

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition
of
TD AMERITRADE, INC.

DETERMINATION
DTA NO. 829523

for Redetermination of a Deficiency of for Refund of New
York State Corporation Franchise Tax Under Article 9-A of the
Tax Law for the Periods January 1, 2012 through December 31,
2014.

Petitioner, TD Ameritrade, Inc., filed a petition for redetermination of a deficiency of for refund of New York State corporation franchise tax under article 9-A of the Tax Law for the periods January 1, 2012 through December 31, 2014.

A videoconferencing hearing was held before Kevin R. Law, Administrative Law Judge, via CISCO Webex on May 25, 2021, with all briefs due October 28, 2021, which date began the six-month period for the issuance of this determination. Petitioner appeared by PricewaterhouseCoopers, LLP (Michael Zagari, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Bruce D. Lennard, Esq., of counsel).

ISSUES

I. Whether petitioner was required to source amounts denominated as a marketing fee (or aggregate fee) within and without New York based on the location of the banks that were required to pay the fee or based upon the location of its brokerage clients.

II. Whether, if petitioner was required to source amounts denominated as a marketing fee within and without New York based on the location of its brokerage clients, the resulting

understatement of tax was based on reasonable cause and not willful neglect, thus allowing for abatement of penalty asserted.

FINDINGS OF FACT

The parties executed a stipulation of facts in connection with this matter. Such stipulated facts have been substantially incorporated into the findings of fact set forth herein.

1. Petitioner, TD Ameritrade, Inc., a New York corporation, is an online introducing broker/dealer headquartered in Omaha, Nebraska, and has significant operations in Texas and New Jersey.

2. Petitioner is the client-facing organization in its corporate group and it is the owner and operator of the corporate website.

3. As an introducing broker-dealer, petitioner introduces brokerage client accounts to TD Ameritrade Clearing, Inc. (TDAC)¹, an affiliated clearing broker-dealer also headquartered in Nebraska.

4. Petitioner is responsible for opening, approving and monitoring their accounts, and transmitting those orders and instructions to TDAC. Petitioner may send orders for the purchase or sale of securities to TDAC for execution, or petitioner may execute the transaction itself and instruct TDAC to post the execution to the brokerage client's account.

5. TDAC provides trade execution and clearing services to petitioner, which includes the confirmation, receipt, settlement, delivery, and record-keeping functions involved in the processing of various transactions.

¹ TDAC is a Nebraska corporation.

6. Petitioner and TDAC are both registered as securities broker-dealers with the Securities and Exchange Commission. Petitioner is also registered with the Commodity Futures Trading Commission as a futures commission merchant.

7. Petitioner and TDAC are each wholly-owned subsidiaries of TDA Online Holdings Corp., a Delaware corporation, which is itself a wholly-owned subsidiary of TDA Holdings Corporation, a Delaware corporation.

8. Individual and institutional clients open brokerage accounts with petitioner. Brokerage clients enter into a standard Client Agreement with petitioner. Brokerage clients deposit cash into their brokerage accounts and direct petitioner how to invest their funds. Petitioner transmits brokerage client trade instructions to TDAC, which causes such instructions to be executed. Brokerage clients pay commissions and other fees to petitioner related to transactions that they direct petitioner to make.

9. As the clearing broker-dealer, TDAC holds the brokerage clients' accounts, including the cash within such accounts, as agents for the brokerage clients.

10. When a brokerage client deposits funds in a brokerage account with petitioner, such funds are automatically invested or deposited into the "sweep vehicle" option that was designated by the brokerage client.

11. Brokerage clients may choose one of the following three sweep vehicle options when opening an account with petitioner: (i) an Insured Deposit Account (IDA), (ii) TDA Cash, and (iii) Money Market Funds. Of these three vehicles, only the IDA moves cash from the brokerage accounts to TD Bank, N.A., and/or TD Bank USA, N.A. (collectively, the Banks).

12. The Banks are each national banks headquartered in New Jersey, and each have the same mailing address in New Jersey.

13. The Banks are operated and managed independently from TDA and TDAC and were not included in petitioner's combined group. The Banks have an ownership, but not a controlling interest, in petitioner and TDAC. At some point prior to 2012, petitioner was wholly-owned by the Toronto Dominion Bank.²

14. The terms of the Client Agreements specific to the IDA option provide, in relevant part, as follows:

"The Banks use IDA balances to fund current and new investment and lending activity. The Banks seek to make a profit by achieving a positive spread between their cost of funds (for example, deposits) and the return on their assets, net of expenses. [Petitioner and TDAC] receive a fee from the Banks for marketing, recordkeeping, and support services in connection with the IDAs. In exchange for providing these services, the Banks pay [Petitioner and TDAC] an aggregate marketing fee based on the weighted average yield earned on the client IDA balances, less the actual interest paid to clients, a servicing fee to the Banks of 25 basis points (subject to adjustment) and the cost of FDIC insurance premiums. [Petitioner and TDAC] have the right to waive all or part of this fee. The rate of the fee that [Petitioner and TDAC] receive may exceed the interest rate or effective yield that [Brokerage Client] receive in [Brokerage Client's] balances in the IDAs, and the payment of this fee reduces the yield that [Brokerage Client] receive[s]. Other than the applicable fees charged on brokerage accounts, there will be no charges, fees, or commissions imposed on [Brokerage Client's] Account for this cash sweep feature. The current IDA interest rate will be disclosed on [petitioner's] website and may be changed without notice."

15. The interest rates paid under the IDA during the period January 1, 2012 through December 31, 2014 (Audit Period) were either the same or greater than the interest rates paid under the TDA Cash and Money Market Funds options.

16. The IDA is the default sweep vehicle and is maintained at the Banks.

17. Generally, at the end of each business day, excess cash in petitioner's brokerage client accounts is "swept" (i.e., deposited) into the IDAs at the Banks (except that excess cash is

² The record does not disclose specifically when.

not swept to the IDAs for those brokerage clients who have instead chosen the TDA Cash or Money Market Funds options).

18. Excess cash for brokerage clients that have elected the Money Market Funds option is used to purchase shares of the money market fund.

19. Excess cash for brokerage clients that have elected TDA Cash remains in the custody of TDAC and is periodically (at least weekly) deposited into special purpose accounts with separate financial institutions.

20. The terms of the IDAs are set forth in an Insured Deposit Account Agreement, dated January 1, 2013 between certain parties including petitioner, TDAC and the Banks (2013 IDA Agreement), during the 2013 and 2014 tax years. Prior to the 2013 IDA Agreement, there was another IDA agreement, dated as of December 19, 2009 (the 2012 IDA Agreement) (collectively, with the 2013 IDA Agreement, the IDA Agreements) with the Banks, that had substantially similar terms as the 2013 IDA Agreement, and which applied during the 2012 tax year.

21. All IDA transactions are on an omnibus basis as TDAC is the custodian of all brokerage client accounts. In other words, the excess cash from the TDA brokerage client accounts that is swept to the Banks is aggregated into one pooled omnibus account.

22. Brokerage clients earn interest on their funds which are deposited in the omnibus account and these funds are insured by the Federal Deposit Insurance Corporation (FDIC).

23. Funds deposited in the TDA Cash or Money Market Funds options are not insured by the FDIC.

24. The Banks are unable to utilize the excess cash in the TDA Cash or Money Market Funds options.

25. The Banks do not know who the brokerage clients are on an individual basis due to the fact that they only have access to the excess cash in the omnibus IDA account.

26. The IDA provides the Banks with a large pool of deposits for investment or other uses without incurring the costs that would have been necessary for the Banks to otherwise market and attract that amount of cash elsewhere. Michael Rice, the former Tax Director at TDA Holdings Corporation, explained:

“[The Banks] get . . . tens of billions of dollars of available cash deposits that they can use for any banking purpose, without having to incur any costs in maintaining those client relationships. So, they don't have to keep track of clients and their concerns.”

27. The Banks do not enter into any contracts or agreements with the brokerage clients in connection with the IDA vehicle.

28. Mr. Rice testified that the yield itself does not belong to the brokerage clients, as follows:

“It is not the client's yield. The only reason that TD Ameritrade is able to command this fee is because of the aggregation services that TD Ameritrade provides, and the stability of the deposit base that is provided to TD Bank. Any one individual customer operating on its own could not command the yield that TD Ameritrade is able to enjoy under this aggregate arrangement. It's the law of big numbers because each individual client can withdraw their money at any time. That deposit isn't worth a whole lot. It cannot command a yield in the marketplace. A \$90 billion deposit made-up of millions of individual customers acting independently does command a premium yield.”

29. Pursuant to the IDA Agreement, the Banks are required to pay petitioner and TDAC what the IDA agreement describes as an “aggregate fee” related to the IDA activity. The fee is also referred to in the IDA Agreement as a “marketing fee” and in the Client Agreement as a fee for marketing, recordkeeping and support services in connection with the IDAs. The computation of the marketing or aggregate fee is determined pursuant to the terms of the IDA Agreement. Specifically, the fee is calculated based on a certain yield that the Banks agree to

pay to petitioner on the cash deposits in the IDA less (i) interest paid by the Banks on the cash deposits from the brokerage accounts, (ii) an annual servicing fee, (iii) certain costs incurred by the Banks for providing FDIC deposit insurance, and (iv) certain additional adjustments for assets and tax benefits related to the federal Community Reinvestment Act.

30. Pursuant to the IDA agreement, petitioner was required to maintain books and records for the Banks setting forth the daily balance and accrued interest for the brokerage cash in the IDA, as well as tracking the names, addresses and social security or tax identification numbers of the millions of Brokerage Clients. Petitioner was also required to provide independent auditors, examiners, and other authorized representatives of the federal bank regulatory agencies that have appropriate jurisdiction over the Banks, reasonable access upon request to the books and records maintained by petitioner.

31. Petitioner also maintained an emergency system to ensure that the books and records for the IDA are retrievable in case of computer failure or malfunction.

32. Petitioner implemented and maintained appropriate programs reasonably designed to ensure compliance with all regulations, orders and policies including the federal Bank Secrecy Act and the USA PATRIOT Act.

33. Petitioner agreed to provide the Banks with reports in connection with their asset/liability management and forecasting programs.

34. Mr. Rice testified that petitioner has an entire department of employees, split between Nebraska and Texas, in order to meet its obligations under the IDA Agreement to provide access to brokerage cash deposits and perform those services for the Banks.

35. For the tax years ended December 31, 2012, December 31, 2013, and December 31, 2014, petitioner timely filed, along with its related corporations including TDAC, forms CT-3-A,

general business corporation combined franchise tax return, and forms CT-3M/4M, general business corporation MTA surcharge return, with the Division of Taxation (Division).

36. Petitioner also timely filed federal forms 1120, corporation income tax returns on a consolidated basis. Petitioner's combined group on its forms CT-3 -A were the same as its federal consolidated group.

37. The Division conducted a general verification field audit of petitioner (and the combined group) for the audit period. Petitioner's combined group was accepted by the Division as filed.

38. During the audit, the Division verified petitioner's (and the combined group's) entire net income (ENI) with addition and subtraction modifications to the combined group's federal taxable income from its federal forms 1120 and its work papers for the audit period. The combined group's ENI was accepted as reported for the audit period except for certain net operating loss (NOL) deductions claimed in each tax year.

39. Specifically, the Division disallowed an NOL deduction of \$476,677.00 resulting in ENI "as adjusted" amounts of \$930,655,729.00 for the 2012 tax year, \$1,140,624,105.00 for the 2013 tax year, and \$1,327,861,947.00 for the 2014 tax year.

40. The parties have stipulated that the aforementioned ENI "as adjusted" amounts are correct.

41. For each of the tax years in the audit period, the Division verified the combined group's receipts to its federal forms 1120.

42. Most of the combined group's receipts during the tax periods were generated by petitioner and TDAC.

43. The majority of receipts generated by petitioner and TDAC were from commissions, stock lending activity and IDA revenue.

44. For each of the tax years, the combined group allocated its receipts from commissions using the mailing addresses of its brokerage clients and this methodology was accepted by the Division.

45. The combined group did not allocate any revenue from stock lending or IDA activity to New York State in any of the tax periods.

46. With respect to receipts from stock lending activity of petitioner and TDAC, the parties agreed during the audit that 8% of the amount of these receipts would be deemed to arise in New York State in each of the tax periods.

47. The Division's auditors, in computing petitioner's business allocation percentage (BAP) for each of the tax periods, started with New York State and "Everywhere" receipts amounts, respectively, of: (i) \$149,147,777.00 and \$2,646,192,641.00 for the 2012 tax year; (ii) \$173,989,392.00 and \$2,872,212,496.00 for the 2013 tax year; and (iii) \$192,933,180.00 and \$3,206,034,020.00 for the 2014 tax year.

48. The parties have stipulated that these starting amounts for the combined group's New York State and "Everywhere" receipts for each of the tax years were reported by petitioner (and the combined group) on its respective forms CT-3-A for the tax years in issue.

49. The Division's auditors added to the combined group's New York State receipts amounts for each of the tax periods 8% of the receipts amounts from the stock lending activity of petitioner and TDAC.

50. The Division's auditors derived the total receipts amounts from the stock lending activity of TDA and TDAC in each of the tax periods from the combined group's work papers.

51. The Division subtracted from the combined group's New York State and "Everywhere" receipts amounts, the amounts of costs incurred by petitioner and TDAC to acquire the securities or commodities.

52. The parties agree that the receipts from the stock lending activity of petitioner and TDAC that the Division added to the combined group's New York State receipts for each of the years are correct.

53. The parties agree that the amounts of costs incurred by petitioner and TDAC to acquire the securities or commodities that the Division subtracted from the combined group's New York State and "Everywhere" receipts for each of the tax years are correct.

54. The parties agree that the final total amounts for the combined group's "Everywhere" receipts for each of the tax periods are correct.

55. During the audit, the Division's auditors added to the combined group's New York State receipts amounts, for each of the tax periods, receipts from the IDA activity of petitioner and TDAC.

56. The auditors derived the total "Everywhere" receipts for the IDA activity of petitioner and TDAC, in each of the tax years, from the combined group's work papers. The parties have stipulated that such amounts are correct.

57. To arrive at the audited New York State receipts amounts for each of the tax years, the auditors multiplied the respective total "Everywhere" receipt amounts for the IDA activity of petitioner and TDAC by the percentage used in the respective tax year to allocate their commission receipts as those percentages were based on the mailing addresses of the brokerage clients.

58. Based upon its audit, the Division determined that the combined group had additional tax due of \$2,024,027.00 for the 2012 tax year, additional tax due of \$2,215,204.00 for the 2013 tax year and additional tax due of \$2,500,565.00 for the 2014 tax year.

59. Accordingly, on May 24, 2019, the Division issued to petitioner notice of deficiency, notice number L-049864595, in the amounts as set forth below:

Tax Year Ended	Tax Asserted	Penalties	Interest	Total
12/31/2012	\$2,024,027.00	\$202,402.00	\$1,297,113.58	\$3,523,542.58
12/31/2012 MCTD	\$410,610.00	\$41,061.00	\$263,142.57	\$714,813.57
12/31/2013	\$2,215,204.00	\$221,520.00	\$1,157,015.97	\$3,593,739.97
12/31/2013 MCTD	\$452,091.00	\$45,209.00	\$236,129.84	\$733,429.84
12/31/2014	\$2,500,565.00	\$250,056.00	\$1,031,036.00	\$3,781,657.00
12/31/2014 MCTD	\$512,319.00	\$51,231.00	\$211,240.39	\$774,790.39
Total	\$8,114,816.00	\$811,479.00	\$4,195,678.35	\$13,121,973.35

59. The penalties asserted in the notice of deficiency are for substantial understatement of tax pursuant to Tax Law § 1085 (k).

60. In addition to Mr. Rice's testimony relating to the substance of the IDA agreement and the aggregate fee, he also testified that petitioner reviewed the New York Tax Law as well as undertook a multistate review, concerning the proper sourcing of the marketing fees and engaged PricewaterhouseCoopers LLP to assist it with determining the proper sourcing methodology. It was petitioner's conclusion that the marketing fees were not allocable to New York based upon this review. No written legal opinions were proffered.

CONCLUSIONS OF LAW

A. Article 9-A of the Tax Law imposes a franchise tax on all domestic and foreign corporations doing business, employing capital, owning or leasing property, or maintaining an office in New York State (Tax Law former § 209 [1]).³

B. In New York, corporate taxpayers report their tax liability based on their computation of the highest of four income bases, one of which is their entire net income base (Tax Law former § 210 [1] [a-d]). A corporation's entire net income base is computed by calculating its entire net income, generally consisting of its investment income (Tax Law former § 208 [6]) and its business income (Tax Law former § 208 [8]; *see* Tax Law former §§ 210 [1] [a]; [3]; 208 [9]; 209 [1]). In turn, the corporation's investment income and business income are allocated to New York pursuant to the corporation's investment allocation percentage (IAC) (Tax Law former § 210 [3] [b]) and its BAP (Tax Law former § 210 [3] [a]), with the resulting amounts totaled to arrive at the corporation's entire net income base. The BAP consists entirely of the receipts factor (Tax Law § 210.3 [a] [10] [A] [ii]), the determination of which is at issue herein.

C. The BAP is computed by dividing the corporation's New York business receipts by its total business receipts. In general, a corporation's New York business receipts are defined as: (i) sales of tangible personal property shipped to points within the state; (ii) services performed within the state; (iii) rentals from properties situated, and royalties from the use of patents or copyrights, within the state; and (iv) all other business receipts earned within the state (Tax Law former § 210 [3] [a] [2] [A-D]). In the case of registered securities or commodities brokers or dealers, Tax Law former § 210 (3) (a) (9) provided customer-based sourcing rules for certain

³ An additional surcharge tax is imposed, per Tax Law former § 209-B, upon corporations located or doing business within the Metropolitan Commuter Transportation District (MCTD).

categories of receipts, including brokerage commissions, margin interest, certain underwriting revenues, interest on certain loans to affiliated entities, account maintenance fees, and fees for management and advisory services.

D. As a registered securities broker-dealer, petitioner was required to source its qualifying receipts using the broker-dealer sourcing rules of Tax Law former § 210 (3) (a) (9). As such, the parties have stipulated that the aggregate fee must be sourced to the “mailing address in the records of the taxpayer of the customer who is responsible for paying” such fee (*see id.*). The parties dispute who the “customer responsible for paying” the aggregate fee is. The Division’s position is that the brokerage clients are the “customer[s] responsible for paying” the aggregate fee. Petitioner’s position is that the Banks are the “customer[s] responsible for paying” the aggregate fee.

E. Petitioner and the Division have stipulated that if it is determined that receipts amounts from the IDA activity of petitioner and TDAC were properly added to the combined group’s New York State receipts amounts, the Division properly determined the amounts to be added by multiplying the respective total receipts amounts for the IDA activity of petitioner and TDAC by the percentage used in the respective tax years to allocate commission receipts, as those percentages were based on the mailing addresses of the brokerage clients.

F. Petitioner and the Division have further stipulated that if it is determined that petitioner's customers with respect to the receipts amounts from the IDA activity are the Banks’ and are not the brokerage clients’, then none of the receipts amounts from the IDA activity are to be included in petitioner’s New York State receipts.

G. In this case, after careful review of the record, it is determined that petitioner’s brokerage clients do not pay petitioner the IDA fee and are not the customer. It is a payment

made by the Banks to petitioner for the use of large amounts of money and for various recordkeeping services in connection therewith. In this situation, the Banks are the customer. While it is beyond question that the amounts used to pay this fee are determined based upon the yield petitioner receives from the Banks on the cash swept from petitioner's brokerage clients' accounts into the omnibus account, this fee is paid by the Banks. The brokerage clients could not make this yield in their own right. In simplistic terms, cash is swept from the brokerage clients' individual accounts into the IDA accounts. Petitioner is thereafter responsible for paying its clients interest on their balances. Petitioner, in turn, receives payments from the Banks for depositing these large amounts of cash which individual brokerage clients could not command in their individual capacities. The power to direct large deposits of cash and the various recordkeeping and compliance activities is what generates this fee. The payment of the fee is structured such that it is paid by the Banks and not by each of petitioner's brokerage clients. Petitioner is free to structure its affairs within the bounds of the law. Rather, the Division's argument is that a portion of the yield earned by the brokerage clients constitutes the aggregate fee. On this score, the Division's theory of liability in this matter is rife with innuendo and speculation. Essentially, the Division advances that the fee paid by the Banks should be recast as interest earned by the brokerage clients that the clients then pay to petitioner. These contentions are rejected as there is no support in the record to do so. The record makes clear that petitioner is paid by the Banks for recordkeeping and for depositing large amounts of cash for the banks use. The record also makes clear that the individual clients are in as good or better position than had they chose another option for their unused cash. Pursuant to the terms of the Client Agreements and the IDA Agreement, the Banks, and not the individual clients, incur this fee. The fact that brokerage clients could not command the yield petitioner receives from the Banks in their own

right is fatal to the Division's theory. As the record makes clear, brokerage clients get paid interest by petitioner and do not pay an account maintenance fee to petitioner; petitioner gets paid a fee by the Banks for directing billions of dollars of deposits to them and for the various services it performs therewith, none of which occurs or is from a New York customer. Pursuant to Tax Law former § 210 (3) (a) (9), none of these receipts are sourced to New York as the mailing address of the customers, the Banks, is in New Jersey. Accordingly, that part of the notice of deficiency that asserts tax on the aggregate fee is cancelled.

H. Alternatively, if the Banks are not petitioner's and TDAC's customers as is alleged by the Division, then the broker dealer rules of Tax Law former § 210 (3) (a) do not apply. Nonetheless, the aggregate fee is not sourced to New York as none of the services generating such fee occurred in New York, as all the services took place in Nebraska and Texas (*see* Tax Law former § 210 [3] [a] [2] [B]; *see also* 20 NYCRR 4-4.3 [a]).

I. Finally, the Division imposed penalties pursuant to Tax Law § 1085 (k), for substantial understatement of tax. Pursuant to Tax Law § 1085 (k) all or any part of the addition to tax may be waived on a showing by petitioner that there was reasonable cause for the understatement and that it acted in good faith. In addition, the amount of understatement may be reduced by the portion thereof attributable to the tax treatment of any item for which there was substantial authority, or if the relevant facts were adequately disclosed on the taxpayer's return (Tax Law § 1085 [k] [2]). First, with respect to that portion of the penalty relating to the understatement of tax attributable to: (i) the Division's disallowance of net operating losses (*see* finding of fact 39 and 40); and (ii) the understatement of tax based on the failure to source any New York receipts on stock lending activities (*see* findings of fact 49 through 53), petitioner has not made a

showing of reasonable cause. Therefore, the penalty attributable to these understatements of tax is sustained.

With respect to petitioner's argument that reasonable cause exists justifying penalty abatement attributable to the tax asserted on the aggregate fee, this argument has been rendered moot based upon the conclusions reached above. Nonetheless, it is addressed for sake of a complete record (*see Matter of Riehm v Tax Appeals Trib.*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992], *reargument denied* 80 NY2d 893 [1992]). After careful review of the record, it is concluded that substantial authority for petitioner's position exists and penalty should be abated (*see* Tax Law § 1085 [k] [2]). As noted by petitioner, this is a case of first impression and the plain language of Tax Law former § 210 (3) (a) (9) supports its reporting position given the conclusions reached above. In addition, Mr. Rice, TDA Holdings Corporation's former tax director, testified that petitioner reviewed the New York Tax Law as well as undertook a multistate review, concerning the proper sourcing of the marketing fees and engaged PricewaterhouseCoopers LLP to assist it with determining the proper sourcing methodology. The authority that the Division has relied on is, as petitioner observes, based upon "mere assertions" that the brokerage clients paid petitioner's IDA fees, a proposition not supported by the weight of the record. Thus, had the tax been sustained on the tax attributable to IDA receipts, penalty abatement would nonetheless be warranted.

J. Based upon the foregoing, the petition of TD Ameritrade, Inc., is granted in accordance with conclusions of law G and H, but is otherwise denied, and the May 24, 2019 notice of deficiency, as modified, is sustained.

DATED: Albany, New York
April 28, 2022

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE