STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BAYERISCHE BEAMTENKRANKENKASSE AG	:	DETERMINATION DTA NO. 824762
for Redetermination of a Deficiency or for Refund of Franchise Tax on Insurance Corporations under Article 33 of the Tax Law for the Years 2006 and 2007.	:	

Petitioner, Bayerische Beamtenkrankenkasse AG, filed a petition for redetermination of a deficiency or for refund of franchise tax on insurance corporations under article 33 of the Tax Law for the years 2006 and 2007.

On October 6, 2014, petitioner, appearing by McDermott, Will & Emery LLP (Arthur R. Rosen, Esq., and Maria P. Eberle, Esq., of counsel), and the Division of Taxation, appearing by Amanda Hiller, Esq. (Clifford M. Peterson, Esq., and Ellen K. Roach, Esq., of counsel) waived a hearing and submitted this matter for determination based on documents and briefs to be submitted by June 5, 2015, which date commenced the six-month period for issuance of this determination. By a letter dated November 25, 2015, this six-month period was extended for an additional three months (Tax Law § 2010[3]). After review of the evidence and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation (Division) correctly determined upon audit that petitioner was not subject to the tax imposed pursuant to Tax Law § 1502-a, but rather was subject to the tax imposed pursuant to Tax Law § 1501 such that, consequently, petitioner was

required to compute its Article 33 tax liability pursuant to Tax Law § 1502.

II. Whether, if so, the Division also correctly determined that petitioner's entire net income allocation percentage should not be computed pursuant to the allocation method set forth under Tax Law Article 33, § 1504(a), but rather should be computed pursuant to an alternative method under the discretionary authority of Article 33, § 1504(d).

FINDINGS OF FACT [1]

I. General Facts

1. Petitioner, Bayerische Beamtenkrankenkasse AG (Bayerische) is incorporated in Germany and has many employees in Europe, whom it compensates. Petitioner provides accident and health insurance services (i.e., *non-life* insurance services as opposed to *life* insurance services) in Europe. Petitioner receives consideration, or premiums, in exchange for providing non-life insurance in Europe.[2]

2. Petitioner did not conduct an insurance business in the United States during the tax years ended December 31, 2006 and December 31, 2007 (the audit period).

3. Petitioner has never engaged in or conducted an insurance business, nor has it ever provided accident and health insurance services in the United States.

4. For the audit period, petitioner was not authorized by the New York Superintendent of

---

[1] The parties executed and submitted a Stipulation of Facts, setting forth 15 numbered stipulated facts including, therewith, 8 agreed-upon exhibits (identified as Exhibits A through H). The parties have agreed that such facts and exhibits, together, comprise the complete record for consideration and review herein. Information in the Findings of Fact that is in addition to that set forth in the parties' stipulated facts, is taken from the parties' agreed upon exhibits. The issues presented in this matter mirror those presented and addressed in ***Matter of Landschaftliche Brandkasse Hannover*** (DTA No. 825517) and mirror two of the three issues presented and addressed in ***Matter of AXA Versicherung AG*** (DTA No. 825518), each decided of even date herewith.

[2] The record does not disclose petitioner's European, or its worldwide, income, premiums or payroll amounts.

Insurance (now known as the New York Superintendent of Financial Services) to transact an insurance business in New York State.

5. The New York Superintendent of Financial Services (formerly known as the New York Superintendent of Insurance) has never authorized petitioner to transact an insurance business in the State.[3]

6. Petitioner has never applied to the New York Secretary of State for authority to do business in the State.

7. The New York Secretary of State has never issued a Certificate of Authority to petitioner to do business in the State.

8. During the audit period, petitioner's business activity in New York and the United States was limited to its participation in two partnerships, U.S. Property Fund III GMBH & Co. KG and U.S. Property Fund GMBH & Co. KG (collectively the Partnerships). The Partnerships' activities in the United States consisted of investments in commercial real estate, including real estate located in New York, and involved ownership of real estate and real estate management.

II. Procedural Facts

9. On or about December 4, 2008, petitioner filed its form CT-33-NL (Non-Life Insurance Corporation Franchise Tax Return) for the tax year ended December 31, 2007. Pursuant to Tax Law § 1502-a, petitioner reported the minimum tax owed thereunder ($250.00). Petitioner's federal effectively connected income (ECI) reported pursuant to Internal Revenue Code § 864(c)

---

[3] An *unauthorized* insurance corporation is one that has not been authorized to transact an insurance business in New York State by the Superintendent of Financial Services. A *non-life* insurance corporation is an insurance corporation that does not transact the business of *life* insurance. Petitioner is an *unauthorized non-life* insurance corporation.

on its Form 1120-F (U.S. Income Tax Return of a Foreign Corporation) for 2007, consisted primarily of the distributive shares of the Partnerships' income reported on federal Form 1065 (U.S. Return of Partnership Income) via Schedules K-1 (Partner's Share of Income, Deductions, Credits, etc.) issued to petitioner by the Partnerships. Petitioner did not write any premiums in the United States and did not report any premium income on its federal income tax return or, consequently, on its New York State tax returns.

10. By a letter dated July 2, 2010, the Division notified petitioner that it was examining the Partnerships' tax returns.

11. On September 2, 2011, the Division issued to petitioner a Notice of Deficiency (L-036578774) reflecting, in part, additional tax due for the period ended December 31, 2007 in the amount of $2,484,874.00, plus interest computed through December 14, 2011, for a (then) total amount due of $3,258,749.33. The tax asserted per the Notice of Deficiency ($2,484,874.00) is that imposed under Tax Law § 1501 (computed under Tax Law § 1502) in the amount of $2,044,290.00, plus the Metropolitan Commuter Transportation District (MCTD) tax surcharge imposed and computed under Tax Law § 1505-a, in the amount of $440,584.00.[4]

12. On December 1, 2011, petitioner timely filed a petition for redetermination of the foregoing Notice of Deficiency with the Division of Tax Appeals.

13. On March 7, 2012, the Division timely filed and served its answer.

14. The Division and petitioner have settled the amount of petitioner's additional tax due

[4] The Division's calculations, based on a receipts only single factor method of allocation (***see*** Exhibit E at sub-exhibit A, pp. 13, 15 thereto), are set forth as Addendum I at the end of this determination. The Division's alternative calculation of liability based on allocation per Tax Law § 1504(a), but premised upon a single wage factor only, i.e., without a premiums factor (***see*** Exhibit E at sub-exhibit L thereto) is set forth as Addendum II at the end of this determination.

for the tax year ended December 31, 2006, which, including the MCTD surcharge, is $32,447.00, plus statutory interest. Petitioner will owe the $32,447.00, plus interest, even if it successfully protests the Division's assessment for the tax year ended December 31, 2007.

III. Waiver

As noted, the parties waived their right to a hearing and agreed to have this matter determined on submission based upon their Stipulation of Facts and Attached Exhibits.

IV. The Record

15. The parties agree that the stipulated facts set forth above together with the eight exhibits listed and identified below comprise the complete record for consideration or review herein:

> A. Petitioner's partnership agreement in U.S. Property Fund III GMBH & Co. KG (without Attachment A), with identifying information of entities other than petitioner redacted. The Division does not object to the accuracy of the translation of this Partnership Agreement from German to English.
>
> B. Petitioner's partnership agreement in U.S. Property Fund GMBH & Co., KG (without Attachment A), with identifying information of entities other than petitioner redacted. The Division does not object to the accuracy of the translation of this Partnership Agreement from German to English.
>
> C. U.S. Property Fund GMBH & Co., KG's Second Amended and Restated Limited Partnership Agreement in 666 Fifth, L.P., with identifying information of entities other than U.S. Property Fund III GMBH & Co. KG and U.S. Property Fund GMBH & Co., KG redacted. The Division does not object to the accuracy of the translation of this Partnership Agreement from German to English.
>
> D. Petitioner's form CT-33-NL (Non-Life Insurance Corporation Franchise Tax Return), including petitioner's federal form 1120-F, filed for the tax year ended December 31, 2007.
>
> E. Affidavit of Choi Y. Downes (a Division employee who served as the auditor in this matter) and attached exhibits.

F. Affidavit of Elizabeth Knaggs (a Division employee who served as the auditor's supervisor in this matter).

G. The petition filed in the matter dated December 1, 2011.

H. The Division's answer dated March 7, 2012.

CONCLUSIONS OF LAW

A. This matter presents the initial issue of whether petitioner's tax liability is properly determined under Tax Law § 1502-a, as reflected by petitioner's tax filings, rather than under Tax Law § 1501, as asserted by the Division under its Notice of Deficiency (the Taxation Issue). In turn, and if Tax Law § 1501 applies, a second issue arises concerning whether the Division may properly determine the portion of petitioner's entire net income subject to New York taxation pursuant to an alternative allocation formula that differs from that set forth at Tax Law § 1504(a) (the Allocation Issue). Each issue will be discussed in turn.

The Taxation Issue

B. As a starting point, certain threshold questions are not in issue. That is, the parties agree that:

-petitioner is an alien non-life insurance corporation that, in addition to its insurance corporation activities, holds interests in properties, or in entities holding interests in properties, located in the United States, including New York State;

-petitioner is not and has never been authorized by either the New York Superintendent of Insurance or the New York Superintendent of Financial Services to transact an insurance business in New York State;

-petitioner has never applied for or been issued a Certificate of Authority to conduct business in this State by the New York Secretary of State.

-petitioner provides accident and health insurance services from which it derives and receives premiums in Europe (but not in the United State or in

New York State), but does not provide life insurance services, in Europe.

-petitioner received no income from premiums in New York or in the United States, is a corporate entity doing an insurance business, has nexus and is subject to taxation under Tax Law Article 33.[5]

In view of the foregoing, the first question presented is how, and to what extent, is petitioner, an *unauthorized non-life* insurance corporation that is admittedly a "taxpayer" for purposes of taxation by New York State under Tax Law Article 33, subject to tax for the year ended December 31, 2007. In order to answer that question, and to address petitioner's challenges herein, a review of the taxation of insurance corporations under relevant statutory provisions is necessary.

Taxation of Insurance Corporations Prior to January 1, 1974

C. As is relevant to this matter, and prior to its repeal effective January 1, 1974, Tax Law Article 9, former § 187, subjected insurance corporations, including domestic non-life insurance corporations (Tax Law former § 187[1]), domestic and authorized foreign (i.e., other states') life insurance corporations (Tax Law former § 187[2]), and authorized foreign (i.e., other states') casualty or surety insurance corporations (Tax Law former § 187[3]), to tax computed as a percentage of gross direct premiums less return premiums.

---

[5] Tax Law Article 33 applies to every domestic, foreign or alien insurance corporation (Tax Law §1501[a]). An "insurance corporation" is generally defined to include all corporate entities that are "doing an insurance business" (Tax Law § 1500[a]). The term "doing an insurance business" is not defined under Article 33, but is defined under the Insurance Law as performing certain acts in New York State, such as making insurance contracts, collecting premiums as an insurer, etc. (***see*** Insurance Law § 1101[b]). This provision includes *both* performing the prescribed acts (i.e., "doing an insurance business") *and* doing such acts in the State of New York. In turn, performing the same prescribed acts, but *outside* of the State of New York, would constitute "doing an insurance business" outside of the State of New York. For purposes of being subject to tax under Article 33, the Division has looked to whether a corporation is doing a business which, *if done in New York State*, would require the corporate entity to be licensed (i.e., authorized) by the Superintendent of Insurance (***see Lansdown Atlantic Ltd.***, TSB-A-06[9]C; December 28, 2006). Because petitioner admittedly engages in a number of acts that would, if performed in New York State, constitute "doing an insurance business" (***see*** Finding of Fact 1), petitioner does not dispute that it is an insurance corporation for purposes of Tax Law Article 33.

Enactment of Tax Law Article 33 (Franchise Taxes on Insurance Corporations)

D. In 1974, the Legislature enacted Tax Law Article 33 (Franchise Taxes on Insurance Corporations) in place of Tax Law former § 187 (***see*** L 1974, ch 649, [eff May 30, 1974 and applicable to taxable years beginning on or after January 1, 1974]). As enacted, Tax Law § 1500 broadly defined the term "insurance corporation" as "a corporation, association, joint stock company or association, person, society, aggregation or partnership, by whatever name known, *doing an insurance business* . . . (italics added)," and provided definitions for "domestic insurance corporation," "foreign insurance corporation," and "alien insurance corporation," without distinctions therein between *authorized* versus *unauthorized* insurance corporations.

E. Article 33 imposed a two-part tax, as follows:

First, and pursuant to Tax Law § 1501, franchise tax was imposed on *every* domestic, foreign and alien insurance corporation (except those specified in Tax Law § 1512[a]) "for the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity, or of maintaining an office in this state . . . ."

The tax thus applied to both *life* insurance corporations and *non-life* insurance corporations, and there was no specific distinction in Tax Law § 1501 between *authorized* versus *unauthorized* insurance corporations.[6] Tax Law § 1502 provided the method by which the tax was to be computed. It directed that the tax due was to be the greatest amount of the tax computed as due on a corporation's allocated entire net income, or its allocated business and investment capital, or

[6] Tax Law § 1501(b) did note that life insurance corporations, whose certificate of authority (either initial or as renewed) had expired, were nonetheless required to continue paying tax as calculated under Tax Law § 1502 upon any business in New York State remaining in force.

a percentage of its entire net income plus certain wage expenses and issued capital stock, or a minimum amount of $250.00, respectively (Tax Law § 1502[a][1] - [4]), plus a tax computed on subsidiary capital (Tax Law § 1502[b]).

Second, an additional tax was imposed on gross premiums less return premiums thereon (Tax Law § 1510[a], [b]). Tax Law § 1510(a) and (b) specified that this tax was imposed, respectively, upon both *life* insurance corporations and *non-life* insurance corporations that were "*authorized* to transact business in this state under a certificate of authority issued by the superintendent of insurance (italics added)."

The Limitation

F. Effective January 1, 1977, the combined total amount of tax liability on *all* insurance corporations, i.e., *life* and *non-life* insurance corporations, due under the foregoing two-part tax provisions was limited or "capped" (Tax Law former § 1505). As capped, the tax due was not to exceed "an amount computed as if such taxes were determined solely under" Tax Law § 1510(a) and (b), i.e., the premiums-based additional tax, though at a rate of tax set under Tax Law § 1505 that was substantially higher than was imposed under Tax Law § 1510(a) and (b) (Tax Law former § 1505).

G. In sum, and pursuant to the terms found in the foregoing provisions, effective as of January 1, 1977, in order to determine their *total* Article 33 tax liability, all *authorized* and *unauthorized life* and *non-life* insurance corporations had to compute both the section 1502 tax, and the section 1510 tax (if any) on premiums, and also compute the section 1510 tax (if any) on premiums but at the section 1505 tax rate. This process entailed the following steps:

a) *all life* insurance corporations and *non-life* insurance corporations, *authorized* and *unauthorized*, had to compute their tax liability under Tax Law § 1502;

b) *all life* insurance corporations and *non-life* insurance corporations, *authorized* and *unauthorized*, had to (in addition) compute their tax liability (if any) based on (net) gross premiums (if any) under Tax Law § 1510(a) and (b) (L 1974, ch 649, § 1);

c) *all life* insurance corporations and *non-life* insurance corporations, *authorized* and *unauthorized*, had to compute their total liability by adding together the foregoing two amounts as determined above;

d) *all life* insurance corporations and *non-life* insurance corporations, *authorized* and *unauthorized*, had to (separately) compute their tax liability (if any) based on (net) gross premiums (if any) under Tax Law § 1510(a) or (b), as applicable, but at the rate provided under Tax Law former § 1505(a)(1) or (2), in order to determine their total tax liability under Article 33 (L 1974, ch 649, § 1); and

e) compare the amount determined at step "c" with that determined at step "d" to arrive at the total amount of tax due, as "capped" under Tax Law former § 1505.[7]

The 2003 Restructuring of Article 33

H. The Article 33 tax was restructured, effective January 1, 2003 (L 2003, ch 62, part H3). It is this restructuring that most directly impacts the matter at issue for the year in question (2007). Under the relevant provisions of Article 33, as restructured, a distinction emerged between *non-life* insurance corporations and *life* insurance corporations, *and* between *authorized* versus *unauthorized* insurance corporations of both ilk, as to the manner in which such entities were to be taxed.

---

[7] The cap under Tax Law former § 1505(a) was amended thereafter, such that the tax rate (and resulting cap amount) for *life* insurance corporations that were "*subject to* tax under [Tax Law § 1510(b)(1)]" was lower than the rate applicable for *non-life* insurance corporations. This rate differential was "to make New York competitive with other states and to reduce the amount of retaliatory taxes New York companies pay to other states" (New York State Legislative Annual – 1997, pp. 254-255; Tax Law § 1505[a][1], [2]; L 1997, ch 389, part A, § 87, eff January 1, 1998;).

First, the Legislature enacted a new provision, at Tax Law § 1502-a, as follows:

> "*In lieu of the tax imposed by section fifteen hundred one* . . . , every domestic insurance corporation, every foreign insurance corporation and every alien insurance corporation, *other than such corporations transacting the business of life insurance, (1) authorized to transact business in this state under a certificate of authority from the superintendent of insurance* . . . shall . . . *pay a tax on all gross direct premiums* . . . written on risks located or resident in this state. The tax imposed by this section shall be computed in the manner set forth in subdivision (a) of section fifteen hundred ten of this article (italics added)."

Tax Law § 1502-a is, by its terms, explicitly applicable to *non-life* insurance corporations that are "(1) *authorized to transact business in New York State* (italics added)." The tax imposed under this newly enacted provision, while computed according to the method set forth in Tax Law § 1510(a), i.e., on the basis of gross direct premiums and at the rates set forth therein, served to replace the *additional* premiums-based tax previously imposed against *authorized non-life* insurance corporations under Tax Law § 1510(a) for years that began before January 1, 2003. Likewise, this newly enacted tax on *authorized non-life* insurance corporations was *in lieu of* and thus replaced, at least as to *authorized non-life* insurance corporations, the tax previously imposed against "every" (i.e., both *authorized and unauthorized) non-life* insurance corporation under Tax Law § 1501. Finally, the "cap" formerly available under Tax Law § 1505(a)(1), as a limitation on the total amount of Article 33 tax liability to be paid by *authorized non-life* insurance corporations for years that began before January 1, 2003, expired.

I. It is critical to note that, as restructured under the terms of Tax Law § 1502-a, *authorized <u>non</u>-life* insurance corporations and *authorized life* insurance corporations were taxed differently under Article 33. That is, *authorized <u>non</u>-life* insurance corporations became subject to only one tax, based on their total gross premiums (less return premiums thereon), with a

minimum tax of $250.00, rather than two taxes (as such two taxes were capped) as before (***see*** Conclusions of Law E and F). In contrast, *authorized life* insurance corporations remained subject to two taxes, as before. As a consequence, commencing with tax years beginning on or after January 1, 2003, it was not necessary for an *authorized non-life* insurance corporation to perform the computational steps set forth above in Conclusion of Law G, in order to calculate its liability. However, while the language of Tax Law § 1502-a specifically included *authorized non-life* insurance corporations as subject to the tax imposed thereunder, it did not likewise specifically include *unauthorized non-life* insurance corporations as so subject. Since such *unauthorized non-life* insurance corporations were therefore not subject to tax under Tax Law § 1502-a, the "*in lieu of* the tax imposed by section [1501]" language in Tax Law § 1502-a was inapplicable to such corporations and did not serve to preclude them from being subject to the tax imposed under Tax Law § 1501. Accordingly, such *unauthorized non-life* insurance corporations: a) remained subject to Tax Law § 1501; b) were required to compute their tax liability under Tax Law § 1502; c) were not subject to the additional tax based on premiums under Tax Law § 1510(a)(1) (since the same applied to *authorized non-life* insurance corporations and to taxable years that began before January 1, 2003); and d) were not impacted by the limitation set forth under Tax Law § 1505(a)(1) since the same was (likewise) applicable to taxable years that began before January 1, 2003.

J. In contrast to the foregoing, *authorized life* insurance corporations were not directly impacted by the enactment of Tax Law § 1502-a, but rather remained subject to the two taxes imposed, respectively, under Tax Law §§ 1501and 1510[b]). While the two taxes are combined,

the total *amount* of tax liability for such *authorized life* insurance corporations is subject to and limited by: a) a cap ("ceiling") under Tax Law § 1505(a)(2) based on the tax on premiums imposed under Tax Law § 1510(b) (at the rate of two percent); and b) to a minimum ("floor") under Tax Law § 1505(b) (at the rate of one and one half percent).

K. The relevant statutory provisions discussed above explicitly identify the specific types of insurance corporations to which they pertain, via their "applicability" language, as *authorized* insurance corporations (***see*** Tax Law §§ 1510, 1502-a). At the same time, none of the relevant provisions explicitly differentiate between *authorized* and *unauthorized* insurance corporations by any specific reference to *unauthorized* insurance corporations. Simply put, the statutes enumerate *authorized* insurance corporations and do not enumerate (or otherwise refer to) *unauthorized* insurance corporations. Likewise, and consistently, in its memoranda summarizing the Article 33 changes enacted in 2003, including the restructuring described above, the Division made no explicit differentiation between *authorized* versus *unauthorized* insurance corporations (***see*** TSB-M-03[5]C; TSB-M-03[9]C).[8] Presumably then, such memoranda were intended to speak to those corporations specifically and explicitly referenced in and covered by the relevant statutory provisions (i.e., *authorized* insurance corporations).

The Division's Initial Interpretation as to All Life Insurance Corporations

L. Prior to 2012, and notwithstanding the foregoing, the Division issued a number of advisory opinions setting forth its interpretation indicating that *unauthorized life* insurance corporations would have no franchise tax liability under Article 33 because the cap and floor

[8] Petitioner refers to this failure to explicitly reference or differentiate between *authorized* versus *unauthorized* insurance corporations in the statutory provisions as "silence" (***see*** Conclusion of Law R).

under Tax Law § 1505(a)(2); (b) effectively eliminated any such liability.[9] The Division's reasoning behind this interpretation appears to have been that while *unauthorized life* insurers were "taxpayers" for purposes of Article 33, they were not authorized to transact an insurance business in New York, and therefore were not *subject to* the premiums-based tax under Tax Law § 1510(b) (applicable by its specific terms only to *authorized life* insurance corporations). Consequently, they had zero liability for such tax. As a result, when the cap and floor, under Tax Law § 1505(a)(2); (b) were applied, the resulting total tax (at the rate specified therein) could only, likewise, be zero. Thus, with a maximum possible tax liability capped at zero, neither part of the two-part Article 33 franchise tax could result in any tax liability (***see e.g.*** TSB-A-04(2)C [April 1, 2004]), notwithstanding that such *unauthorized life* insurance corporations could have New York income from other sources including, as here, income from real estate investments.[10]

The foregoing conclusion and advice as set forth in the noted advisory opinions, for years both before and after 2003, addressed itself specifically to queries from *unauthorized life* insurance corporations. No similar guidance was published with respect to *unauthorized non-life* insurance corporations, such as petitioner, at least until 2009 (***see Service Lloyds Ins. Co.***,

---

[9] Such opinions, issued both before and after the 2003 restructuring of Article 33, but before the Division's March 2, 2009 Advisory Opinion in ***Service Lloyds Ins. Co.*** (TSB-A-09[2]C), included ***Mound, Cotton & Wollan,*** (TSB-A-88[20]C); ***Manufacturers Life Ins. Co. (USA)***, (TSB-A-97[23]C); ***Pacific Life Ins. Co.***, (TSB-A-99[28]C); ***Bankers Life & Casualty Co.*** (TSB-A-04[2]C); ***Conseco Annuity Assurance Co.*** (TSB-A-04[3]C; ***Conseco Senior Health Ins. Co.*** (TSB-A-04[4]C); ***Washington National Ins. Co.*** (TSB-A-04[5]C; ***State Farm Life Ins. Co.*** (TSB-A-05[16]C; and ***Service Life and Casualty Ins. Co.*** (TSB-A-08[3]C). Petitioner also makes reference to ***Lansdown Altlantic Ltd.*** (TSB-A-06[9]C). This Advisory Opinion addressed the broader question of whether ***Lansdown*** was subject to tax under either Article 33 or Article 9-A, and not the more particular issue of how the Article 33 tax itself was to be applied to entities (unlike ***Lansdown***) who were subject to tax under Article 33.

[10] It is recognized that an *unauthorized* insurance corporation could conceivably have premium-based income in New York State (e.g., premiums generated from policies initially written by an insurer with respect to risks appurtenant to its insureds who were located outside of New York, but who subsequently moved into New York and remained so insured). Such circumstances are not presented here.

[Advisory Opinion] TSB-A-09[2]C, March 2, 2009 [concluding that an *unauthorized non-life* insurance corporation (such as petitioner) was not subject to Tax Law § 1502-a, and that its Article 33 liability, if any, would be computed per Tax Law § 1501]).

M. In summary, and *prior to* the Division's 2009 ***Service Lloyds*** advisory opinion:

1) under the explicit language of Tax Law § 1502-a, *authorized non-life* insurance corporations were no longer subject (as of January 1, 2003) to the two-part tax system formerly imposed under Tax Law §§ 1501 and 1510(a), as capped under Tax Law former § 1505(a)(1), and instead were subject only to the premiums based tax as imposed per Tax Law § 1502-a, at the rate of tax set by Tax Law § 1510(a) as in effect for years prior to January 1, 2003. The cap formerly imposed by Tax Law § 1505(a)(1), having expired, was no longer a factor.

2) by contrast *authorized life* insurance corporations remained subject to the two part tax system under Tax Law §§ 1501, and 1510(b), with the amount of tax due limited by the terms of Tax Law §§ 1505(a)(2) and 1505(b).

3) the Division, in its published guidance specifically pertaining to *life* insurance corporations, treated *authorized life* insurance corporations and *unauthorized life* insurance corporations as follows:

a) the liability of *authorized life* insurance corporations would be the lesser of the combined total of the two taxes under Tax Law §§ 1501 and 1510(b), or of the amount of premiums-based tax as computed under Tax Law § 1510(b) but (capped) at the rate specified under Tax Law § 1505(a)(2), while

b) the liability of *unauthorized life* insurance corporations for either of the two Article 33 taxes would be zero because the cap and floor under Tax Law § 1505(a)(2); (b) effectively eliminated their liability, since such insurers were not authorized to transact an insurance business in New York State, their tax on premiums under Tax Law § 1510(b) would be zero, their tax under Tax Law § 1505(a)(2), (b) would also be zero, and thus (as a mechanical computational matter) the cap under Tax Law § 1505(a)(1), pertaining to their entire combined tax liability, would be zero.

4) the liability, if any, for *unauthorized non-life* insurance corporations was not specifically addressed by any published guidance issued by the Division.

The Division's Changed Interpretation as to Unauthorized Life Insurance Corporations

N. In 2012, the Division changed its interpretation as to the tax treatment of *unauthorized life* insurance corporations under Article 33, based upon the conclusion that Tax Law § 1505(a)(2) could *apply* only to *authorized life* insurance corporations, i.e., only to those "taxpayers *subject to* [the premiums-based] tax" under Tax Law § 1510(b). In fact, only *authorized life* insurance corporations, but not *unauthorized life* insurance corporations, were subject to tax under the explicit terms of Tax Law § 1510(b). The Division reasoned that since such *unauthorized life* insurance corporations were *not subject to* the section 1510(b) tax on premiums, then the cap of Tax Law § 1505(a)(2) simply had *no application* in determining or limiting their Article 33 liability. From this result, it follows that Tax Law § 1505(a)(2) did not bar such *unauthorized life* insurers from being subject to liability under Tax Law § 1501 (the first part of the two-part Article 33 tax) on their allocated entire net income or other tax base, with no cap on their overall tax liability as imposed and computed thereunder. Thus, while the "cap" and "floor" provisions of Tax Law § 1505(a)(2) and (b) continued to apply to *authorized life* insurance corporations, they did not apply to *unauthorized life* insurance corporations.

O. The Division provided notice of this change of interpretation as to *unauthorized life* insurance corporations via a Technical Memorandum, dated February 17, 2012 and titled "Filing Requirements and the Calculation of Tax for *Unauthorized* Insurance Corporations" (TSB-M-12[4]C; emphasis added). The Division recognized the change in interpretation concerning *unauthorized life* insurance corporations represented a major change from its earlier interpretation (***see*** Conclusions of Law L and M), and so expressly limited its effect to taxable years beginning on or after January 1, 2012. In addition, however, and as specifically relevant

hereto, the Division further explained in its Technical Memorandum that its change in interpretation had no effect on *non-life* insurance corporations. In this latter respect, the Division noted that all such *non-life* insurance corporations ceased being subject to the two-part Article 33 tax as of January 1, 2003, with *authorized non-life* insurance corporations becoming subject at that time to the premiums-based tax under Tax Law § 1502-a only (as computed per Tax Law former § 1510[a][1]), in lieu of the two-part tax. The Division's Technical Memorandum specifically states that the provisions of section 1502-a do *not* apply to *unauthorized non-life* insurance corporations, and further notes that the "cap" under Tax Law § 1505(a)(1) that had previously applied to *non-life* insurers expired as of taxable years beginning on or after January 1, 2003. Consequently, and by contrast to *authorized non-life* insurance corporations, *unauthorized non-life* insurance corporations simply continued to be subject to the first part of the Article 33 tax on allocated entire net income or other tax base only, per Tax Law § 1501, as before and without limitation or cap. Notably, the summary introduction to this memorandum provides the following:

> "This memorandum provides guidance regarding the filing requirements and the calculation of the Article 33 franchise taxes for *unauthorized* insurance corporations. An *unauthorized* insurance corporation is one that does not have a certificate of authority from the Superintendent of Financial Services to conduct an insurance business in New York State.
>
> *This memorandum also announces a change in the department's interpretation of the Tax Law with respect to unauthorized* ***life*** *insurance corporations* (emphasis added)."

P. In view of the Division's February 17, 2012 change of interpretation pertaining specifically to *unauthorized life* insurance corporations:

1) the treatment of *authorized non-life* insurance corporations and of *authorized life*

insurance corporations remained the same as set forth above (***see*** Conclusion of Law M[1],[2]).

2) the treatment of *unauthorized life* insurance corporations changed, as set forth in Conclusion of Law N, above, upon the premise that since such insurers were not *subject to* the tax on premiums in any event because they were not *authorized*, the "cap" and "floor" under Tax Law § 1505(a)(2); (b) were inapplicable, and such *unauthorized life* insurance corporations were to compute their Article 33 liability (if any) per Tax Law § 1501.[11]

3) the treatment of *unauthorized non-life* insurance corporations remained as before, whereunder such corporations were not subject to the provisions of Tax Law § 1502-a, and were required to compute their Article 33 liability (if any) per Tax Law § 1501 (***see*** Conclusion of Law G; ***Service Lloyds Ins. Co.***, [Advisory Opinion] TSB-A-09[2]C, March 2, 2009).

Thus, the Division maintains that Tax Law § 1501, and not Tax Law § 1502-a, applies to petitioner, and that petitioner should have computed its tax on its entire net income base, consisting of the portion of its federal taxable income (per form 1120-F) allocable to New York via a single receipts factor formula (consistent with Tax Law Article 9-A), rather than via the weighted premiums and wages allocation formula set forth under Tax Law Article 33, § 1504(a), or (as an alternative thereto) via the wage factor portion of the formula (single wage factor). Petitioner does not object to the accuracy of the mathematical calculations that underlie the assessment of additional tax, including the mathematical calculation of petitioner's entire net income or the income allocation percentage that would apply under the rules of Tax Law Article 9-A (if relevant). While petitioner does not object to the mathematical (computational) accuracy of the alternative (single wage factor) allocation method as performed by the Division, petitioner

[11] Again, this result differs from the Division's earlier interpretation that *unauthorized life* insurance corporations were taxpayers subject to tax under Article 33, but who would have no actual tax liability thereunder because, as *unauthorized* to transact insurance business, they were *not subject to* the second (or additional) premiums-based tax under Tax Law § 1510[b], thus leaving their actual or total tax liability effectively or functionally capped at zero.

does not agree that the same, without accounting for worldwide factors (premiums and wages) is a proper application of the statutory allocation formula set forth at Tax Law § 1504(a).

Petitioner's Challenge

Q. The parties spar, in their written arguments, over certain statutory language denominated by petitioner as the "operative phrase." Petitioner's "operative phrase" consists of the "applicability" language imposing the tax under Tax Law § 1502-a upon, "every [domestic, foreign, and] alien insurance corporation, other than such corporations transacting the business of life insurance, *(1) authorized to transact business in this state under a certificate of authority from the superintendent of insurance . . .* (italics added)," as accompanied by the *limitation* (or cap) language by which the amount of tax is computed as that which would be imposed on New York-source premiums under Tax Law former § 1510(a), as that provision applied for taxable years prior to January 1, 2003, or a minimum amount of $250.00.

Petitioner points out that the tax imposed under Tax Law former § 1510(a) had been imposed using similar "applicability" language, i.e., upon domestic, foreign, and alien insurance corporations "other than such corporations transacting the business of life insurance, *(1) authorized to transact business in this state under a certificate of authority from the superintendent of insurance. . .* (italics added)."

Petitioner notes further, and critically, that this same "operative phrase" language is found in the "applicability" language imposing tax under Tax Law § 1510(b)(1) upon "every domestic life insurance corporation, and every foreign and alien *life* insurance corporation *authorized to transact business in this state under a certificate of authority from the superintendent of insurance,*" as accompanied by the limitation (or "cap" and "floor") language under Tax Law §

1505(a)(2) and (b).

R. Upon the foregoing, petitioner maintains that *unauthorized non-life* insurers, like itself, are not *explicitly excluded* from being subject to the tax imposed under Tax Law § 1502-a in lieu of the tax imposed under Tax Law § 1501, because the language of Tax Law § 1502-a does not *explicitly* mention such *unauthorized non-life* insurance corporations. Petitioner interprets this statutory "silence" as to *unauthorized non-life* insurers, as akin to the statutory "silence" concerning *unauthorized life* insurers. Petitioner argues that both types of *unauthorized* insurers (non-life and life) should be treated in like fashion, at least for years prior to 2012, thus leaving all *non-life* insurers subject to one tax on premiums (under Tax Law § 1502-a), and all *life* insurers subject to the two taxes under Tax Law §§ 1501 and 1510(b), as limited by the cap (Tax Law § 1505[a][2]) and floor (Tax Law § 1505[b]).

S. Petitioner's argument proceeds from the position that for many years the Division treated *life* insurance corporations, both *authorized and unauthorized*, in the same manner (i.e., as subject to the tax limitation [cap] set forth above under Tax Law § 1505[a][2]), notwithstanding that the applicability provision (i.e., the operative phrase) specified only *authorized life* insurance corporations. From this starting point, petitioner points out that the applicability provision pertaining to *non-life* insurance corporations under Tax Law § 1502-a likewise specifies only *authorized non-life* insurance corporations, and (like the *life* insurance corporation applicability provisions) is silent as to *unauthorized non-life* insurance corporations. Petitioner argues that such symmetry in the statutory language, coupled with the Division's published interpretation and guidance as to *life* insurance corporations (***see*** Conclusion of Law L,

n 7) demands like treatment for *non-life* insurance corporations, *authorized and unauthorized*, such that both should be subject to the tax imposed under Tax Law § 1502-a, at least for the year here at issue and, in fact, until the point in time when the Division *explicitly* reversed its prior published interpretation and guidance regarding *life* insurance corporations. Distilled to its essence, petitioner's argument is that notwithstanding the explicit statutory language, there was no recognized or functional difference in treatment between *authorized* and *unauthorized* insurance corporations before the Division's explicit repudiation of such interpretation effective January 1, 2012 (***see*** TSB-M-12[4]C; Conclusions of Law N and O) or, at the very earliest, as of March 2, 2009, based on the Division's issuance of its ***Service Lloyds Ins. Co.*** Advisory Opinion (TSB-A-09[2]C) (***see*** Conclusion of Law L).

T. The primary thrust of petitioner's argument hinges, as noted, on the absence of a specific and explicit distinction between *authorized* and *unauthorized* insurance corporations in the "operative phrase," or more precisely upon the absence of any specific and explicit language, i.e., "statutory silence," concerning the treatment of *unauthorized* insurance corporations. Petitioner's operative phrase argument is rejected. First, Tax Law § 1502-a explicitly sets forth a limitation on applicability by specifying that those to whom the tax applies must be "authorized" (***see*** Conclusion of Law H). Further, any purported reliance by petitioner on the Division's advisory opinions must be tempered by the fact that none of the opinions cited by petitioner address its own particular circumstances, i.e., the opinions listed speak to *unauthorized life* insurance corporations that were taxed under a different (two-part) taxing regime for the year at

issue, and not to an *unauthorized non-life* insurance corporation such as petitioner.[12] In fact, the only published guidance pertaining to the circumstances of an *unauthorized non-life* insurance corporation such as petitioner reached the conclusion advanced by the Division herein (***see Service Lloyds Ins. Co.*** (Advisory Opinion [TSB-A-09(2)C], March 2, 2009]). It is noteworthy that petitioner itself does not appear to have sought any guidance, including making any request for an advisory opinion, specifically addressing its particular circumstances. There are distinctions between *life* and *non-life* insurance corporations, and between *authorized* and *unauthorized* insurance corporations of both ilk. Such distinctions cannot be ignored as superfluous or meaningless, and in fact bear directly on the outcome herein. In ***Matter of Helmsley Enterprises, Inc.*** (Tax Appeals Tribunal, June 20, 1991, ***confirmed*** 187 AD2d 64 [1993], ***lv denied*** 81 NY2d 710 [1993]), the Tribunal stated:

> "As a general rule, the maxim *expressio unius est exclusio alterius* is applied in interpreting statutes, so that where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded [citations omitted]."

---

[12] Petitioner accords substantial weight to the Division's advisory opinions (***see*** Conclusion of Law L, n 7). Tax Law § 171 and 20 NYCRR 2376.1 provide for the issuance of advisory opinions of the Commissioner of Taxation and Finance. An advisory opinion is issued at the request of a person who is or may be subject to liability under the Tax Law, presents the Division's interpretation of the Tax Law at a specific point in time, and is binding upon the Commissioner only with respect to that person and only at that specific point in time and only as to the facts specified therein (20 NYCRR 2375.5; 2376.1[a]; 2376.4). In fact, a "note" appearing at the end of each advisory opinion sets forth this same advice (***see*** Conclusion of Law O). In this context, it must be noted that advisory opinions issued by the Division of Taxation are not duly promulgated and adopted regulations and do not carry the force and effect of law (***see Downey v. Allstate Ins. Co.***, 638 Fed Supp 322 [SD NY 1986]; ***Matter of AIL Systems, Inc.***, Tax Appeals Tribunal, May 4, 2006; ***Matter of Stuckless and Olsen [Stuckless II]***, Tax Appeals Tribunal, August 17, 2006.) The Tax Appeals Tribunal has reviewed advisory opinions to determine if the Division has been consistent in its interpretation of the law (***see Matter of Bausch & Lomb, Inc.***, Tax Appeals Tribunal, December 20, 2007). In this case, the advisory opinions cited by petitioner pertain specifically to *unauthorized life* insurance corporations. Petitioner, by contrast, is an *unauthorized non-life* insurance corporation. In sum, such advisory opinions (notwithstanding that they consistently elucidated the Division's initial interpretation and application of the law as to *unauthorized life* insurance corporations) are not entitled to be accorded significant weight or deference herein with respect to *unauthorized non-life* insurance corporations.

By specifying *authorized non-life* insurance corporations in the text of Tax Law § 1502-a, the Legislature distinguished such corporations from *unauthorized non-life* insurance corporations. Such specific applicability language establishes the fact that no other type of *non-life* insurance corporation (including those that were *unauthorized* such as petitioner) were contemplated as falling within the ambit of that statutory provision. Since Tax Law § 1502-a, by its specific terms, applied only to *authorized non-life* insurance corporations, and imposed its tax on such corporations in lieu of the two taxes formerly imposed on such corporations under Tax Law §§ 1501 and 1510, it follows that Tax Law § 1502-a simply did *not* apply to *unauthorized non-life* insurance corporations. Such *unauthorized non-life* insurance corporations therefore were, and remained, subject to tax under Tax Law § 1501, without limitation.

U. Petitioner recognizes that Tax Law § 1502-a is specifically made applicable, by its terms, only to *authorized non-life* insurance corporations. Nonetheless, petitioner argues that because the same type of language found in Tax Law § 1502-a was employed in other provisions (***see*** Tax Law §§ 1510, 1505), the Legislature (in enacting Tax Law § 1502-a) in fact *acquiesced* to an interpretation that such provision was to apply equally to both *authorized* (as specified) and *unauthorized non-life* insurance corporations, consistent with the Division's prior interpretation concerning both *authorized* and *unauthorized life* insurance corporations (***see*** Conclusion of Law L).

Accepting petitioner's argument that the Legislature "acquiesced" to the Division's prior interpretation and application of such provisions concerning *life* insurance corporations, and so acquiesced and adopted that view with its enactment of Tax Law § 1502-a, requires ignoring the

clear terms of the statute, and its specific linguistic limitation of applicability only to *authorized non-life* insurance corporations. It further requires a conclusion that the Legislature agreed with and approved that interpretation, and made the same applicable by using language that on its face requires an entirely different result. To agree with petitioner's argument requires:

> a) accepting that the Legislature was specifically aware of the Division's interpretation and application of the Tax Law treating *unauthorized* and *authorized life* insurance corporations as though there was no statutory distinction between the two, as described in detail above;
>
> b) accepting that the Legislature approved of such interpretation and application and acquiesced thereto; and
>
> c) accepting that the Legislature indicated its acquiescence, approval and adoption of the same by enacting a statutory provision (Tax Law § 1502-a) the explicit terms of which drive an entirely opposite result.

Petitioner's argument that the Legislature's "silence" in Tax Law § 1502-a (or its failure to *affirmatively* and *specifically* exclude <u>un</u>*authorized non-life* insurance corporations therefrom), simply does not overcome the clear wording of the statute and its enumeration of the particular type of entity (an *authorized non-life* insurance corporation) to which the provision applied from the outset. As such, petitioner's argument must be rejected, leaving petitioner subject to tax under Tax Law § 1501, and not Tax Law § 1502-a, for the year 2007.

The Allocation Issue

V. As concluded above, petitioner is subject to tax pursuant to Tax Law §1501, based on its allocated entire net income, and is not subject to the premiums-based tax under Tax Law § 1502-a. This result in turn presents the issue of how to allocate to New York the appropriate portion of petitioner's entire net income subject to tax. Article 33 provides a formula by which an insurance corporation's entire net income is allocated to New York via an income allocation

percentage comprised of a premiums factor and a wage factor, as follows:

> "Allocation of entire net income. The portion of entire net income of a taxpayer to be allocated within the state shall be the amount determined by multiplying such income by the income allocation percentage determined by:
>
> (1) ascertaining the percentage which the taxpayer's New York premiums for the taxable year bear to the taxpayer's total premiums for the taxable year, and multiplying such percentage by nine,
>
> (2) ascertaining the percentage which the total wages, salaries, personal service compensation and commissions for the taxable year of employees, agents and representatives of the taxpayer within New York bear to the total wages, salaries, personal service compensation and commissions for the taxable year of all the taxpayer's employees, agents and representatives, and
>
> (3) adding the amounts determined under paragraphs one and two and dividing the sum by ten" (Tax Law § 1504[a][1], [2], [3]).

W. The Tax Law goes on, however, to provide the Division with the discretion to calculate a taxpayer's income allocation percentage by resort to an alternative method that differs from that set forth above, as follows:

> "If it shall appear to the [Division] that the income allocation percentage determined as hereinabove provided does not properly reflect the activity, business or income of a taxpayer within the state, the [Division] shall be authorized, in its discretion, to adjust it by:
>
> (1) excluding one or more factors therein;
>
> (2) including one or more other factors therein, such as expenses, purchases, *receipts other than premiums*, real property or tangible personal property;
>
> (3) or any other similar or different method calculated to effect a fair and proper allocation of the income and capital reasonably attributable to the state. The [Division] from time to time shall publish all rulings of general public interest with respect to any application of the provisions of this subdivision" (Tax Law § 1504[d]; italics added).

X. The Division would invoke the Commissioner's discretionary authority under Tax Law § 1504(d) to employ a method of allocation different from that statutorily prescribed. Turning to

this separate issue of proper allocation, as now presented, it is initially noted that departure from the statutorily prescribed method requires a strong justification by the proponent of the departure. Thus, the Division must show that the statutorily prescribed method for allocating entire net income does not properly reflect petitioner's business, activities or income in New York, resulting in an allocation that is "out of all appropriate proportion to the business transacted [by petitioner] in [the] State," and that its proposed alternative method of allocation effects a fair and proper allocation (***Matter of British Land [Maryland], Inc. v. Tax Appeals Tribunal,*** 85 NY2d 139, 146 [1995]). In short, the Division must show that the Article 33 statutory formula does not properly reflect petitioner's New York activity, business or income *and* that its proposed alternative formula does.

Y. Tax Law § 1504(b)(1) defines "premiums" to mean:

> "[f]or purposes of [allocation of entire net income], the term 'premium' includes all amounts received as consideration for insurance contracts, reinsurance contracts and annuity contracts and shall include premium deposits, assessments, policy fees, membership fees and every other compensation for such contract. The term 'total premiums' means total gross premiums or deposit premiums or assessments, less returns thereon, on all policies, annuity contracts, certificates, renewals, policies subsequently cancelled, insurance and reinsurance executed, issued or delivered on property or risks, including premiums for reinsurance assumed, less dividends on such total premiums, including unused or unabsorbed portions of premium deposits paid or credited to policyholders but not including deferred dividends paid in cash to policyholders on maturing policies, nor cash surrender values, and less premiums on reinsurance ceded."

Tax Law § 1504(b)(2)(A), in turn, defines "New York premiums" to mean:

> "that portion of total premiums written, procured or received on property or risks located or resident in New York and shall also include premiums written, procured or received in this state on business which cannot be specifically assigned as located or resident in any other state or states."

Z. The statutory income allocation formula set forth at Tax Law § 1504(a) consists of (1) a premiums factor and (2) a wage factor. This statutory formula is weighted most heavily on premiums, carrying a premiums factor multiplier of nine, with wages carrying a wage factor multiplier of one (***see*** Conclusion of Law V). The income subject to allocation here was not income from premiums. In fact, it is undisputed that petitioner had no income from premiums in either New York State or in the United States. Thus, the numerator of the premiums factor would be zero and would result (regardless of the denominator) in a zero premiums allocation factor. The tax imposed under Tax Law § 1502-a (that which petitioner *sought* to be applicable herein) is based solely on "gross direct premiums, less return premiums thereon, written on risks located or resident in [New York] State" (Tax Law § 1502-a). At the same time, the tax to which petitioner *is* subject under Article 33 (as concluded above) is *not* a tax based on premiums, but rather is one (in this instance) based upon allocated entire net income.[13] Allocating non-premium-based entire net income to a given jurisdiction under a formula based almost entirely upon premium income in that jurisdiction, in an instance where, as here, the taxpayer had no premium-based income (or premiums) in that jurisdiction, appears questionable at the outset. This is especially true here, where the statutory allocation formula heavily weights the premium factor by assigning a multiplier factor of nine thereto. Thus, there exists a clear and substantial basis for rejecting the appropriateness of applying an income allocation formula resting almost entirely (90%) upon premiums. Instead these circumstances strongly support the

[13] The tax imposed under Tax Law § 1501 is, similar to the tax imposed under Tax Law Article 9-A, the highest resulting amount of tax computed on four bases ([1] allocated entire net income; [2] allocated business and investment capital; [3] 9% of entire net income plus certain officers' and shareholders' salaries and other compensation; or [4] a minimum tax of $250.00, plus tax on allocated subsidiary capital [if applicable]) (Tax Law §§ 1501, 1502).

Division's resort to alternative allocation, as contemplated and authorized under Tax Law § 1504(d). Any other conclusion renders the statutory authority to depart from the prescribed allocation formula, where justified, essentially meaningless.

AA. Tax Law § 1503(a), "Computation of entire net income," provides that "[t]he entire net income of a taxpayer shall be its total net income from all sources *which shall be presumably the same as the life insurance company taxable income . . . , which the taxpayer is required to report to the United States treasury department*, for the taxable year . . . (italics added)." Petitioner maintains that an allocation of its entire net income, in any event, must be based upon its worldwide income, business and activities, as opposed to the more limited realm of its United States or New York State income, business and activities.[14] This position is perhaps premised upon the theory that petitioner's worldwide activities, business and income provide the wherewithal enabling it to make the types of investments in entities such as the partnerships herein through which the income in question was generated. This premise, however, largely overlooks the New York location of the properties in which the partnerships invested, the ties to the income generated as a result thereof, and the accompanying benefits attendant thereto (such as a regulated system of commerce), each of which facts provides support for the Division's resort to its discretionary authority to apply an alternative method of allocation.

BB. Article 33 imposes a premiums-based tax on *authorized non-life* insurance corporations and on *authorized life* insurance corporations (Tax Law §§ 1502-a, 1510[b]).

---

[14] As noted, the record does not disclose petitioner's European or worldwide income or premiums (its European *non-life* insurance premiums) or payroll (its European employee compensation) (***see*** Finding of Fact 1, n 2).

Article 33 also imposes a tax on all *authorized* and *unauthorized life* insurance corporations and on *unauthorized non-life* insurance corporations computed (among other bases) on allocated entire net income (Tax Law § 1501). As noted, Article 33 does not explicitly differentiate by text between *authorized* and *unauthorized* insurance corporations. To the extent the tax under Tax Law § 1501 is applied to insurance corporations with New York premium based income (i.e., *authorized* insurance corporations), Article 33 provides an allocation formula that, while heavily weighted on premiums (Tax Law § 1504[a]; ***see*** Tax Law § 1504[b][1], [2][A]), is presumed appropriately applicable to such corporations. At the same time, and given that the statutory provisions do not explicitly differentiate between *authorized* and *unauthorized* insurance corporations, it is not surprising that there is no explicit statutory allocation formula for such latter insurance corporations. Instead, Article 33 affords the discretion to utilize an alternative method of allocation. Such alternative would, as here, reasonably be utilized in instances where the tax involved is not premium-based, and where the income to be allocated is, likewise, not premium income. Since *unauthorized* insurance corporations are not licensed to write premiums and consequently may, as here, have no premium-based income, the application of a premium based allocation formula to allocate non-premium-based entire net income would be, at best, inconsistent.

CC. The question thus devolves to whether the particular alternative method of allocation, as proposed by the Division under Tax Law § 1504(d), in fact effects a proper, fair and reasonable reflection of petitioner's "activity, business or income" within New York. Tax Law § 1503(a) provides, subject to certain modifications not relevant here (***see*** Tax Law § 1503[b]), that:

> "[t]he entire net income of a taxpayer shall be its total net income from all sources which shall be *presumably* the same as the life insurance company taxable income . . . , taxable income of a partnership or taxable income . . . which the taxpayer is required to report to the United States treasury department, for the taxable year . . . (italics added)."

This presumption that entire net income is federal taxable income, coupled with the fact that federal taxable income here consists of petitioner's federal ECI (***see*** Finding of Fact 9), means that the same would not include petitioner's entire world wide income (***compare*** Tax Law § 208[9][c] ["(e)ntire net income shall include income within and without the United States"]). This supports the Division's resort to alternative allocation based on the ratio of petitioner's New York distributive portion of its receipts from the Partnerships to its "everywhere" distributive portion of receipts from the Partnerships (***see*** Addendum I). Petitioner argues that the Division's alternative method allocates over two-thirds of petitioner's income to New York. While true, this result is not surprising given that the majority of the income in question arose as the result of the partnerships' holdings in and sale of real estate located in New York. Under all of such factors, it cannot be concluded that the Division's proposed alternative allocation method results in allocating *income* to New York that is out of all appropriate proportion to petitioner's business, *income* or activities in New York. In sum, the Division's resort to the allocation method prescribed under Article 9-A, premised upon receipts-based allocation as set forth under Tax Law § 210(3)(a)(10)(A)(ii); (3)(a)(2) and 20 NYCRR 4-6.5(a)(1), was clearly reasonable under the facts presented.[15]

---

[15] As the Division notes by brief, the business allocation formula (BAP) calculation under Article 9-A was based, for the year at issue, on a single "receipts" factor (Tax Law §§ 210[3][a][10][A][ii]; [3][a][2]). Further, a taxpayer (such as petitioner) that is a corporate partner in a partnership "takes into account its distributive share of the partnership's receipts and payroll within and without New York," together with its distributive share of the partnership's property in computing its BAP (20 NYCRR 4-6.5[a][1]). The Division computed petitioner's BAP

DD. In sum of the foregoing, petitioner's tax liability is properly determined pursuant to the provisions of Tax Law § 1501, and not pursuant to Tax Law § 1502-a. In addition, the Division properly resorted to its discretionary authority in selecting and correctly applying an allocation formula different from the statutorily prescribed formula set forth under Tax Law Article 33. Finally, the Division also provided a second alternative calculation based upon a single wage factor and a consequent 100 percent allocation of entire net income as subject to tax under Tax Law § 1501. This calculation results in the assertion of a deficiency greater than that set forth on the Notice of Determination (***see*** Addendum II). Since the Division's alternative receipts-based allocation has been upheld, as above, the appropriateness of this second alternative calculation (to which petitioner did not in any manner acquiesce) becomes irrelevant.

EE. The petition of Bayerische Beamtenkrankenkasse AG is hereby denied, and the Division's Notice of Deficiency dated September 2, 2011 is sustained.[16]

DATED: Albany, New York
March 3, 2016

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

upon the basis of the foregoing language and petitioner does not contest the Division's mathematics or the dollar amounts resulting therefrom.

[16] As stipulated, the parties reached agreement as to the amount of petitioner's additional liability for the taxable year ended December 31, 2006 and such year is no longer in dispute (***see*** Finding of Fact 14).

Addendum I

Petitioner's entire net income to be allocated arises entirely from its distributive share of income from each of the Partnerships, with the Division's proposed allocation thereof as follows:

USPF

Total New York Partnership Receipts:	$561,265,742.00
Total (everywhere) Partnership Receipts:	$577,745,205.00

Petitioner's Distributive Share of Partnership Receipts @ 5.8051%:

Distributive Share of New York Receipts:	$32,582,038.00
Distributive Share of Total (everywhere) Receipts:	$33,538,687.00

USPF III

New York Partnership Receipts:	$745,719,742.00
Total (everywhere) Partnership Receipts:	$1,441,496,947.00

Petitioner's Distributive Share of Partnership Receipts @ 3.7534%:

Distributive Share of New York Receipts:	$27,989,845.00
Distributive Share of Total (everywhere) Receipts:	$54,105,146.00

Petitioner's Total New York Partnership Receipts: ($32,582,038.00 plus $27,989,845.00)	$60,571,883.00
Petitioner's Total (everywhere) Partnership Receipts: ($33,538,687.00 plus $54,105,146.00)	$87,643,833.00

ENTIRE NET INCOME ALLOCATION PERCENTAGE

Petitioner's New York Partnership Receipts:	$60,571,883.00
Petitioner's Total (everywhere) Partnership Receipts:	$87,643,833.00
New York Entire Net Income Allocation Percentage	69.1114%

Addendum II

The Division's calculation of petitioner's liability using the allocation formula under Tax Law § 1504(a), but with a zero premiums factor and a single wages factor (1,688) results in the allocation of 100% of petitioner's entire net income ($41,666,545.00) to New York, and to the New York MCTD (since all of the Partnership's New York properties were located within the MCTD). This calculation results in tax due under Tax Law § 1501 in the amount of $2,958,075.00, plus an MTA surcharge tax under Tax Law § 1505-a in the amount of $637,498.00, representing increases, in the respective amounts of $913,785.00 and $196,914.00, over the amounts of such taxes due under the receipts factor-based allocation set forth above and asserted as due under the Notice of Deficiency.