STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **ARK BRYANT PARK, LLC, f/k/a** **ARK BRYANT PARK CORPORATION** For Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the period October 3, 2010 through September 29, 2012.	: : : : : :	DETERMINATION DTA NO. 827801

Petitioner, Ark Bryant Park, LLC, f/k/a Ark Bryant Park Corporation, filed a petition for revision of a determination or for refund of corporation franchise tax under article 9-A of the Tax Law for the 2010 and 2011 tax periods.

A hearing was held before James P. Connolly, Administrative Law Judge, in New York, New York, on May 30, 2018, at 10:30 a.m., with all briefs to be submitted by September 28, 2018. Petitioner appeared by Andersen Tax, LLC (Kenneth T. Zemsky, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (David Markey, Esq., of counsel). After due consideration of the documents and arguments submitted, James P. Connolly, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether, in computing the entire net income base of its corporation franchise tax liability under article 9-A for the 2010 and 2011 tax periods, petitioner properly deducted the amount it treated as an “excess FICA credit” pursuant to Internal Revenue Code § 45B on its federal income tax return for those periods.

II. Whether the Division of Taxation violated petitioner's right to equal protection under the laws by denying the "other subtraction" petitioner took, based on its federal excess FICA credit, in computing the entire net income base of its corporation franchise tax liability under article 9-A for the years 2010 and 2011.

FINDINGS OF FACT

1. Petitioner, Ark Bryant Park, LLC, is a New York corporation owning a number of restaurants in New York and other states. Many of its employees receive tips from customers, including cooks and wait-staff. As the employer, petitioner is obligated to track the amount of the tip income earned by its employees, report that income to the Internal Revenue Service (IRS), and pay or pay over the employer and employee portions of the social security taxes and Medicare taxes (FICA taxes) on such income. Internal Revenue Code (IRC) § 45B, however, provides that food or beverage establishments may take a credit for "excess employer social security tax." IRC § 45B defines the quoted term to mean such employer's share of the social security tax or Medicare tax due under IRC § 3111 on its employees' cash tip income that exceeds tip income treated as wages for purposes of the minimum wage laws (excess FICA taxes). The parties do not dispute the amount of the excess FICA taxes in this matter.

2. Petitioner filed a New York State general business corporation franchise tax return (form CT-3) and a general business corporation MTA surcharge return (form CT-3M/4M) covering the period October 3, 2010 through October 1, 2011(2010 tax period). On the return, petitioner's entire net income tax base yielded the highest tax of its alternative tax bases. On line 15 of the return, petitioner reported "[o]ther subtractions" in the amount of $136,882.00, which

matched the amount petitioner reported on line 12 of its federal form 8846, credit for employer social security and medicare taxes paid on certain employee tips (excess FICA credit). Petitioner attached the form to its federal form 1120, U.S. corporation income tax return, that it filed for the 2010 tax period and included the amount of the excess FICA credit as a general business credit at part I, tax computation, line 5c of the federal return.

3. Petitioner's CT-3 for the 2010 tax period also reported a net operating loss (NOL) deduction in the amount of $559,590.00.

4. Petitioner filed a form New York State CT-3 and a form CT-3M/4M covering the period October 2, 2011 to September 29, 2012 (2011 tax period). Petitioner's entire net income base was the highest of its alternative tax bases on its form CT-3 for the 2011 tax period. On line 15 of its form CT-3, petitioner reported "[o]ther subtractions" of $159,437.00. That amount matched the excess FICA credit petitioner reported on line 12 of its federal form 8846, which petitioner attached to the form 1120 that it filed for the 2011 tax period, and reported on that return as a general business credit, as in the 2010 tax period.

5. The Division conducted an audit of petitioner's article 9-A liability for the 2010 and 2011 tax periods. The Division disallowed the "other subtraction" petitioner took based on the excess FICA credit for each of those periods and also disallowed the NOL deduction petitioner took for the 2010 tax period.

6. Based on those adjustments, the Division issued notice of deficiency number L-044784882 (Notice), dated May 18, 2016, asserting $71,425.00 in additional tax, plus interest, under article 9-A of the Tax Law, including the MTA surcharge. Petitioner later agreed that the

Division was correct in disallowing the NOL deduction petitioner took for the 2010 tax period and it paid the tax and interest attributable to that part of the Notice.

7. At the hearing, petitioner introduced the testimony of Wayne Trumbull, an attorney currently employed with Andersen Tax, LLC, who has been a tax return preparer for 20 years and prepared petitioner's returns for the years at issue. In response to the question whether "he had personal knowledge of, in certain cases, New York allowing the deduction [for the excess FICA taxes]," Mr. Trumbull replied, "yes." He did not describe the facts of those cases where New York had allowed the deduction or how he came upon that knowledge. Petitioner also produced an article from the April 2015 edition of the magazine Metropolitan Corporate Counsel, in which the author, Kurt S. Kiess, identified as a partner in Marks Panneth LLP, stated that the New York City Department of Finance auditors have taken varying positions with regard to the deductibility of the excess FICA taxes, as some auditors have allowed the excess FICA taxes amount as a reduction of taxable net income, while others do not. Mr. Trumbull testified that the author's statements also applied to New York State, as he had "familiarity with situations where the FICA tip credit has been allowed in whole or in part," again not detailing those cases.

8. Mr. Trumbull testified that, as an alternative filing position, petitioner could have reported the excess FICA taxes on its form CT-3 for the periods in question by preparing a pro forma federal form 1120, in which petitioner would take a deduction for the excess FICA taxes, instead of a credit under IRC § 45B, as it did on the federal forms 1120 that it actually filed with the IRS. By taking a deduction for excess FICA taxes on the pro forma 1120, petitioner would have shown a lower federal taxable income, which is the starting point for calculating the entire

net income base of the corporation franchise tax in article 9-A of the Tax Law. The Division did not cross-examine Mr. Trumbull.

9. The auditor who performed the audit is no longer employed by the Division and did not testify at the hearing. The Division instead introduced an affidavit of Winston Dipchand, Tax Auditor II, dated May 7, 2018, who supervised the auditor. The affidavit explains the basis of the audit adjustments and notes that petitioner made a payment in the amount of $65,000.00 on the Notice.

10. The audit report submitted by the Division indicates that, in rejecting petitioner's other deduction based on the excess FICA credit, the auditor followed the result in an earlier audit of petitioner, in which the Division concluded that there is no subtraction modification for the excess FICA credit amount.

11. Petitioner submitted 18 proposed findings of fact with its brief, while the Division submitted eight proposed findings of fact. In accordance with State Administrative Procedure Act § 307 (1), the following rulings are made with respect to such proposed findings of fact:

> Petitioner's proposed findings of fact 1 through 4, 8, and 16 have been accepted as supported by the record and are substantially incorporated herein;
>
> Petitioner's proposed findings of fact 5, 6, 11, 13, 14, 17, and 18 are modified to better reflect the record, and, as so modified, are substantially incorporated herein;
>
> Petitioner's proposed findings of fact 12 and 15 are rejected as irrelevant; and
>
> Petitioner's proposed findings of fact 7, 9 and 10 are rejected as constituting legal conclusions.
>
> The Division's proposed findings of fact 1 through 7 are accepted as supported by the record and are substantially incorporated herein, while its proposed finding of fact 8 is modified to remove material irrelevant to the legal issues herein, and, as so modified, is substantially incorporated herein.

CONCLUSIONS OF LAW

A. The primary issue here is whether, in computing its article 9-A liability for the 2010 and 2011 tax periods, petitioner properly took a subtraction modification for the amount of its excess FICA taxes. Federally, an employer's share of the FICA taxes it pays on behalf of its employees is a deductible expense, provided that the expense relates to a profit seeking business (***see*** 26 USC § 162 [a]; 7 Mertens Law of Fed. Income Tax'n § 27, citing 16 Treas. Reg § 1.164-2 [f]). IRC § 45B, however, provides that food or beverage establishments may take a credit for excess FICA taxes. Crucially, for this case, however, section 45B (c) provides that "[n]o deduction shall be allowed under this chapter for any amount taken into account in determining the credit under this section." Given that a tax credit is more favorable, in terms of tax savings, than a deduction in the same amount, it is not surprising that, on its federal form 1120 for the periods in question, petitioner took the credit allowed it under IRC § 45B and, thus, was ineligible to take a deduction for the excess FICA taxes it paid in computing its federal taxable income. The question here is how this election affects petitioner's New York corporation franchise tax liability under article 9-A.

Tax Law § 209 (1) imposes franchise tax on the basis of entire net income (ENI) or other basis as may be applicable, for the privilege of a corporation's exercising its corporate franchise, or of doing business or of employing capital or leasing property in New York.[1] Tax Law § 209-B imposes a surcharge on that privilege when the taxpayer maintains an office in the metropolitan commuter transportation district. As relevant herein, Tax Law § 208 (9) defines ENI as "total net

---

[1] Article 9-A was extensively amended by chapter 59 of the Laws of 2014 and chapter 59 of the Laws of 2015. All references to provisions in article 9-A herein will therefore refer to the version in effect during the periods at issue.

income from all sources, which shall be presumably the same as the entire taxable income . . . which the taxpayer is required to report to the United States treasury department . . . ," with certain subtraction and addition modifications. This starting point for ENI is referred to as "federal taxable income" (FTI) in the Division's regulations and is generally the same as taxable income as defined in IRC § 63 (***see*** 20 NYCRR 3-2.2 [b]). As discussed above, having taken the excess FICA credit on its federal return, petitioner was not permitted, and did not take, any deduction for the excess FICA taxes it paid in computing its taxable income under IRC § 63. Thus, the FTI starting point of petitioner's ENI includes in it no deduction for excess FICA taxes.

B. Petitioner's filing position was that it was entitled to take a subtraction modification for the amount of its excess FICA taxes under IRC § 45B. As the Division contends, none of the subtraction modification provided for in Tax Law § 208 (9) (a) encompasses a deduction for the amount of excess FICA taxes. Tax Law § 208 (9) (a) (7) provides a subtraction modification for "that portion of wages and salaries paid or incurred for the taxable year for which a deduction is not allowed pursuant to the provisions of [IRC § 280C]." As the Division points out, IRC § 45B is not one of the wage credit provisions mentioned in IRC § 280C, and thus § 208 (9) (a) (7) does not provide any subtraction modification for excess FICA taxes.[2]

C. For its part, petitioner does not dispute that the subtraction modification in Tax Law § 208 (9) (a) (7) does not cover its claimed subtraction modification for excess FICA taxes. Its argument instead relies on the federal conformity rule in Tax Law § 607 (a), which provides:

---

[2] IRC § 280C provides that "[n]o deduction shall be allowed for that portion of the wages or salaries paid or incurred for the taxable year which is equal to the sum of the credits determined for the taxable year under [IRC] sections 45A (a), 45P (a), 51 (a), and 1396 (a), 1400P (b), and 1400R."

> "Any term used in this article shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required but such meaning shall be subject to the exceptions or modifications prescribed in this article or by statute."

From this rule petitioner derives the principle that "the New York Tax Law [must be put] in the same context as the federal tax law." Petitioner asserts that the purpose of the prohibition in IRC § 45B (c) against taking a deduction for excess FICA taxes if a taxpayer is taking a credit under that provision is to prevent a taxpayer from receiving a double benefit, which is evidenced by the provision's header -- "Denial of double benefit." Next, petitioner notes that article 9-A has no credit provision for excess FICA taxes, so that treating the excess FICA taxes as a deduction would not lead to any double benefit for the taxpayer in the article 9-A context. Petitioner then reasons as follows:

> "Therefore, to place New York Tax Law in the same context as the federal tax law . . . one must look to IRC section 45B as if no credit were claimed federally. When one does so, section 45B makes clear: taxpayers are entitled to a deduction. Hence reading New York law in the comparable context as federal compels allowance of the excess FICA wage deduction."

In claiming that it must be allowed a deduction for its excess FICA taxes despite there being no subtraction modification for excess FICA taxes, petitioner is really arguing that its FTI starting point for its ENI base should be reduced as if it had taken the deduction for excess FICA taxes, instead of the credit allowed by IRC § 45B. In fact, Mr. Trumbull, petitioner's tax preparer, expressed petitioner's argument in exactly this way (***see*** finding of fact 8). The question that needs to be resolved, then, is whether allowing petitioner to make a different election for purposes of computing its ENI than it made in computing its FTI on its federal form 1120 would be consistent with the statutory mandate that a taxpayer's ENI "shall be presumably

the same as the entire taxable income . . . which the taxpayer is required to report to the United States treasury department . . . except as hereinafter provided" (Tax Law § 208 [9]). The Tax Appeals Tribunal has interpreted this provision to mean that "the starting place for the computation of income taxable under the franchise tax is the [IRC] and conformity with Federal income tax treatment is to be expected in the absence of countervailing legal or policy considerations" (***Matter of AIL Systems, Inc.***, Tax Appeals Tribunal, May 4, 2006). In the personal income tax context, the Appellate Division has said that:

> "Federal conformity was an important step in the efficient administrative and enforcement of the State income tax laws. Deviation from the Federal adjusted gross income may only be permitted in those limited instances provided by the Legislature in the applicable statute" (***Guerney v Tully***, 67 AD2d 303, 306 [3d Dept 1979]).

The Court of Appeals has referred to this policy as a "strict policy of federal conformity" (***Hunt v State Tax Comm'n***, 65 NY2d 13, 19 [1985]). Here, petitioner has not cited a policy or statutory provision that would allow it to deviate on its article 9-A tax return from the election it made on its federal form 1120 with regard to the treatment of excess FICA taxes, and, accordingly, its argument fails.

D. Of all the cases petitioner cites, only one, ***Hunt***, involves a situation in which a taxpayer was allowed to deviate from the federally-conformed starting point of its New York State income tax liability, as petitioner wishes to do here. In ***Hunt***, the issue was whether the deduction for state and local taxes was a tax preference item required to be included in calculating New York's minimum tax (Tax Law former § 622). That section provided for a minimum tax equal to the sum of "items of tax preference" reduced by specified amounts. The term "items of tax preference" was statutorily defined as the federal items of tax preference,

subject to certain modifications set forth in the Tax Law. One of the federal items of tax preference was the deduction for state and local taxes. Even though state and local taxes were included in the federal base that was the base of New York's minimum tax, the Court of Appeals held that the state and local tax deduction was not properly included in the New York base. In reaching that conclusion, the Court found that the "tax benefit rule" codified at IRC § 58 (h) was applicable under the federal conformity principle (***see Hunt***, 65 NY2d at 14-15, 17). That provision authorized the Secretary of the Treasury to prescribe regulations "under which items of tax preference shall be properly adjusted where the tax treatment giving rise to such items will not result in the reduction of the taxpayer's tax under this subtitle for any taxable years." Because the state and local tax deduction did not provide any tax benefit to petitioner on its New York State tax return, the court concluded that, under the tax benefit rule codified in IRC former § 58 (h), petitioner need not include a state and local tax deduction as a tax preference item in computing the base of its New York minimum tax.

Importantly, the ***Hunt*** court took pains to distinguish the case before it from its decision in ***Matter of Kreiss v State Tax Comm'n*** (61 NY2d 916 [1984]), in which it had relied on the strict federal conformity principle to uphold the State's rejection of petitioners' refund claim. In ***Kreiss***, the taxpayers had reported a $40,000.00 capital gain on both their 1974 New York State and federal income tax returns. When the amount of the gain was subsequently reduced to $16,700.00 as a result of litigation, petitioners sought a refund from the IRS, and from New York State based on Tax Law § 607 (a). The IRS granted the refund based on the claim of right provision in IRC § 1341 but the State denied the refund claim, which denial was upheld in ***Kreiss***. The ***Hunt*** court explained the decision to uphold the State's denial of the refund claim in

Kreiss was a proper application of the federal conformity principle because IRC § 1341, relied on by the IRS, was procedural in nature and did not relate to the computation of the tax, rendering the incorporation language of Tax Law § 607 (a) an insufficient basis for requiring the State to grant petitioner a refund.

Thus, in ***Hunt***, the Court of Appeals did not simply ignore the federal conformity principle, and allow a single IRC provision to apply in one manner on the taxpayer's federal income tax return and in another manner on the taxpayer's New York State return, due to the different context of the State return. Instead, it concluded that the provision applied differently in the New York State context because another IRC provision – the tax benefit rule in IRC former § 58 (h) -- came into play, given the different New York Tax Law context.[3] The current version of the tax benefit rule in the IRC is analyzed below, and is found not to apply. Petitioner does not cite that rule or any other IRC provision to justify allowing it to make a different election with regard to its excess FICA taxes on its New York State return than on its federal return. Rather, the crux of its argument seems to be that it should be allowed to make a different election on its State return because, otherwise, it will not receive any deduction for its excess FICA taxes, which normally are a deductible expense. However, the fact that application of the federal conformity principle leads to the taxpayer losing out on a tax benefit does not justify a deviation from that principle (***see Toronto Dominion Holdings***, 162 AD3d at 1258 [Appellate Division upholds the

---

[3] The Tribunal followed the same course in ***Matter of Brooke-Bonds Group (U.S.), Inc***. (Tax Appeals Tribunal, December 28, 1995), in which the Tribunal allowed the petitioner to claim a net operating loss deduction amount that was less than it had claimed on its Federal return for the year in question because of the rule in IRC § 172 limiting an NOL deduction to the amount necessary to reduce a taxpayer's net income to zero. The Tribunal reasoned, in part, that "conformity to this federal NOL rule took precedence over conformity to the amount of the federal deduction" (***Matter of TD Holdings, II, Inc.***, Tax Appeals Tribunal, April 7, 2016 [discussing ***Brooke-Bonds***], ***affd sub nom Toronto Dominion Holdings (U.S.A.), Inc. v Tax Appeals Trib.***, 162 AD3d 1255 [3d Dept 2018), ***lv denied***, 32 NY3d 907 [2018]).

Tribunal’s decision to apply the federal ordering rule for the State net operating loss deduction, stating “the fact that a taxpayer may not reap a franchise tax benefit in a given year is not determinative of the issue, so long as such a result is not inconsistent with the application of the statute”]).

E. The Supreme Court has described the tax benefit rule as follows:

> “What is today called the ‘tax benefit rule’ evolved in two stages, reflecting the rule's two components. The ‘inclusionary’ component requires that the recovery within a taxable year of an item previously deducted be included in gross income. The ‘exclusionary component’, which gives the rule its name, allows the inclusionary component to operate only to the extent that the prior deduction benefited the taxpayer.
>
> The inclusionary component of the rule originated in the Bureau of Internal Revenue in the context of recoveries of debts that had previously been deducted as uncollectible. . . . As one commentator [Plumb, The Tax Benefit Rule Today, 57 Harv L Rev 129, 131 n 10 (1943)] described it, 'the allowance of a deduction results in a portion of gross income not being taxed; when the deducted item is recouped, the recovery stands in the place of the gross income which had not been taxed before and is therefore taxable. ...’
>
> The exclusionary component was not so readily accepted. The Bureau first incorporated it during the Great Depression as the natural equitable counterweight to the inclusionary component [citation omitted]. It soon retreated, however, insisting that a recovery could be treated as income even if the prior deduction had not benefited the taxpayer [citation omitted].... At that point, Congress intervened for the first and only time. It enacted the forerunner of § 111 of the present code [citation omitted] using language that by implication acknowledges the propriety of the inclusionary component by explicitly mandating the exclusionary component” (***Hillsboro National Bank v Commr***., 460 US 370, at 405-406 [1983]).

The tax benefit rule codified in IRC § 111 provides:

> “a) Deductions.--Gross income does not include income attributable to the recovery during the taxable year of any amount deducted in any prior taxable year to the extent such amount did not reduce the amount of tax imposed by this chapter.

> (b) Credits.--
>
> (1) In general.--If--
>
> (A) a credit was allowable with respect to any amount for any prior taxable year, and
>
> (B) during the taxable year there is a downward price adjustment or similar adjustment,
>
> the tax imposed by this chapter for the taxable year shall be increased by the amount of the credit attributable to the adjustment.
>
> (2) Exception where credit did not reduce tax.--Paragraph (1) shall not apply to the extent that the credit allowable for the recovered amount did not reduce the amount of tax imposed by this chapter."

The tax benefit rule in IRC § 111 is not applicable here. While subsection (a) of section 111 allows for a reduction in FTI, it deals with a "recovery during the taxable year of any amount deducted in any prior taxable year" and here, petitioner received a federal credit for its excess FICA taxes, and not a deduction, so this subsection is not applicable. Subsection (b) of section 111 deals with credits, but it contemplates an *increase* in FTI, as a result of "downward price adjustment or similar adjustment" in respect to a credit taken in a prior year. Because petitioner is seeking to decrease its FTI in the amount of its excess FICA taxes, subsection (b) also does not avail it. Moreover, both subsections of IRC § 111 contemplate tax adjustments occurring over two or more years, and not occurring all in one year, as in this case.[4] This is not an incidental aspect of the tax benefit rule:

> "Federal income tax calculations are based on an annual accounting system. Nevertheless, the tax impact of an apparently completed transaction may be changed in a subsequent taxable year. The purpose of the tax benefit rule is not

[4] The version of the tax benefit rule at issue in ***Hunt***, IRC former § 58 (h), did not have any "prior year" language and thus could plausibly be read to allow an adjustment involving only a single year.

> merely to tax recoveries, but to approximate the results produced by a tax system based on transactional rather than annual accounting and thereby achieve "Federal income tax calculations are based on an annual accounting system. Nevertheless, the tax impact of an apparently completed transaction may be changed in a subsequent taxable year. The purpose of the tax benefit rule is not merely to tax recoveries, but to approximate the results produced by a tax system based on transactional rather than annual accounting and thereby achieve "rough transactional parity" (1 Mertens Law of Fed. Income Tax'n § 7:25, Statement of tax benefit rule).

In sum, the tax benefit rule does not contemplate allowing a taxpayer a deduction in computing its ENI where, as petitioner did here, the taxpayer exercised its option under IRC § 45B to take a credit on its federal form 1120 for its excess FICA taxes.

F. Petitioner also argues that ***Matter of Shorter*** (Tax Appeals Tribunal, July 31, 2007) supports its position that the federal conformity principle dictates granting petitioner a subtraction modification for its excess FICA taxes. The issue in that case involved how to compute the modification reducing federal itemized deductions in Tax Law § 615 (c) (1), which provided that a taxpayer's itemized deductions from federal adjusted gross income are reduced by the amount of such federal deductions for State and local taxes, in light of the IRC § 68's limitation on itemized deductions for certain high income taxpayers. The Division's regulation provided an "ordering convention" under which the amount of the reduction caused by IRC § 68's limitation should be attributed first to itemized deductions <u>not</u> subject to Tax Law § 615 (c) (1), rather than attributing the limitation amount pro rata to all of the taxpayer's itemized deductions that were subject to the limitation, as petitioner urged. The Tribunal ruled in favor of the petitioner's pro rata solution based on its conclusions that (1) the regulation's ordering convention read a requirement into Tax Law § 615 (c) (1) that was not present; and (2) the ordering convention would have caused the petitioner's deduction for State and local taxes to be

disallowed twice, first, in calculating federal adjusted gross income based on a pro rata allocation of the IRC § 68 reduction, and again in calculating the subtraction modification required by Tax Law § 615 (c) (1). Tax Law § 615 (c) (1)'s interpretation is not at issue here, however, and the Tribunal in ***Shorter*** did not rely on the federal conformity principle (or the tax benefit rule). Thus, ***Shorter*** is inapposite to this case. Similarly, petitioner's reliance on ***Matter of Accessories by Pearl, Inc.*** (Tax Appeals Tribunal, February 24, 1989) is also misplaced. The Tribunal described the issue there as "what did the Legislature mean when, in the employment incentive credit provided by Tax Law section 210 (12-A), it used the term 'allowed' with reference to" the investment tax credit under Tax Law § 210 (12). While the Tribunal looked to the meaning of "allowed" under the net operating loss provision in IRC § 172 (c), it did not do so because the federal conformity principle applied, but rather because the provision presented an "analogous situation."

G. Petitioner also argues that the Division acted "arbitrarily and capriciously" in failing to grant petitioner a subtraction modification based on its excess FICA taxes because "New York regularly allows the excess FICA wages as a bona fide state tax deduction." According to petitioner, the Division should, therefore, be required to grant it a subtraction modification for its excess FICA credit. Petitioner's argument amounts to a discriminatory enforcement claim. The Tribunal has held that "[t]o prove a claim of discriminatory enforcement, petitioner needs to prove selectivity of enforcement and that the selectivity arose from "an intentional invidious plan of discrimination on the part of the Division" (***Matter of Goetz***, Tax Appeals Tribunal, November 18, 1999, quoting ***Matter of Petro Enters.***, Tax Appeals Tribunal, September 19, 1991; ***see also 303 W. 42nd St. Corp. v Klein***, 46 NY2d 686 [1979] ["A mere showing of

selective enforcement is, therefore, not enough. As indicated, the disparate impact must be shown as well to have been the product of an 'evil eye'"]).

Here, petitioner's evidence is not sufficient to meet its burden of showing by clear and convincing evidence that the Division has not been evenhanded in enforcing its policy that a taxpayer's federal excess FICA taxes cannot be the basis of a New York subtraction modification for purposes of article 9-A (***see*** Tax Law § 1089 [e]; ***Suburban Carting Corp. v Tax Appeals Trib.***, 263 AD2d 793 [3d Dept 1999]). While Mr. Trumbull testified that he knows of cases where the Division did allow such a subtraction modification, he did not establish how he came to know that fact, and thus his testimony is not competent to show that the Division was not evenhandedly applying its policy (***see Matter of Impath, Inc.***, Tax Appeals Tribunal, January 8, 2004 ["Opportunity and capacity to perceive combined with capacity to recollect and communicate constitute the ingredients of competency"]; ***Matter of IT USA, Inc.***, Tax Appeals Tribunal, April 16, 2014 [because the witness was not employed by petitioner during the audit period, he was not in a position to know whether the cash management system caused distortion during the audit period, and thus Tribunal found his testimony not to be competent on that issue]). The only other evidence petitioner produced to prove selective enforcement was the article from the Metropolitan Counsel magazine (***see*** finding of fact 7). Given that the article refers to the New York City Department of Finance not being consistent in disallowing any such subtraction modification, it is not sufficient to show that the Division has not consistently enforced that policy. In any event, even if such evidence is sufficient to show that the Division was not consistent in denying taxpayers a subtraction modification based on excess FICA taxes, petitioner has not alleged, let alone shown herein, "an intentional invidious plan of

discrimination" on the part of the Division. Thus, petitioner's selective enforcement claim lacks merit.

H. The petition of Ark Bryant Park, LLC f/k/a Ark Bryant Park Corporation is denied, and the notice of deficiency, dated May 18, 2016, is sustained.

DATED: Albany, New York
March 28, 2019

/s/ James P. Connolly
ADMINISTRATIVE LAW JUDGE