STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

LANDSCHAFTLICHE BRANDKASSE HANNOVER : DECISION
DTA NO. 825517

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, Landschaftliche Brandkasse Hannover, and the Division of Taxation each filed an exception to the determination of the Administrative Law Judge issued on March 3, 2016. Petitioner appeared by McDermott, Will & Emery LLP (Arthur R. Rosen, Esq., and Alysse McLoughlin, Esq., of counsel). The Division of Taxation (Division) appeared by Amanda Hiller, Esq. (Clifford M. Peterson, Esq., and Ellen K. Roach, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division filed a brief in support of its exception and in opposition to petitioner's exception. Petitioner filed a brief in opposition to the Division's exception and in reply to the brief in opposition. The Division filed a reply brief. Oral argument was heard in New York, New York on March 9, 2017, which date began the six-month period for the issuance of this decision.

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

ISSUES[1]

I. Whether the 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 in Tax Law § 1504 (a), but rather should be computed pursuant to an alternative allocation method under the discretionary authority of Tax Law § 1504 (d).

III. Whether, if so, the Division's recomputation of petitioner's franchise tax liability pursuant to Tax Law § 1502 using an alternative allocation method pursuant to Tax Law § 1504 (d) impermissibly discriminates against petitioner as an alien insurer and thereby violates the United States-Germany Tax Treaty and the Foreign Commerce Clause.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, although we have not restated herein the Administrative Law Judge's finding of fact 17, a list of the agreed-upon exhibits submitted by the parties. As so modified, the Administrative Law Judge's findings of fact are set forth below.

1. Petitioner, Landschaftliche Brandkasse Hannover (Landschaftliche) is incorporated in Germany and has many employees in Europe, whom it compensates. Petitioner provides

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[1] The issues and facts in this matter are similar to those presented and addressed in ***Matter of Bayerische Beamtenkrankenkasse AG*** (DTA No. 824762), also decided and issued on this date.

property and casualty 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 property and casualty insurance services in the United States.

4. For the audit period, petitioner was not authorized by the New York Superintendent of 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 New York State.[3]

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

7. The New York Secretary of State has never issued a certificate of authority to petitioner to do business in New York State.

8. During the audit period, petitioner's business activity in New York and the United

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

[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.

States was limited to its participation in a partnership, U.S. Property Fund GMBH & Co. KG (the partnership). The partnership's 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.

9. On or about September 12, 2007, petitioner filed its form CT-33-NL (non-life insurance corporation franchise tax return) and form CT-33-M (insurance corporation MTA surcharge return) for the tax year ended December 31, 2006 (the 2006 returns).

10. On or about December 15, 2008, petitioner filed its form CT-33-NL (non-life insurance corporation franchise tax return) and form CT-33-M (insurance corporation MTA surcharge return) for the tax year ended December 31, 2007 (the 2007 returns).

11. On its forms CT-33-NL, petitioner reported the minimum tax owed under Tax Law § 1502-a ($250.00) for each of the years at issue. On its forms CT-33-M, petitioner reported tax owed in the amount of $43.00 for each of the years at issue. Petitioner's federal effectively connected income reported pursuant to Internal Revenue Code (26 USCA) § 864 (c) on its form 1120-F (U.S. income tax return of a foreign corporation) for the years at issue, consisted primarily of the distributive shares of the partnership's 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 partnership. Petitioner did not write any premiums in the United States and did not report any premium income on its federal income tax returns.

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

13. On November 23, 2012, the Division issued to petitioner a notice of deficiency (L-03882758-2) reflecting, in part, additional tax due for the period in the amount of $1,960,667.00 plus interest, computed through December 14, 2012, for a (then) total amount due of $3,017,613.89. The tax asserted per the notice of deficiency ($1,960,667.00) is that imposed under Tax Law § 1501 (computed under Tax Law § 1502) in the amounts of $11,504.00 (2006) and $1,601,919.00 (2007), plus the Metropolitan Commuter Transportation District (MCTD) tax surcharge imposed and computed under Tax Law § 1505-a, in the amounts of $1,998.00 (2006) and $345,256.00 (2007).[4] 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 business and investment capital (for 2006) or its entire net income (for 2007), or the income allocation percentage that would apply to petitioner under the rules of (Tax Law) Article 9-A (if relevant).

14. The Division has since abated the penalties in the amount of $195,866.00 as reflected in the notice of deficiency.

15. On February 13, 2013, petitioner timely filed a petition for redetermination of the foregoing notice of deficiency with the Division of Tax Appeals.

16. On May 14, 2013, the Division timely filed and served its answer.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

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[4] The Division's calculations underlying its position premised on three-factor allocation (property, payroll and [thrice weighted] receipts) for 2006 and on single-factor allocation (receipts) for 2007 (***see*** exhibit E at sub-exhibit B, pp. 6, 10 - 15 thereto) are set forth as Addendum I at the end of this decision. 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-exhibits C, pp 16, 17 and M thereto) is set forth as Addendum II at the end of this decision.

The Administrative Law Judge determined that petitioner, an unauthorized non-life insurance corporation, was properly subject to the tax imposed under Tax Law § 1501 and not Tax Law § 1502-a. He found that Tax Law § 1502-a was applicable to authorized non-life insurers only. The Administrative Law Judge thus rejected petitioner's argument that the Division's prior interpretation of Tax Law former § 1505 as set forth in certain advisory opinions, by which the Division applied the premiums-based cap on Article 33 taxes to unauthorized life insurance corporations, indicates that the later-enacted Tax Law § 1502-a applies to unauthorized insurance corporations. The Administrative Law Judge also thus rejected petitioner's argument that, by its use of similar applicability language in Tax Law § 1502-a, the Legislature acquiesced to the Division's prior interpretation of the tax cap.

Having concluded that petitioner was taxable pursuant to Tax Law § 1501, the Administrative Law Judge next addressed the allocation issue. The Administrative Law Judge noted that Tax Law § 1504 provides a statutory allocation formula and also permits the Division to use an alternative formula when the Division deems it appropriate. The Administrative Law Judge observed that the Division's use of alternative allocation requires that the Division show that the statutory formula does not reasonably reflect a taxpayer's New York activity and that the proposed alternative allocation does. The Administrative Law Judge next observed that 90% of the statutory allocation formula under Tax Law § 1504 (a) is based on premium income and that petitioner had no New York premium income. In contrast, the Administrative Law Judge noted, the tax to which petitioner is subject, i.e., Tax Law § 1501, is based on entire net income and petitioner did have New York income during the years at issue. Under such circumstances, the

Administrative Law Judge found it reasonable to use a non-premiums-based allocation formula. The Administrative Law Judge thus concluded that the Division established that the statutory allocation formula was inappropriate and that the use of an alternative allocation was reasonable. The Administrative Law Judge also determined that the specific alternative allocation method utilized by the Division, based on allocation factors prescribed by Article 9-A (franchise tax on business corporations), was reasonable.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner does not dispute that its proposed interpretation of Tax Law § 1502-a is inconsistent with a literal reading of that statute. Nonetheless, petitioner contends that Tax Law § 1502-a does not apply exclusively to authorized non-life insurers. As it did below, petitioner contends that the history of the taxation of non-life insurers under Article 33; the Division's long-standing practical construction of the premiums-based cap provision under Tax Law former § 1505 as applied to unauthorized life insurers; and the legislative history regarding the enactment of Tax Law § 1502-a make clear that the Legislature intended for Tax Law § 1502-a to apply to both authorized and unauthorized non-life insurance corporations.

Petitioner's legislative intent argument rests, in significant part, on its interpretation of three advisory opinions issued to unauthorized life insurance corporations prior to the enactment of Tax Law § 1502-a. Such unauthorized insurers had New York investment income, but no New York premium income. The advisory opinions found that, such investment income notwithstanding, the Article 33 tax liability of the unauthorized insurers was zero as a result of the application of the premiums-based cap under Tax Law former § 1505.

Petitioner argues that these advisory opinions established a practical construction of Tax Law former § 1505 by the Division. Petitioner contends that, by applying the cap to unauthorized insurers, the Division deemed the applicability language in Tax Law former § 1510 (i.e., "authorized to transact business in this state under a certificate of authority from the superintendent of insurance") to include unauthorized insurers. Petitioner further contends that the Legislature is charged with knowledge of the Division's statutory interpretation as set forth in the advisory opinions. As the applicability language in Tax Law § 1502-a is identical to the applicability language in Tax Law former § 1510, petitioner asserts that the Legislature acquiesced to the Division's interpretation.

Petitioner also asserts that the statutory construction espoused by the Administrative Law Judge would subject New York unauthorized insurers to retaliatory taxes in other states and thereby frustrate one of the Legislature's purposes in enacting the cap.

Next, petitioner contends that, assuming it is subject to tax pursuant to Tax Law § 1501, the Administrative Law Judge erred in permitting the Division to use an alternative allocation formula to allocate petitioner's entire net income. Petitioner contends that the Division failed to meet its burden to show that the statutory formula in Tax Law § 1504 (a) does not properly reflect its activities, business or income in New York during the years at issue and that the alternative allocation, authorized pursuant to Tax Law § 1504 (d) and which uses Article 9-A allocation principles, does.

Petitioner argues that the Division improperly considered its New York investment activities in isolation and did not consider whether such investment activities were a part of its

insurance business. Petitioner asserts that its New York investment activities were, in fact, an integral part of its insurance business. Absent an investigation regarding whether its New York investment income is separate from its insurance business, petitioner asserts that the Division had no basis to use an alternative allocation method.

Next, petitioner argues that, even if the Division established that the statutory allocation formula in Tax Law § 1504 (a) did not properly reflect petitioner's New York activity, the Division failed to establish that the Article 9-A allocation method used here was a fair and proper allocation. Petitioner makes two points in support of this argument. First, petitioner notes that the Legislature has indicated, via Tax Law § 1504 (a), that premiums are a significant factor in the allocation of an insurance corporation's activities and the Division's Article 9-A allocation does not provide a reasonable alternative to Article 33's heavy use of a premiums factor. Second, petitioner argues that even if the Division properly used an Article 9-A allocation formula, the Division has offered no rationale for failing to include petitioner's worldwide activities, especially considering that Article 9-A income allocation factors are calculated on a worldwide basis.

Petitioner further contends that a discretionary alternative allocation under Article 33 must be consistent with the Legislature's underlying policy objective for allocating the income of insurance corporations. Petitioner argues that by creating a statutory allocation formula heavily weighted on premiums and leaving out any factor measured by investment income, the Legislature intended to provide an incentive for insurers to invest their reserves in New York. According to petitioner, the Division's alternative allocation method runs counter to the

Legislature's underlying policy objective because it relies heavily on investment income and therefore falls outside the Division's discretionary authority under Article 33.

Petitioner also contends that the alternative allocation formula, as applied to it, is unconstitutional because the formula permits the state to tax income "out of all appropriate proportion" to petitioner's New York business. Petitioner thus contends that the Division's use of an alternative allocation method herein violates the Due Process Clause of the United States Constitution. Petitioner stresses that its only connection to New York is its partnership investment and that the discretionary formula completely disregards petitioner's worldwide activities. Petitioner asserts that its worldwide activities may not be disregarded in calculating its New York tax liability because such activities, including its New York real estate investments, constitute a unitary insurance business.

Finally, for the first time on exception, petitioner asserts that the Division's alternative allocation method impermissibly discriminates against it due to its status as an alien insurer and thereby violates the United States-Germany Tax Treaty and the Foreign Commerce Clause of the United States Constitution.[5] These claims are premised on the assertedly different treatment accorded petitioner because, as an alien insurer, it does not report its worldwide income. Petitioner thus contends that it is treated differently than a similarly situated taxpayer that is incorporated in the United States.

In response to petitioner's exception, the Division contends that the Administrative Law

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[5] Petitioner asserts that its Foreign Commerce Clause allegation is an "as applied" constitutional claim. Petitioner also raises a "facial" Foreign Commerce Clause discrimination allegation in order to preserve such claim on appeal.

Judge properly determined that petitioner is subject to tax under Tax Law § 1501 and not Tax Law § 1502-a. The Division asserts that the statutory language is unambiguous and that the term "authorized" as used in Tax Law § 1502-a does not also mean "unauthorized." The Division further contends that it has consistently interpreted the phrase "authorized to transact business in this state under a certificate of authority from the superintendent of insurance" to exclude unauthorized insurance corporations in advisory opinions issued prior to the 2003 enactment of Tax Law § 1502-a. The Division also contends that any reference to the legislative history of Tax Law § 1502-a is inappropriate because that statute is unambiguous.

Next, the Division asserts that the Administrative Law Judge correctly concluded that petitioner's income allocation should not be determined pursuant to Tax Law § 1504 (a), but rather by an alternative method as authorized by Tax Law § 1504 (d). In support of this assertion, the Division notes that petitioner had no New York premiums because it was unauthorized and therefore did not conduct an insurance business in New York. The Division also notes that petitioner had no total premiums because its federal effectively connected income did not include any premium income. The Division contends that there is no statutory authority to include petitioner's worldwide premiums in the denominator of its premiums factor. Hence, the Division asserts that petitioner had a "missing" premiums factor. Under such circumstances, its Article 33 statutory allocation formula would consist of only a wage factor. According to the Division, the use of a single wage factor would not properly reflect petitioner's New York business activity, considering that such activity consisted solely of real estate investments. Since petitioner's New York activity resembled a general business corporation, the Division contends

that the use of an Article 9-A allocation formula is reasonable. The Division asserts that this conclusion was consistent with Tax Law § 1504 (d), which authorizes the use of an alternative allocation under certain circumstances.

The Division contends that petitioner's claim that its tax bases must include its worldwide activities is a factual issue never raised in the pleadings or the stipulation below. Accordingly, the Division asserts that this issue should not be considered by this Tribunal.

With respect to petitioner's contention that its entire net income computed pursuant to Tax Law § 1503 should include its worldwide income, the Division contends that there is no statutory authority in Article 33 to support such a computation.

The Division further asserts that petitioner's U.S. activities are not part of its European insurance business and that, accordingly, petitioner's arguments protesting the Division's use of alternative allocation are without factual support. The Division cites findings of fact 3, 8 and 11 herein in support of this assertion.

The Division contends that petitioner uses the wrong standards to prove that the Division's allocation method results in income "out of all appropriate proportion" to New York activity being subject to tax. The Division again asserts that the denominator of petitioner's income allocation percentage cannot include values for activities performed outside the United States. Accordingly, the Division rejects petitioner's as applied due process challenge.

Regarding petitioner's Foreign Commerce Clause claim, the Division contends that all similarly situated taxpayers, described by the Division as domestic, foreign and alien unauthorized non-life insurance corporations that do not earn premium income in the United

States, but do earn income from domestic investments, will have "missing" premium factors, which could lead to the use of alternative allocation. The Division asserts that petitioner's Foreign Commerce Clause argument is a facial argument because petitioner's complaint is with the Legislature's scheme for the taxation of insurance corporations and the Division's rules regarding missing allocation factors. As such, the Division asserts that this Tribunal may not address this argument. The Division further submits that petitioner's Foreign Commerce Clause argument is without merit because there is no evidence in the record that petitioner's effectively connected income was subject to tax in another jurisdiction.

Finally, the Division contends that the Tax Appeals Tribunal lacks authority to review a claim under the United States-Germany tax treaty.

In support of its own exception, the Division asserts that the determination erroneously implies that the removal of the premiums factor from the allocation percentage was part of the Division's exercise of its discretionary authority. It is the Division's contention that the premiums factor was "missing" because petitioner had zero New York premiums and zero total premiums for allocation purposes (i.e., the premiums factor had a zero in both the numerator and the denominator). The status of "missing" is based on the Division's application of an Article 9-A regulation (20 NYCRR 4-2.2 [b] [1]) to the present matter. The Division asserts that the Article 9-A regulation is applicable here because the allocation section of Article 33 is in pari materia with the allocation section of Article 9-A. The Division thus contends that the removal of the premiums factor was required by regulation and was not an exercise of its discretionary authority.

The Division also requests certain additional findings of fact on exception. We have declined to grant such request.

OPINION

We begin with a brief review of the taxation of insurance corporations from Article 33's inception (***see*** L 1974, c 649) through the period at issue, as relevant to the present matter.

From January 1, 1974 through December 31, 2002, both life and non-life insurance corporations were required to pay a franchise tax under Tax Law § 1501 and an additional franchise tax on premiums under Tax Law former § 1510. The tax under Tax Law § 1501 was imposed on "[e]very domestic insurance corporation and every foreign or alien insurance corporation," and thus did not distinguish between life and non-life or authorized and unauthorized insurers. The premiums tax under Tax Law former § 1510 was imposed on both non-life and life insurance corporations (Tax Law former § 1510 [a] and [b], respectively) that were "authorized to transact business in this state under a certificate of authority from the superintendent of insurance" (that is, authorized insurers). An insurer's liability under this regime was limited (or capped) by Tax Law former § 1505, which became effective January 1, 1977 and which provided, in relevant part, that, "[n]otwithstanding the provisions of [Tax Law §§ 1501 and 1510]," the total amount of a taxpayer's Article 33 tax could not exceed an amount computed "as if" such liability were determined solely under Tax Law former § 1510, although at a substantially higher rate. From 1977 through 1997, the cap was contained in a single provision applicable to both life and non-life insurers.

Effective January 1, 1998, Tax Law former § 1505 (a) was split into two paragraphs ([1]

and [2]) applicable to non-life and life insurers, respectively. The 1998 changes did not amend the statutory language actually imposing the cap, but the paragraph applicable to life insurers added a sentence that explicitly limited the application of the cap to authorized life insurers ("The provisions of this paragraph shall apply to taxpayers subject to tax under [Tax Law former § 1510 [b] [1]"). The paragraph applicable to non-life insurers (i.e., Tax Law former § 1505 [a] [1]), did not add a similar sentence.

The Legislature made several additional amendments to Article 33 in 2003 (***see*** L 2003, c 62, part H3). These changes are at the center of the dispute in the present matter. First, the Legislature enacted Tax Law § 1502-a. As relevant here, Tax Law § 1502-a, by its terms, imposes a franchise tax on non-life insurance corporations that are, in language identical to the previously-enacted Tax Law former § 1510, "authorized to transact business in this state under a certificate of authority from the superintendent of insurance [now superintendent of financial services]." The tax is measured by the authorized insurer's gross direct premiums and is imposed "in lieu of" the franchise tax imposed on "[e]very" insurance corporation under Tax Law § 1501.

As part of the same legislation, the Legislature amended Tax Law §§ 1505 (a) and 1510 (a) to provide that the tax cap and the additional franchise tax on premiums were no longer applicable to non-life insurance corporations for taxable years commencing on or after January 1, 2003.

As a consequence of these 2003 changes, authorized non-life insurance companies were subject to the tax under Tax Law § 1502-a, but were no longer subject to the tax under Tax Law

§§ 1501 or 1510 (a). Life insurance corporations remained taxable under Tax Law §§ 1501 and 1510 (b) (1), subject to the cap under Tax Law § 1505 (a) (2), and a newly enacted floor set forth in Tax Law § 1505 (b) (***see*** L 2003, c 62, part H3).

We turn now to the first issue presented. Whether unauthorized non-life insurance companies are subject to tax under Tax Law § 1502-a, as petitioner contends, is a matter of statutory interpretation, the purpose of which is to ascertain and give effect to the discernible intent of the Legislature (***see 1605 Book Ctr. v Tax Appeals Trib. of State of N.Y.***, 83 NY2d 240, 244-245 [1994], ***cert denied*** 513 US 811 [1994]). "[W]hen the language of a tax statue is unambiguous, it should be construed so as to give effect to the plain meaning of the words used (citation omitted)" (***Matter of New York State Assn. of Counties v Axelrod***, 213 AD2d 18, 24 [1995], ***lv dismissed*** 87 NY2d 918 [1996]). Every word must, if possible, be given meaning (***Sanders v Winship***, 57 NY2d 391, 396 [1982]). This is because "[t]he statutory text is the clearest indicator of legislative intent" (***Matter of DaimlerChrysler Corp. v Spitzer***, 7 NY3d 653, 660 [2006]).

Tax Law § 1502-a is facially unambiguous. It expressly applies to authorized non-life insurance corporations. Petitioner is an unauthorized non-life insurance corporation. Well-established rules of statutory construction, as cited above, would thus seem to compel the logical inference that Tax Law § 1502-a does not apply to petitioner (***see also*** McKinney's Cons. Laws of N.Y., Book 1, Statutes § 240 ["*expressio unius est exclusio alterius*"]).

Petitioner contends, however, that section 1502-a does not "clearly and unambiguously" apply exclusively to authorized non-life insurers. Rather, as previously noted, petitioner

contends that, in several advisory opinions issued prior to the enactment of Tax Law § 1502-a, the Division articulated a practical construction of statutory language identical to that contained in the subject provision, by which, according to petitioner, the Division deemed language applicable to authorized insurers to include unauthorized insurers, and that the Legislature acquiesced to that construction by using the same language in Tax Law § 1502-a.

As petitioner reminds us, the Court of Appeals has held that the absence of facial ambiguity is not necessarily conclusive and that "[s]ound principles of statutory interpretation generally require examination of a statute's legislative history and context to determine its meaning and scope" (***New York State Bankers Assn. v Albright***, 38 NY2d 430, 434 [1975]). However, while legislative history may be relevant and therefore should be considered to ascertain legislative intent, "[a]s a general rule unambiguous language of a statute is alone determinative" (***Riley v County of Broome***, 95 NY2d 455, 463 [2000]).

As petitioner also notes, "[w]here the practical construction of a statute is well known, the Legislature is charged with knowledge and its failure to interfere indicates acquiescence (citation omitted)" (***Engle v Talarico***, 33 NY2d 237, 242 [1973], ***affd*** 33 NY2d 237 [1973]). Such a failure to act is not determinative, however, but merely "some additional evidence of its intention" (***id.***).

Petitioner's proposed construction requires that we find statutory language stating that Tax Law § 1502-a applies to authorized insurers also means that the same provision applies to unauthorized insurers. Considering that every insurance corporation subject to tax under Article 33 is necessarily either authorized or unauthorized, petitioner's construction thus requires us to

ignore such applicability language altogether. Hence, petitioner's proposed construction means that we must disregard the statute's literal meaning.

Statutory construction that departs from the text should be used with "with extreme caution and only where the plain intent and purpose of a statute would otherwise be defeated" (***Bright Homes v Wright***, 8 NY2d 157, 161-162 [1960]). In other words, a construction "rendering statutory language superfluous is to be avoided (citations omitted)" (***Branford House, Inc. v Michetti***, 81 NY2d 681, 688 [1993]).

With these principles in mind, we examine petitioner's contention that certain advisory opinions and the legislative history of Tax Law § 1502-a require us to look behind the words to find legislative intent.

The advisory opinions cited by petitioner were issued to unauthorized life insurance corporations that had New York investment income, but no premium income.[6] The Division determined in these opinions that, notwithstanding their investment income, the Article 33 tax liability of the unauthorized insurers was zero due to the application of the cap under Tax Law former § 1505. The Division reasoned that, as such corporations had no premium income, they had zero premium tax liability under Tax Law former § 1510. Because the cap under Tax Law former § 1505 limited an insurer's total Article 33 tax to the amount of its premiums tax calculated at a higher rate, the advisory opinions concluded that the total Article 33 tax for an unauthorized life insurer with zero premium income must be zero (***see Mound, Cotton &***

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[6] Petitioner correctly notes that the cited advisory opinions are not precedential (***see*** Tax Law § 171 [twenty fourth]; 20 NYCRR 2376.4), but observes that they are "indicative of the [Division's] position concerning the applicability of statutory and regulatory provisions to specific sets of facts" (20 NYCRR 2375.5). We discuss them here only in connection with petitioner's argument that the cited opinions show a practical construction by the Division of relevant statutory language.

Wollan, TSB-A-88[20]C [September 16, 1988]; ***The Manufacturers Life Insurance Company [USA]***, TSB-A-97[23]C [September 3, 1997]; ***Pacific Life Insurance Company***, TSB-A-99[28]C [November 10, 1999]).

The practical construction component of petitioner's argument rests on a finding that, in the cited advisory opinions, the Division construed the applicability language in Tax Law former § 1510 to include unauthorized life insurers. The advisory opinions, however, make no such finding. Rather, such opinions find that unauthorized life insurers were subject to Tax Law former § 1510 *for purposes of the cap* under Tax Law former § 1505, which contained no such applicability language. This distinction is significant because, prior to January 1, 1998, the cap provision (Tax Law former § 1505 [a]) could fairly be construed as negating the applicability language of former section 1510 (i.e., "*[n]otwithstanding*" the provisions of Tax Law § 1510, a taxpayer's Article 33 tax could not exceed an amount computed "*as if*" such liability were determined solely under Tax Law § 1510 [emphasis added]). Two of the advisory opinions cited by petitioner were issued under this earlier version of the cap (***see Mound, Cotton & Wollan***; ***The Manufacturers Life Insurance Company [USA]***). These two advisory opinions thus may not reasonably be understood as interpreting the applicability language of Tax Law § 1510 to include unauthorized life insurers.

The remaining advisory opinion cited by petitioner (***Pacific Life Insurance Company***) was issued after January 1, 1998, when a sentence was added to the cap for life insurers (Tax Law § 1505 [a] [2]) that appears to restrict application of the cap to authorized life insurers: "The provisions of this paragraph shall apply to taxpayers subject to tax under [Tax Law § 1510 (b)

(1).” That advisory opinion, however, takes no notice of this amendment and, hence, it is unclear whether the author of the advisory opinion ever considered it. Accordingly, the interpretation of the applicability language of Tax Law § 1510 in ***Pacific Life Insurance Company*** is, at best, ambiguous.[7]

Additionally, as cited by the Division in its brief, an advisory opinion issued during the same period expressly reached the opposite conclusion by finding that a non-life captive insurer was not subject to the premiums tax under Tax Law § 1510 because it was unauthorized (***see Mactras (Bermuda) Ltd.***, Advisory Opinion, TSB-A-96[15]C [May 10, 1996]).

A review of the legislative history of the 2003 amendments to Article 33 (***see supra*** p 15) indicates that the Legislature intended “to move to a premiums only tax for non-life companies” (Report of the Fiscal Committees on the Executive Budget, Bill Jacket Supplement, p 28, L 2003, c 62, Part H3; ***see also*** Governor’s Bill Jacket, p 27, L 2003, c 62 [the bill “eliminates the tax on non-life insurance companies based on income . . . and, in lieu thereof, establishes a single premiums based tax for such companies”]). The legislative history, however, makes no reference to authorized or unauthorized insurance companies; any policy of the Division regarding

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[7] The 1998 amendment to Tax Law § 1505 (a) (2) notwithstanding, it remained the Division’s position that unauthorized life insurance companies were subject to the cap and thus necessarily had zero liability under Article 33. The Division subsequently issued several advisory opinions consistent with this position (***see Bankers Life and Casualty Company*** TSB-A-04[2]C [April 1, 2004]; ***Conseco Annuity Assurance Company*** TSB-A-04[3]C [April 1, 2004]; ***Conseco Senior Health Insurance Company*** TSB-A-04[4]C [April 1, 2004]; ***Washington National Insurance Company*** TSB-A-04[5]C [April 1, 2004]; ***State Farm Life Insurance Company*** TSB-A-05[16]C [December 2, 2005]; and ***Service Life and Casualty Insurance Company*** TSB-A-08[3]C [April 29, 2008]; ***but compare Service Lloyds Insurance Company*** TSB-A-09[2]C [March 2, 2009] [reaches opposite conclusion with respect to an unauthorized non-life insurer]). As these advisory opinions were issued following the 2003 enactment of Tax Law § 1502-a, they are not relevant to petitioner’s practical construction argument. In 2012, the Division announced a change in its policy with respect to unauthorized life insurers based upon “a better interpretation of the statutory provisions” (***see*** “Filing Requirements and the Calculation of Tax for Unauthorized Insurance Corporations” TSB-M-12[4]C [February 17, 2012]).

unauthorized insurance companies; any established construction by the Division of Tax Law § former 1505 or former § 1510; or any advisory opinions.

Pursuant to the foregoing discussion, we find that neither the cited advisory opinions nor the legislative history provide any basis to depart from the unambiguous statutory language of Tax Law § 1502-a. The advisory opinions fail to establish that, prior to the enactment of Tax Law § 1502-a, the Division ever directly interpreted the similar applicability language in Tax Law § 1510 to include unauthorized life insurers. Furthermore, the legislative history provides no indication that the Legislature was under the misapprehension that the Division had articulated such an interpretation and thus provides no basis to conclude that the Legislature did not mean what it said in Tax Law § 1502-a. Accordingly, we find that, as an unauthorized non-life insurer, petitioner is not subject to the franchise tax on premiums in accordance with Tax Law § 1502-a.

With respect to petitioner's argument that the imposition of the franchise tax under Tax Law § 1501 on unauthorized non-life insurers could lead to retaliatory taxes in other states, we are compelled to follow the unambiguous statutory language of Tax Law § 1502-a, which, as previously noted, is the best indicator of legislative intent. With respect to petitioner's contention that such a finding will frustrate the purpose behind the cap, we note that the cap does not apply to non-life insurers for tax years commencing on or after January 1, 2003.

As petitioner is not taxable pursuant to Tax Law § 1502-a, it follows that petitioner is subject to franchise tax under Tax Law § 1501, as that tax is imposed on "every" insurance corporation for the privilege of exercising its franchise, doing business, employing capital,

owning or leasing property, or maintaining an office in New York.[8]

Liability under Tax Law § 1501 is the greatest amount of tax as determined pursuant to four different tax bases, plus a tax on subsidiary capital (Tax Law § 1502). Here, the Division recalculated petitioner's tax liability for the years at issue using the business and investment capital base for 2006 (Tax Law § 1502 [a] [2]) and the entire net income base for 2007 (Tax Law § 1502 [a] [1]).

The starting point for an insurance corporation's entire net income is its taxable income as reported on its federal return (Tax Law § 1503 [a]). As an alien non-life insurance corporation, petitioner's federal taxable income consisted of income effectively connected with its conduct of business in the United States (***see*** finding of fact 11; ***see also*** Internal Revenue Code (26 USCA) § 864 [c]). Effectively connected income means U.S. source income (***see*** Internal Revenue Code [26 USCA] § 861). As petitioner did not conduct an insurance business in the United States, its federal effectively connected income did not include any premiums. Rather, such income consisted of petitioner's share of the partnership's income from its investments in commercial real estate in the United States, the bulk of which was located in New York. Tax Law § 1503 (b) lists specific modifications to add to or subtract from federal taxable income in computing an insurance corporation's entire net income. There is no modification for the inclusion of an insurance corporation's worldwide income in its entire net income (***compare*** Tax Law § 208 [9] [c] [entire net income under Article 9-A includes income "without the United

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[8] Petitioner's status as an insurance corporation as defined in Tax Law § 1500 (a) is not in dispute in this matter.

States"]). Petitioner's entire net income thus properly excluded its European premium income.[9]

Franchise tax liability as computed pursuant to Tax Law § 1502 is calculated, generally, by multiplying the tax base by the allocation percentage to determine the New York proportionate share of the taxpayer's tax base. The resulting product is then multiplied by the tax rate.

Tax Law § 1504 (a) sets forth the following allocation percentage for the entire net income base under Article 33:

> "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]).

The business and investment capital base also uses the entire net income allocation percentage (Tax Law § 1504 [c] [1]).

As indicated above, the entire net income allocation formula under Tax Law § 1504 (a) consists of a premiums factor and a wage factor. The premiums factor equals the ratio of the

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[9] The statutory definition of entire net income in Tax Law § 1503 effectively undercuts petitioner's argument that its real estate investments were part of a unitary insurance business and that, accordingly, its worldwide income must be considered in any entire net income allocation. Given this statutory definition, there is no authority to include petitioner's worldwide income in any such allocation.

taxpayer's New York premiums for the taxable year to the taxpayer's total premiums for the taxable year. Under the formula, the premiums factor accounts for 90% of the allocation percentage.

The proper treatment of petitioner's premiums factor is a primary point of dispute in this matter. Premiums are "amounts received as consideration for insurance contracts" (Tax Law § 1504 [b] [1]). "New York premiums" are that portion of total premiums "written, procured or received on property or risks located or resident in New York" and also includes premiums that "cannot be specifically assigned as located or resident in any other state" (Tax Law § 1504 [b] [2] [A]). "Total premiums" are total gross premiums, less returns thereon, on all policies (Tax Law § 1504 [b] [1]).

It is undisputed that petitioner had zero New York premiums during the years at issue. It is also clear that petitioner had zero total premiums within the meaning of Tax Law § 1504 (a) (1) during the same period, even though petitioner had premium income from its European insurance business during that time. As noted previously, petitioner's worldwide (i.e., European) premiums were not included in the computation of its federal effectively connected (i.e., U.S. source) income and therefore were not included in its entire net income. Petitioner's entire net income thus consists of U.S. source income only, all of which was income from real estate investments. The allocation under Tax Law § 1504 (a) is intended to apportion the New York share of such U.S. source income. An alien insurance corporation's New York share of *worldwide* premiums is not rationally related to said corporation's New York share of *U.S.* income. Accordingly, petitioner's total premiums may not include its European premiums for

purposes of the premiums factor. Hence, petitioner's premiums factor equals 0/0 and thus cannot be computed.[10]

Although we reach the conclusion advocated by the Division on this point, we disagree with an argument advanced by the Division in support thereof. Specifically, the Division argues that a zero total premiums amount is supported by language in Tax Law § 1504 (b) (3), which provides that total premiums are to be "reported on a written basis or on a paid-for basis, consistent with the basis required by the annual statement filed with the superintendent of financial services pursuant to [Insurance Law § 307]." Insurance Law § 307 (a) (3) provides that such annual statement of an alien insurer shall be a statement of its business and assets in the United States and "shall not contain any statement in regard to its assets and business elsewhere." The Division thus argues the meaning of total premiums under Tax Law § 1504 (b) is necessarily consistent with the requirements of the annual statement referenced in Insurance Law § 307. We disagree. In our view, the quoted language in Tax Law § 1504 (b) (3) simply requires a consistent accounting method. That is, an insurance corporation must account for its total premiums on its tax returns in the same way (that is, on a written basis or on a paid-for basis) that it accounts for its premiums on its Department of Financial Services annual report (***see also*** Insurance Law § 9103 [c]).

As noted previously, the Division did not use the statutory formula under Tax Law § 1504 (a), but rather employed an alternative method of allocation pursuant to its discretionary authority under Tax Law § 1504 (d), which provides, as follows:

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[10] We note that there is no authorization in the Tax Law to simply deem petitioner's premiums factor to be zero, as petitioner suggests in its reply brief.

> "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]).

To properly invoke its discretionary authority, the Division must show that the statutory formula 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 [MD] v Tax Appeals Trib. of State of N.Y.***, 85 NY2d 139, 146 [1995] ***quoting Container Corp. v Franchise Tax Bd.***, 463 US 159, 170 [1983]).

We find that the Division has met the ***British Land*** standard for the use of the alternative allocation method employed herein. As noted by the Administrative Law Judge, the use of a premiums-based allocation formula to allocate entire net income where, as here, the taxpayer has zero New York premiums, zero total premiums and zero premiums included in its entire net income "appears questionable at the outset." Considering that petitioner's premiums factor cannot be computed, use of the statutory formula here would require an allocation based solely on petitioner's wage factor. The wage factor, however, is plainly intended to have only a marginal impact (i.e., 10%) on the statutory formula, in contrast to the 90% weight accorded the

premiums factor. In our view, the use of such a truncated statutory formula would result in an allocation that is "out of all appropriate proportion" to petitioner's business in New York (***id.***). The Division thus properly used an alternative method of allocation pursuant to its discretionary authority under Tax Law § 1504 (d).

We also agree with the Administrative Law Judge that the allocation method used by the Division on audit effected a "fair and proper allocation" of petitioner's entire net income and thus also met the ***British Land*** standard. As indicated in Addendum I, the Division calculated petitioner's allocation percentage using Article 9-A rules in accordance with Tax Law § 210 (3) (a) (10) (A) (ii); (3) (a) (2) and 20 NYCRR 4-6.5 (a) (1). Petitioner does not contest the computations that resulted in the audited allocation percentages for the years at issue.

Petitioner does, however, argue that the alternative allocation is flawed because the Division did not supply a reasonable alternative to the premiums factor. We disagree. The Division's use of the Article 9-A factors was reasonable here because petitioner had no premiums that could be included in a premiums factor. We note also that petitioner offered no suggestion as to what such a reasonable alternative to premiums might be under the present circumstances.

Noting that Article 9-A income allocation factors are calculated on a worldwide basis, petitioner also asserts that the Division improperly failed to include petitioner's worldwide activities in its calculation of petitioner's tax base and allocation percentage as required under Article 9-A. We disagree. Tax bases and allocation percentages under Article 9-A are calculated on a worldwide basis because entire net income under that Article necessarily includes

worldwide income (***see*** Tax Law § 208 [9] [c]). As discussed, entire net income for purposes of Article 33 (Tax Law § 1503) does not necessarily include an alien taxpayer's worldwide income. While the Division has discretionary authority under Tax Law § 1504 (d) to modify the statutory allocation formula, it lacks any similar authority to modify the statutory definition of entire net income. As also discussed, worldwide allocation factors are not properly employed where entire net income is limited to U.S. source income.

We now turn to the third issue, raised for the first time on exception.[11] Petitioner contends that the Division's alternative allocation impermissibly discriminates against it 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]).

The Division contends, however, that the Tax Appeals Tribunal does not have jurisdiction to review a claim under the Tax Treaty. In support of its position, the Division cites Article 1, paragraph 3, subparagraph (a), clause (aa) of the Tax Treaty, as amended by the Protocol, which provides, in part, that "the Contracting States agree that any question arising as to the interpretation or application of the Convention and, in particular, whether a taxation measure is within the scope of the Convention, shall be determined exclusively in accordance with the provisions of Article 25 (Mutual Agreement Procedure)."

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[11] 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).

Article 25, paragraph 1 of the Tax Treaty (Mutual Agreement Procedure) provides that:

> "Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, *he may, irrespective of the remedies provided by the domestic law of those States*, present his [nondiscrimination case under paragraph 1 of Article 24] to the competent authority of the Contracting State of which he is a national (emphasis added)."

The Tax Treaty defines competent authority as "the Secretary of the Treasury or his delegate" (Tax Treaty Article 3 [1] [h] [aa]).

The Division interprets the foregoing provisions as restricting interpretation of the Tax Treaty to the Mutual Agreement Procedure identified therein and observes that the present administrative adjudication is not such a procedure and that this Tribunal is not such a competent authority.

We disagree with the Division that the above-cited provisions mean that this Tribunal lacks jurisdiction to review a claim under the Tax Treaty.

As noted, Article 1, paragraph 3 of the Tax Treaty provides that questions regarding interpretation or application of the treaty are to be resolved in accordance with Article 25. The language of Article 25, as quoted above, indicates that an aggrieved taxpayer "may" seek relief through the Mutual Agreement Procedure "irrespective" of remedies provided by the laws of the taxpayer's country. In our view, such language indicates that the availability of the Mutual Agreement Procedure does not preclude an American or German national from pursuing other available means of redress.

We observe that Article 1, paragraph 3 was added to the Tax Treaty by the 2006 Protocol. No change was made at that time (or has since been made) to the language in Article 25

acknowledging the availability of other remedies to address claimed treaty violations (i.e., the "irrespective" clause). If the drafters of the Protocol intended for the Mutual Agreement Procedure to be the exclusive means to adjudicate disputes under the treaty, as the Division claims, it is reasonable to conclude that they would have amended Article 25 accordingly.

This interpretation of the Tax Treaty's language is in accord with the U.S. Treasury Department's Technical Explanation of the treaty, which states that Article 1, paragraph 3 "specifically relates to non-discrimination obligations of the Contracting States under other agreements." The Technical Explanation further provides:

> "[Article 1] paragraph 3 provides that, notwithstanding any other agreement to which the Contracting States [i.e., the United States and Germany] may be parties, a dispute concerning the interpretation or application of the Convention, including a dispute concerning whether a taxation measure is within the scope of the Convention, shall be considered only by the competent authorities of the Contracting States, and the procedures under Article 25 (Mutual Agreement Procedure) of the Convention exclusively shall apply to the dispute. Thus, dispute resolution procedures that may be incorporated into trade, investment, or other agreements between the Contracting States shall not apply in determining the interpretation, application or scope of the Convention" (Treasury Department Technical Explanation of the Convention and Protocol 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 [Technical Explanation], Article 1).

The Technical Explanation thus indicates that Article 1, paragraph 3 is intended to address disputes arising under other treaties entered into by the United States and Germany. Such disputes could require an interpretation of the Tax Treaty. Article 1, paragraph 3 provides that such disputes must be resolved by the Mutual Agreement Procedure.

We note also that this Tribunal has previously exercised its jurisdiction to consider the

question of whether an allocation of entire net income under Article 9-A of the Tax Law violated a similar nondiscrimination clause contained in a tax treaty between the United States and the United Kingdom (***see Matter of Reuters, Ltd.***, Tax Appeals Tribunal, March 21, 1991, ***confirmed sub nom Matter of Reuters, Ltd. v Tax Appeals Trib.*** (180 AD2d 270 [1992], ***affd*** 82 NY2d 112 [1993], ***cert denied*** 512 US 1235 [1994]).

We thus conclude that we have jurisdiction to consider petitioner's contention that the Division's action in the present matter violates the Tax Treaty's nondiscrimination provision.

Before addressing petitioner's argument, we note that treaties are the supreme law of the land (***see*** US Const, art VI) and that they are part of the law of every state (***see United States v City of Glen Cove***, 322 F Supp 149, 155 [1971], ***affd*** 450 F2d 884 [1971]). Accordingly, if the Tax Treaty and the Tax Law are in conflict in the present matter, the Tax Treaty must prevail and the notice of deficiency must be deemed invalid (***see Scandinavian Airlines Sys. v County of Los Angeles***, 56 Cal 2d 11, 37 [1961], ***cert denied*** 368 US 899 [1961]).

We note further that "[a] treaty is to be liberally construed to give effect to the purpose which animates it" and its language should be given "its ordinary meaning, unless a more restricted sense is clearly intended" (***American Air Liquide v Commr.***, 116 TC 23, 28, 29 [2001], ***affd*** 45 Fed.Appx 721 [2002]).

Turning now to the substance of petitioner's Tax Treaty claim, the nondiscrimination provision in Article 24, paragraph 1 of the Tax Treaty, provides in relevant part:

> "Nationals of a Contracting State [i.e., the United States or Germany] shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith that is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same

circumstances are or may be subjected."

A German national is defined by the Tax Treaty, in relevant part as "any legal person, partnership or association deriving its status as such from the law in force in the Federal Republic of Germany" (Tax Treaty Article 3 [1] [h] [bb]). The treaty's definition of "person" includes a "company" (***id.*** at Article 3 [1] [d]). For purposes of the nondiscrimination provision in Article 24, "Contracting State" as applied to the United States includes state and local governments, and "taxation" includes state and local taxes (***see*** Tax Treaty Art. 24 [6] ["The provisions of this Article shall . . . apply to taxes of every kind and description imposed by a Contracting State or a political subdivision or local authority thereof."]; ***see also*** Technical Explanation, Article 2 ["Except with respect to Article 24 (Nondiscrimination), state and local taxes in the United States are not covered by the Convention. Article 24 prohibits discriminatory taxation with respect to all taxes, whether or not they are covered taxes under Article 2, and whether they are imposed by the Contracting States, their political subdivisions or local authorities."]).

Pursuant to the foregoing, we find that the franchise tax at issue is subject to the nondiscrimination provision of the Tax Treaty and that petitioner is a German national eligible for relief under the same provision.

Petitioner asserts that impermissible discrimination under the Tax Treaty does not require less favorable treatment of German taxpayers, but more broadly prohibits taxation that is "*other* or more burdensome (emphasis added)" than the taxing requirements imposed on the taxing country's nationals. We agree with petitioner that the ordinary meaning of "other or more burdensome" includes different treatment and that, accordingly, petitioner need not prove that an alternative calculation of its liability under Article 33 using worldwide allocation percentages and

a worldwide tax base would result in a lower tax than that asserted in the notice of deficiency.

Petitioner contends that the Division treated it differently in the present matter and did so because of its status as an alien insurance corporation. Specifically, petitioner asserts that the Division used the alternative allocation formula because it had no premiums factor and that it had no premiums factor because it was an alien insurance corporation with no U.S. source premiums.[12] Petitioner also contends that the alternative allocation discriminates against it because it also does not permit a worldwide allocation, a circumstance that also stems from petitioner's status as an alien insurance corporation.

Petitioner compares its situation to that of a 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. Such a hypothetical corporation would be taxed differently than petitioner because such a corporation's entire net income would include its worldwide premium income and such a corporation would be able to compute a premiums factor because its total premiums would be greater than zero. In sum, such a corporation would allocate its entire net income pursuant to the statutory formula in Tax Law § 1504 (a).

We agree with petitioner that the hypothetical corporation described above is similarly situated to it in all respects, except for petitioner's status as an alien corporation. We further

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[12] To review, petitioner had a missing premiums factor because it had zero total premiums (and thus its premiums factor fraction had a zero denominator). It had zero total premiums because its federal taxable income, and hence its entire net income, included only its effectively connected income (and not its worldwide income). It reported its effectively connected income on its federal returns because it was an alien corporation.

agree with petitioner that its alien corporate status triggers the differential tax treatment accorded petitioner and the hypothetical non-New York U.S. corporation. Furthermore, given the statutory definition of entire net income in Tax Law § 1503 and the allocation provisions in Tax Law § 1504 (a), we see no way that the conflicting provisions can be reconciled (***see American Air Liquide v Commr.***, 116 TC at 29 ["When a treaty and a statute relate to the same subject, courts attempt to construe them so as to give effect to both."]).

Accordingly, we find that petitioner's tax treatment as prescribed under Article 33 and as described herein subjects it to taxation or other connected requirements that are "other or more burdensome" than the taxation or other connected requirements to which U.S. nationals (i.e., U.S. insurance corporations) are subjected and that such differential treatment contravenes Article 24 of the Tax Treaty.

As noted previously, where the Tax Treaty and the Tax Law are in conflict, the Tax Treaty must prevail (***see Scandinavian Airlines Sys. v County of Los Angeles***). Hence, the notice of deficiency herein must be canceled.

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. We note, however, that our finding with respect to the Tax Treaty also compels the conclusion that the relevant provisions of Article 33, as applied to petitioner in the present matter, impede the federal government from "speaking with one voice" in regulating foreign trade, contrary to the Foreign Commerce Clause (***see Japan Line, Ltd. v Los Angeles County***, 441 US 434, 451 [1979]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Landschaftliche Brandkasse Hannover is granted;

2. The exception of the Division of Taxation is denied;

3. The determination of the Administrative Law Judge is reversed;

4. The petition of Landschaftliche Brandkasse Hannover is granted; and

5. The notice of deficiency dated November 23, 2012 is canceled.

Addendum I

Petitioner's tax was computed based on allocated business and investment capital (for 2006) and on allocated entire net income (for 2007), with the Division's allocations thereof computed as follows (***see*** exhibit E at sub-exhibit B, schedules E and E1):

2006

	Property	Receipts	Wages
Total New York Partnership Property, Receipts &Wages:	$207,508,858.00	$37,452,639.00	$1,496,204.00
Total (everywhere) Partnership Property, Receipts &Wages:	$281,668,353.00	$127,798,134.00	$1,496,204.00

Petitioner's Distributive Share of Partnership Property, Receipts Wages @ 7.7492%:

	Property	Receipts	Wages
Total New York Share:	$16,080,276.00	$2,902,280..00	$115,944.00
Total (everywhere) Share:	$21,827,044.00	$9,903,333.00	$115,944.00

New York Property Factor ($16,080,276.00 ÷ $21,827,044.00)	73.6713%
New York Receipts Factor ($2,902,280.00 ÷ $9,903,333.00)	29.3061%
New York Receipts Factor as (thrice) Weighted (29.3061% x 3)	87.9183%
New York Wages Factor ($115,944.00 ÷ $115,944.00)	100.0000%
Sum of Factors	261.5896%
Number of Factors	÷ 5
Business and Investment Capital Allocation Percentage	52.3179%

2007

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

Petitioner's Distributive Share of Partnership Receipts @ 6.6787%:

Distributive Share of New York Receipts:	$37,485,255.00
Distributive Share of Total (everywhere) Receipts:	$38,585,869.00
New York Entire Net Income Allocation Percentage	97.1476%
($37,485,255.00 ÷ $38,585,869.00)	

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 ($115,944.00), results in the allocation of 100% of petitioner's capital base for 2006 ($12,621,299.00) and entire net income base for 2007 ($23,228,324.00) 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 respective amounts of $20,194.00 (2006) and $1,649,211.00 (2007), plus an MTA surcharge tax under Tax Law § 1505-a in the respective amounts of $3,433.00 (2006) and $355,393.00 (2007). Such amounts, after reductions to reflect taxes paid with petitioner's returns and taxes assessed per the notice of deficiency, represent increases to liability under Tax Law § 1501 in the respective amounts of $8,440.00 (2006) and $47,042.00 (2007), and under Tax Law § 1505-a in the respective amounts of $1,435.00 (2006) and $10,137.00 (2007), over the amounts of such taxes asserted as due under the notice of deficiency.

DATED: Albany, New York
September 11, 2017

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner