STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
BAYERISCHE BEAMTENKRANKENKASSE AG	:	ORDER 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.	:	

The Division of Taxation filed a notice of motion, together with an affirmation in support of motion for reargument and memorandum of law in support of motion for reargument, requesting that the Tax Appeals Tribunal reverse its prior decision in the ***Matter of Bayerische Beamtenkrankenkasse AG*** (Tax Appeals Tribunal, September 11, 2017). Petitioner, Bayerische Beamtenkrankenkasse AG, filed a brief in opposition to the motion for reargument.

The Division of Taxation (Division) appeared by Amanda Hiller, Esq. (Clifford M. Peterson, Esq., of counsel). Petitioner appeared by McDermott, Will & Emery LLP (Arthur R. Rosen, Esq., and Alysse McLoughlin, Esq., of counsel).

Oral argument on the motion was heard in New York, New York on June 28, 2018, which date began the 90-day period for the issuance of this order.

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

ORDER

On September 11, 2017, this Tribunal issued its decision in ***Matter of Bayerische Beamtenkrankenkasse AG*** (***Matter of Bayerische***), involving a notice of deficiency issued to

petitioner for franchise tax on insurance corporations under Article 33 of the Tax Law. In that decision, we held that: the Division properly sought to tax petitioner under Tax Law § 1501; and the Division's exercise of its discretion in employing an alternative allocation method under Tax Law § 1504 (d) rather than the statutory allocation under Tax Law § 1504 (a) was proper because it had shown that the application of the statutory allocation method was out of all appropriate proportion to petitioner's business transacted in New York. Neither of those issues is before us in the Division's motion for reargument.

What the Division seeks to reargue is the conclusion of this Tribunal that the alternative allocation utilized by the Division impermissibly discriminates against petitioner based on its status as an alien insurance corporation and thereby violates the United States-Germany Tax Treaty (Convention between the Federal Republic of Germany and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes [signed August 29, 1989] as amended by a Protocol [signed June 1, 2006] [Tax Treaty]).[1]

In reaching our decision on that issue in ***Matter of Bayerische***, we agreed with petitioner that it was similarly situated to a hypothetical foreign (i.e., non-New York, but U.S.) insurance corporation that, like petitioner, does not have premium income in New York or elsewhere in the United States, but, also like petitioner, does have worldwide premium income and does have real estate investment income in New York. We found that such a hypothetical corporation would be taxed differently than petitioner because such a corporation's entire net income would include its

[1] We note that the issues in this motion for reargument are similar to those presented and addressed in the motion for reargument filed in ***Matter of Landschaftliche Brandkasse Hannover*** (DTA No. 825517), also decided and issued on this date.

worldwide premium income and such a corporation would be able to compute a premiums factor because its total premiums would be greater than zero. We agreed with petitioner that it is its alien corporate status that triggers the differential tax treatment accorded petitioner and the hypothetical non-New York U.S. corporation.

In reaching our decision, we also considered the only argument posited by the Division in response – that the Tax Appeals Tribunal does not have jurisdiction to adjudicate any claim under the Tax Treaty. We concluded that the Tribunal does have such jurisdiction (***see Matter of Reuters, Ltd.***, Tax Appeals Tribunal, March 21, 1991, ***confirmed*** 180 AD2d 270 [3d Dept 1992], ***affd*** 82 NY2d 112 [1993], ***cert denied*** 512 US 1235 [1994]).

The Division urges in its motion for reargument that the Tribunal misapplied a controlling principle of law applicable to tax treaties of the United States, i.e., that domestic corporations and nonresident alien corporations are "never in the same circumstances," and thus the notice of deficiency does not violate the Tax Treaty. The Division also urges in its motion for reargument that the Tribunal "misapprehended the relevant facts" and "misapplied" case law by concluding that petitioner was similarly situated to a non-New York, U.S. corporation because, as alleged by the Division, petitioner's business was not unitary.

At the outset, it must be noted that, while we have the authority to reconsider our own decisions:

> "[w]e have no statutory authority to reconsider our decisions and in the absence of statute, our authority to reconsider our decisions is limited (***Matter of Fisher***, Tax Appeals Tribunal, July 19, 1990; ***Matter of Capitol Coin***, Tax Appeals Tribunal, August 23, 1989; ***Matter of Goldome Capital Inv.***, Tax Appeals Tribunal, November 3, 1988). Our authority is limited, due to the long established principle, as articulated by the Court of Appeals in the case of ***Evans v. Monaghan***, that '[t]he rule which forbids the reopening of a matter once judicially determined by a competent jurisdiction, applies as well to the decisions of special and subordinate

> tribunals as to decisions of courts exercising general judicial powers (citations omitted). Security of person and property requires that determinations in the field of administrative law should be given as much finality as is reasonably possible' ***Evans v. Monaghan***, 306 NY 312, 118 NE2d 452, 457" (***Matter of Jenkins Covington, N.Y.***, Tax Appeals Tribunal, November 21, 1991, ***affd*** 195 AD2d 625 [3d Dept 1993], ***lv denied*** 82 NY2d 664 [1994]; ***see also*** 20 NYCRR 3000.16 [c]; ***Matter of Trieu***, Tax Appeals Tribunal, June 2, 1994, ***confirmed*** 222 AD2d 743 [3d Dept 1995], ***appeal dismissed*** 87 NY2d 1054 [1996], ***lv denied*** 88 NY2d 809 [1996], ***rearg denied*** 88 NY2d 1065 [1996])."

A motion to reargue is thus addressed to our discretion and any reconsideration of a previous decision must be for compelling reasons.

In exercising such limited authority, we recognize that reargument is "designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law" (***Foley v Roche***, 68 AD2d 558, 561 [1st Dept 1979]; ***see also*** Siegel, NY Prac § 254, at 495 [6th ed] [the purpose of a motion to reargue is "to convince the court that it overlooked or misapprehended something on the first go around and ought to change its mind"]). A motion to reargue is not, however, intended to "afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted" (***William P. Pahl Equip. Corp. v Kassis***, 182 AD2d 22, 27 [1st Dept 1992], ***lv dismissed in part, lv denied in part*** 80 NY2d 1005 [1992], ***rearg denied*** 81 NY2d 782 [1993] [citations omitted]).

In response to petitioner's argument in ***Matter of Bayerische*** that the notice of deficiency violated the nondiscrimination provision of the Tax Treaty, the Division argued only that the Tribunal did not have the authority to adjudicate such a claim. The Division did not put forth any of the arguments made in its motion to reargue. Thus, we conclude that this is a case where the Division is attempting to reargue issues that were decided in ***Matter of Bayerische*** by utilizing

arguments not made in the initial proceeding. However, the Division urges that irrespective of that conclusion, the Tribunal should find that it misapplied a controlling principle of law. In support of its position, the Division points to various interpretations of the United States Treasury Department in general, and the Internal Revenue Service in particular, the Organization for Economic Co-operation and various commentaries, as controlling principles of law. While each of these sources might be useful or persuasive to an adjudicating body determining an issue under the Tax Treaty (***accord Matter of Bayerische***, wherein we cite to the U.S. Treasury Department's Technical Explanation of the Tax Treaty as support for our interpretation of the Tax Treaty), we find that such sources do not amount to a controlling principle of law that would require us to reconsider our decision, especially where the Division is attempting to introduce new arguments that it could have made in the initial proceeding (***see Amato v Lord & Taylor, Inc.***, 10 AD3d 374 [2d Dept 2004] ["Here, the plaintiff did not originally present the argument regarding the applicability of the doctrine of res ipsa loquitur"]). Furthermore, as noted by petitioner, there could be different results reached in interpreting the Tax Treaty when dealing with a question of federal income tax than might be reached while dealing with a question under the franchise tax on insurance corporations contained in Article 33 of the Tax Law. While the Division disagrees, this is also an argument that should have been addressed in the initial proceeding.

The Division also asserts that this Tribunal, in treating petitioner as similar to a non-New York U.S. corporation, misapplied the controlling legal principle that would require petitioner's European insurance business to be unitary with its New York investment business in order for this similarity in treatment to apply. In support of its assertion, the Division contends that this Tribunal misapprehended the relevant facts because it must have determined that petitioner's European and

New York businesses were unitary and there was no evidence in the record to support those facts.

In ***Matter of Bayerische***, we specifically pointed out that petitioner was raising its Tax Treaty argument for the first time on exception and found that, as this issue is legal and not factual in nature, it may be raised on exception (***see Matter of Faupel***, Tax Appeals Tribunal, December 23, 2015). The Division made no assertion during the initial Tribunal proceeding that petitioner's argument regarding the Tax Treaty was fact-based and therefore should not be considered by the Tribunal on exception. Again, the only assertion made by the Division in response to this argument in the initial Tribunal proceeding was that the Tribunal had no jurisdiction to consider a conflict under the Tax Treaty. A party cannot be allowed to raise a fact-based argument in a motion to reargue when this Tribunal has not allowed such arguments to be raised on exception (***id.***; ***see also Ahmed v Pannone***, 116 AD3d 802, 805 [2d Dept 2014], ***lv dismissed*** 25 NY3d 964 [2015], ***rearg denied*** 26 NY3d 944 [2015]).

Finally, the Division also seeks to reargue this Tribunal's finding that our conclusion regarding the Tax Treaty compels the same result on the issue of whether the notice of deficiency violates the Foreign Commerce Clause of the United States Constitution. As this conclusion was dicta, it is not addressed in this order (***Matter of Bayerische*** ["As we have determined that the notice of deficiency violates the Tax Treaty and is therefore invalid, it is not necessary for us to address petitioner's Foreign Commerce Clause argument"]).

Succinctly stated, we are cognizant of our responsibility to provide the parties with "as much finality as is reasonably possible" in regard to the Tax Appeals process (***Matter of Evans v Monaghan***, 306 NY 312, 323 [1954]), and in the particular circumstances of this case, we find nothing that would require us to exercise our limited authority to reconsider our decision.

Accordingly, it is ORDERED, ADJUDGED and DECREED that the motion for reargument filed by the Division of Taxation is denied.

DATED: Albany, New York
September 25, 2018

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner