amounts of $3,517.00, $152,931.00, and $99,527.00 for the tax years ended June 30, 2007, June 30, 2008, and June 30, 2009, respectively. As a result of her computation of additional MTA surcharge due, the auditor determined additional MTA surcharge due in the amounts of $289.00, $24,427.00, and $19,108.00 for the tax years ended June 30, 2007, June 30, 2008 and June 30, 2009, respectively.

76. The audit continued after the schedules detailing the proposed audit changes were sent to petitioner on July 27, 2015. A review of the tax field audit record (audit log) indicates that the auditor sent additional IDRs and letters requesting information to petitioner's representative, Ernst & Young LLP (EY).

77. In response to the auditor's IDR dated January 22, 2016, petitioner's representative, in a letter dated April 14, 2016 (April 14, 2016 letter), provided the following information related to a "'Routine on Call' decision to de-combine YLL KOP, Inc."

> "Please note that we do not have the actual date of the meeting documented, but it took place sometime in late 2007 or early 2008. Michael Goldsmith met with Lend Lease to discuss working with EY [to] [sic] update the tax team in connection with recent state and local tax changes that may have been relevant to the company's business.
>
> During the course of the meeting, EY briefly reviewed the company's business and combined filing group. Based on this review, it was clear that YLL KOP was not in the same line of business as the rest of the group, as it was merely a passive investor in a partnership and was not involved in the construction management business that every other entity was an active member in. The fact that they were not in the same unitary business as the rest of the group prompted a brief review of any shared services, personnel, customers, and the like and it was determined that YLL KOP should not be included in the combined group."

This letter also provided information related to "whether a comprehensive ten steps [sic] analysis was performed in accordance with TSB-M-07(6)C and TSB-M-08(2)C."

> "YLL KOP never met the substantial intercorporate transaction test with any other entity within or without the New York Combined Group. Therefore, even if the comprehensive ten step analysis was performed, King of Prussia would have been excluded. Nonetheless, it was determined that combining YLL KOP with the unitary group would have been distortive and therefore improper (see comprehensive responses dated December 23, 2014 and June 23, 2015)."

78. The April 14, 2016 letter also included information detailing a correction to the Division's adjustments to petitioner's BAP for the tax year ended June 30, 2008.

79. After reviewing the information provided by petitioner's representative in previous correspondence, the auditor sent a letter dated October 14, 2016, to petitioner's representative that stated, in part, as follows:

"Upon review of this information, we did not find any indication that YLL KOP is treated differently from the other members of the consolidated return and should be treated differently when determining its inclusion in a combined group. In particular:

- YLL KOP did not have its own bank account and was part of the central cash management system[.] [sic]

- YLL KOP did not report any salary or rent expenses meaning that the company must have shared the office space with the affiliated entities and the employees of affiliated entities must have performed necessary functions on YLL KOP['s] [sic] behalf.

- The copy of the Treasury Policy states that the management and governance of treasury activities are provided across the Lend Lease Group, without excluding the YLL KOP. Therefore, YLL KOP is part of [a] [sic] common decision making and management system.

- AIG insurance policy provided does not have a list of all companies, but there is no indication that the YLL KOP is not a part of it.

- The agreement between Lend Lease Americas Inc. and Guy Brown Management, LLC refers to Lend Lease Americas and **all of its Affiliates**, without any exclusion.

- The statement that the American Express travel agreement does not cover YLL KOP is not a relevant argument as the company has no employees. Employees of affiliated entities that might travel on the company's behalf are covered by the agreement.

- The YLL KOP is in a [sic] business of the Real Estate investment, as [are] [sic] a number of other companies included in the combined return. Therefore, we do not consider it being engaged in a different business, as you claimed earlier.

- In addition to the above, the Joint Venture agreement, in its Article XVIII *Disclosure, Conflicts, Waiver*, binds not only YLL KOP but also its affiliates by the competitive clause. It is one more indication that this company should be treated in the same way as the other members of the combined group.

Based on the above, we uphold our position that the YLL KOP should be part of the combined return in FYE 6/30/08 and 6/30/09, as it has been in all prior years" (emphasis in original).

80. Petitioner, "Lend Lease (U.S.) Inc. and Combined Affiliates," executed 11 consents extending the period of limitations for assessment of corporation franchise tax under article 9-A of the Tax Law that collectively extended the period in which to assess corporation franchise tax due for the "taxable period(s) 07/01/2006 through 06/30/2009" to "12/31/2016."

81. At the conclusion of the audit, the Division determined that YLL KOP should have been included in the combined returns with the Lendlease U.S. Group for the tax years ended June 30, 2008 and June 30, 2009. As a result of combination, the Division included the income of YLL KOP in petitioner's entire net income and its business receipts in the denominator of the BAP in accordance with the relevant schedules.

82. On November 4, 2016, the Division issued to Lendlease U.S. Group a notice of deficiency, assessment ID L-045657620, (Notice), in the amount of $498,731.78, including a total tax amount assessed in the amount of $299,799.00 plus interest and penalties for the tax periods ended June 30, 2007 through June 30, 2009. The Notice included the following detailed "**COMPUTATION SUMMARY SECTION**:"

Tax Period Ended	Tax Amount Assessed	(+) Interest Amount Assessed	(+) Penalty Amount Assessed	(-) Assessment Payments/Credits	(=) Current Balance Due
06-30-2007	3,517.00	2,631.77	0.00	0.00	6,148.77
06-30-2007	289.00	214.88	0.00	0.00	503.88
06-30-2008	152,931.00	93,575.00	15,293.00	0.00	261,799.00
06-30-2008	24,427.00	14,945.97	2,442.00	0.00	41,814.97
06-30-2009	99,527.00	48,630.53	9,952.00	0.00	158,109.53
06-30-2009	19,108.00	9,336.83	1,910.00	0.00	30,354.83
TOTALS	299,799.00	169,335.78	29,597.00	0.00	498,731.78

83. Following the issuance of the Notice, petitioner informed the Division of its intention to file a request for conciliation conference (Request) with the Bureau of Conciliation and

Mediation Services (BCMS). Petitioner filed a Request with BCMS, dated January 24, 2017. By conciliation order, dated July 26, 2019, the Notice was sustained.

84. Following the issuance of the conciliation order, the Division concluded that a correction to its adjustments to petitioner's BAP should be made for the tax year ended June 30, 2008. As a result of the correction, the amount of additional tax due should be $274,437.00 for the tax years ended June 30, 2007 through June 30, 2009. The parties agree that if the Notice is sustained, the amount of additional tax due would be $274,437.00 for the tax years ended June 30, 2007 through June 30, 2009.

85. The auditor testified that her October 14, 2016 letter to petitioner's representative was the final statement of "the Department's position on why [YLL KOP] should be combined." The auditor also testified that she focused on the business of YLL KOP and did not review the business activities of all other members of the Lendlease U.S. Group because she did not think the business activities of the other members of the Lendlease U.S. Group were relevant to the unitary analysis.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

At the outset of the determination in this matter, the Administrative Law Judge explained that Article 9-A imposes a franchise tax on corporations doing business, employing capital, owning or leasing property, or maintaining an office in New York State and, for those located or doing business within the Metropolitan Commuter Transportation District, they are also subject to an additional surcharge tax. The Administrative Law Judge further explained that each corporation is considered a separate taxpayer and must file its own reports, except under certain circumstances when combined reporting may be permitted or required.

Upon a review of the circumstances and facts of the relationship between petitioner and YLL KOP for the tax years ending June 30, 2008 and June 30, 2009, the Administrative Law Judge determined that there were not "substantial intercorporate transactions" between the two entities, that they did not carry on a "unitary business" and that the exclusion of the subsidiary corporation in the report of petitioner would not result in a distortion of petitioner's New York tax liability. Accordingly, the Administrative Law Judge found that petitioner correctly excluded YLL KOP from its combined New York filing and that the proposed deficiency assessment issued by the Division should be cancelled.

In analyzing the purported substantial intercorporate transactions at issue, the Administrative Law Judge found that they did not exceed the threshold (i.e., less than 50% of expenditures were from a related corporation). Further, the Administrative Law Judge determined that the Division's arguments in support of its position were without merit in that the substantial intercorporate transactions analysis applies only to corporations and not flow-through entities. The Administrative Law Judge stated that a corporation that is in a partnership must compute its franchise tax under either the aggregate method or the entity method as provided under the regulations. The Administrative Law Judge determined that YLL KOP correctly calculated its substantial intercorporate transactions analysis, and concluded that there was no flow of value between YLL KOP and any other member of petitioner's group because YLL KOP's transactions with other members of petitioner's group were limited to oversight of a valuable investment and were conducted at arm's length. The Administrative Law Judge found that the transactions between YLL KOP and other members of petitioner's group were non-strategic, and did not indicate an integrated operating business connected to any of those businesses and had no other connections to petitioner's business for the tax years in issue.

Accordingly, the Administrative Law Judge determined that petitioner was not engaged in a unitary business with YLL KOP.

The Administrative Law Judge determined that inclusion of YLL KOP in the combined reports would distort petitioner's tax liability as all the intercompany transactions in this matter were conducted at arm's length. YLL KOP had no substantive connection to New York (all activities were conducted outside of New York for the relevant tax years). By every measure except substantial ownership, which was conceded by petitioner, the Administrative Law Judge determined that petitioner and YLL KOP were not engaged in substantial intercorporate transactions. The Administrative Law Judge found no flow of value, centralized management, functional integration, or economies of scale between other members of petitioner's group and YLL KOP. Where there were interactions between them, the Administrative Law Judge determined them to be at arm's length.

Though determining that the deficiency should be cancelled, the Administrative Law Judge nonetheless addressed whether petitioner established that penalties were improperly asserted. Citing the failure of petitioner to use published guidance from the Division and other factors, the Administrative Law Judge concluded that petitioner did not make a "good faith effort" to determine their tax liability and, accordingly, did not meet their burden of proving that penalties should otherwise be abated. However, as the tax deficiency itself was dismissed, the Administrative Law Judge also determined that the penalty issue was moot.

The Administrative Law Judge cancelled in part and sustained in part the notice of deficiency and granted the petition in accordance with the cancellation of the tax.

ARGUMENTS ON EXCEPTION

The Division argues that the Administrative Law Judge's determination is incorrect and

should be reversed. Specifically, it asserts that petitioner and YLL KOP were part of a unitary business; that several transactions between the parties were not at "arm's length;" that centralized management existed between petitioner and YLL KOP; that economies of scale existed between petitioner and YLL KOP; that there was functional integration between the entities; that intercompany loans were made from petitioner to YLL KOP that served an operational function; and that the failure to include YLL KOP in the combined group of petitioner would distort petitioner's New York income. The Division requested additional findings of fact and took exception to conclusions of law that are inconsistent with those assertions. Accordingly, the Division concludes that the notice of deficiency should be sustained and the petition denied in full.

Petitioner asserts that the determination was correctly decided, and that the Division has failed to advance a basis to modify or reverse the determination. They further argue that there was no flow of value or centralized management between YLL KOP and other members of petitioner's group; that cash management between the entities was at "arm's length;" that there were no economies of scale between YLL KOP and petitioner's group; that prior treatment by petitioner of entities other than YLL KOP is irrelevant; that there was no functional integration between YLL KOP and members of petitioner's group; that the exclusion of YLL KOP from petitioner's combined reports did not result in distortion; and that inclusion of YLL KOP in that manner would indeed result in distortion of petitioner's income.

It is noted that the Division did not specifically address the issue of penalties in the exception or initial brief. They do so, however, assert in their reply brief that penalties should be sustained. Petitioner's brief is silent on the issue.

OPINION

Under Article 9-A, the Corporation Franchise Tax Law, corporations may be required, permitted or not allowed to report on a combined basis with other entities. The law sets down specific circumstances for each. This matter concerns that concept.

There are over 25 individual corporate entities involved with petitioner here. Some of those entities are wholly owned subsidiaries, some are related by contract for management and financial purposes, while others have various kinds of relationships, such as partners in a given business. There are four entities that make up the most significant aspects of this case. Ultimately, the matter concerns petitioner and one subsidiary.

Though the existence and function of all of the other numerous entities has some relevance, the issue can be simply stated as whether the Division properly determined that petitioner, LLAH, should have filed on a combined basis with YLL KOP for the tax years ending June 30, 2008 and June 30, 2009.

As a general rule, every corporation is considered a separate taxpayer and must file its own report. However, under certain circumstances, combined reporting, that is, including the report or reports of other corporations, may be permitted or required (***see*** 20 NYCRR 6-2.1). For taxable years starting after January 1, 2007, the tax law required combined reporting where a substantial ownership requirement is met and where there are substantial intercorporate transactions among related corporations (Tax Law former § 211 [4] [1]).

The statute says that the commissioner shall consider and evaluate all activities and transactions of the taxpayer and its related corporations to determine whether substantial intercorporate transactions exist. Included are:

(i) manufacturing, acquiring goods or property, or performing services, for related corporations;

(ii) selling goods acquired from related corporations;
(iii) financing sales of related corporations;
(iv) performing related customer services using common facilities and employees for related corporations;
(v) incurring expenses that benefit, directly or indirectly one or more related corporations, and
(vi) transferring assets from one or more related corporations

(Tax Law former § 211 [4] [a]).

In a Technical Service Bulletin Memorandum (TSB) dated March 3, 2008, (TSB-M-08[2]C), the Division issued guidance which defined "substantial", with regard to intercorporate transactions as, generally, more than 50% and provided the following additional guidance regarding substantial intercorporate expenditures:

> "The substantial intercorporate transactions requirement will be met when, during the taxable year, 50% or more of a corporation's expenditures included in the computation of entire net income, including for inventory (but excluding nonrecurring items), are from one or more related corporations. However, if a corporation's expenditures, including for inventory (but excluding recurring items), from one or more related corporations are between 45% and 55%, the multi-year test . . . applies.
>
> Expenditures incurred by a corporation that directly or indirectly benefit a related corporation can constitute substantial intercorporate transactions. For example, when a related corporation is incurring expenditures that benefit another related corporation and the amount of those expenditures represent 50% or more of the direct and indirect expenditures of the beneficiary corporation, the substantial intercorporate transaction requirement is satisfied" (TSB-M-08[2]C, March 3, 2008).

The TSB is in agreement with former and current regulations (***see*** 20 NYCRR former 6-2.3 [c] and 20 NYCRR 6-2.3 [b] [2]) that also provide that service functions like accounting, legal and personnel services are not to be considered when determining whether substantial intercorporate transactions exist when such services are incidental to the business of the corporation providing such service.

Even in the absence of substantial intercorporate transactions, the Tax Law also provides for filing of combined reports if it is necessary to avoid distortion of tax liability and to properly

reflect income (Tax Law former § 211 [4] [a] [4]; ***see also Matter of Knowledge Learning Corp.***, Tax Appeals Tribunal, September 18, 2014).

Petitioner included YLL KOP in its combined returns for every taxable year up until June 30, 2007, the first of the three years comprising the audit period. By the conclusion of the tax year ending June 30, 2007, petitioner had sold off most of its mall business, with the sole exception of YLL KOP. Starting in the tax year ending June 30, 2008, and again in the tax year ending June 30, 2009, petitioner did not include YLL KOP in its combined returns.

Corporations that are substantially intertwined are required to combine reports and if excluding an entity would otherwise distort income and tax liability, they must also be combined.

The first factor to consider is whether the substantial ownership requirement is met. In the present matter, that is not in issue. Both parties agree that as the capital stock of YLL KOP is wholly owned by petitioner, the substantial ownership requirement is met. However, it must still be determined whether substantial intercorporate transactions exist between the taxpayer and other related corporations such that combined reporting is required. In addition, it must also be determined whether the taxpayer and other members of the combined group are engaged in a unitary business (***see Matter of Whole Foods Market Group, Inc.***, Tax Appeals Tribunal September 11, 2017).

Petitioner performed an analysis of intercorporate transactions for the 2008 and 2009 years, demonstrating that intercorporate receipts were 0.00% and 1.97%, respectively. They also calculated that intercorporate expenses were 26.46% and 22.21% for those two years, respectively. The findings reflected those ratios and, citing a departmental memorandum, the Administrative Law Judge concluded that the amounts are significantly below the threshold of 50% in order to find that substantial intercorporate transactions exist (***see*** TSB-M-08[2]C) and

barring other factors to negate that, found that no substantial intercorporate transactions existed for the periods in issue.

It has long been established that if an interstate enterprise is part of a unitary business, then a state may use an apportionment formula to tax that portion of the enterprise's total income that is reasonably related to the enterprise's intrastate activities (***see e.g. Exxon Corp. v Wisconsin Dept. of Revenue***, 447 US 207, 223 [1980]).

We agree with the conclusion of the Administrative Law Judge that New York State precedent and law are in harmony with federal doctrine on the subject and that the factors to be considered in determining whether a group of companies comprise a unitary business were correctly enunciated. Some examples of factors to consider include manufacturing or acquiring goods or property or performing services for other corporations in the group; selling goods acquired from other corporations in the group; or financing sales of other corporations in the group (20 NYCRR former 6-2.2 renum 20 NYCRR 6-2.3 eff 1/2/2013).

As there is no single test for determining whether a unitary business exists (***Matter of Medtronic***, Tax Appeals Tribunal, September 23, 1993, citing ***Container Corp. of Am. v Franchise Tax Bd.***, 463 US 159, 178 [1983], ***rehearing denied*** 464 US 909 [1983]), a unitary business analysis necessarily depends on the specific facts of each case (***Matter of SunGard Capital Corp.,*** Tax Appeals Tribunal, May 19, 2015).

There must be a "flow of value" between the subject entities (***Container Corp. of Am. v Franchise Tax Bd.***, 463 US at 178) and "hallmarks" or essentials of a unitary business include "functional integration, centralized management, and economies of scale" (***MeadWestvaco Corp. v Illinois Dept. of Revenue***, 553 US 16, 30 [2008]). Indicia of the factors include "transactions not undertaken at arm's length; a management role by the parent which is grounded in its own

operational expertise and operational strategy; and the fact that corporations are engaged in the same line of business" (***Allied-Signal, Inc. v Director, Division of Taxation***, 504 US 768, 789 [1992]).

There was no flow of value, or contributions to income, between YLL KOP and any other affiliate in the form of a management role undertaken by any other member of the group with respect to YLL KOP that was grounded in its own operational expertise and strategy. Furthermore, petitioner had effectively left the real estate management business when it shed all of its shopping mall businesses except YLL KOP.

Petitioner's other businesses included project management and construction of high-rise condominiums, office buildings, hotels and hospitals. Petitioner was also engaged in development, asset and construction management for military family housing pursuant to leases with the U.S. military. Meanwhile, YLL KOP was a single purpose investment entity that held a passive investment in KOP. None of the other entities were involved in retail malls similar to the KOP Mall. Their customer base was entirely different. There was no retail operating business by petitioner during the years at issue. There was no operational overlap between YLL KOP and other members of petitioner's group. Further, YLL KOP's role with KOP was one of passive investor and it had been trying to divest from their KOP interest for several years.

The Division asserts that because YLL KOP had no salary, officer, rent or advertising expenses, YLL KOP "relied on the employees and officers of other members of the group to perform its functions," thus demonstrating a centralized management system and a flow of value between YLL KOP and petitioner. The Division also pointed to a management agreement between YLL KOP and Lend Lease Real Estate Investments, Inc. (LL REI), a subsidiary of Lendlease U.S. Group. Again, the Administrative Law Judge dismissed the theory as the terms

of the management arrangement between YLL KOP and petitioner's group member, LL REI, were identical to the terms of the prior management agreement with an outside entity, Morgan Stanley. We agree with the Administrative Law Judge that YLL KOP was merely a holding company for a single investment asset in KOP Mall and that the asset itself was operated and managed by KOP, which is not an affiliate or member of petitioner's group.

Applying the above analysis, we conclude that the Administrative Law Judge properly determined that petitioner and YLL KOP were not engaged in a unitary business for the tax years ending June 30, 2008 and June 30, 2009.

What remains then is considering whether excluding YLL KOP from petitioner's combined report results in a distortion of its New York income. Again, the Administrative Law Judge found no distortion and, in fact, found the opposite, that inclusion of the income of YLL KOP would have distorted the New York income of petitioner.

Specifically, the payment and receipt of arm's length interest on loans and bank deposits and the nature and purpose of loans differentiated the cash management system from other cases where those attributes were found to be not at arm's length. The management prerogatives that were exercised were done so under the terms of a management agreement that mirrored a previous agreement with an unrelated party. Major decisions, such as acquisition and disposal of assets by YLL KOP were made, not by a member of petitioner's group, but by the Australian parent, that was not a member and, in fact, would be prohibited from being so. Finally, YLL KOP was not a New York business and did not do business in New York. Its sole asset was a partnership interest in a Pennsylvania partnership that owned a Pennsylvania shopping mall and, notably, all other parties related to that asset were located and acted outside New York, including YLL KOP. The oversight exercised by members of petitioner's group over YLL KOP was

minimal and the occasional oversight that a parent gives to any investment in a subsidiary does not support a finding of a unitary business (***F.W. Woolworth Co. v Taxation & Revenue Dept. of N.M.***, 458 US 354, 364-372, 369 [1982], ***rehearing denied*** 459 US 961 [1982]).

We agree with the Administrative Law Judge that petitioner's New York income was not distorted by the exclusion of YLL KOP from its combined report.

In its exception, the Division proposed the inclusion of numerous findings of fact. While this Tribunal has de novo authority to determine additional facts or to reinterpret them, we do not regularly do so, and only then in compelling circumstances (***Matter of Rakusin***, Tax Appeals Tribunal, July 26, 2001 ["[a]lthough the Tax Appeals Tribunal usually defers to the Administrative Law Judge's evaluation of the evidence, we are not bound by that determination]; ***Matter of Jericho Delicatessen***, Tax Appeals Tribunal, July 23, 1992; 20 NYCRR 3000.17 [e] ["the Tribunal shall review the record and shall, to the extent necessary or desirable, exercise all power which it could have exercised if it had made the determination;" ***see also*** Tax Law § 2006 [7]). In this instance, however, the additional findings requested by the Division are either irrelevant, redundant or unsupported. While we agree with the Division that the Tribunal has the power to review any aspect of the Administrative Law Judge's determination (Tax Law § 2006 [7]; 20 NYCRR 3000.11 [e]), we see no reason why the Tribunal should exercise this discretion in this instance. Accordingly, we accept the facts as indicated in the determination below and herein.

Neither petitioner nor the Division introduced any new arguments on exception. What was offered as distinguishing the logic of the conclusions were mere restatements of assertions made below and rightfully rejected. For the reasons so stated, we agree with the determination

of the Administrative Law Judge that the petition should be granted, and the deficiency cancelled insofar as it determines additional tax due.

The last issue taken up by the Administrative Law Judge was the matter of penalties. As we determine here that no additional tax is due, we find that petitioner did not underreport their tax liability, substantially or otherwise. Thus, the issue of penalty is moot.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The Division of Taxation's exception is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Lendlease Americas Holdings, Inc. & Subsidiaries is granted; and
4. The notice of deficiency dated November 4, 2016 is cancelled.

DATED: Albany, New York
January 23, 2025

/s/ Jonathan S. Kaiman
Jonathan S. Kaiman
President

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner

/s/ Kevin A. Cahill
Kevin A. Cahill
Commissioner