STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **METLIFE, INC. & COMBINED AFFILIATES** for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Taxable Years ending December 31, 2016 through December 31, 2018.	:	ORDER DTA NO. 850556

Petitioner, MetLife, Inc. and Combined Affiliates, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under article 9-A of the Tax Law for the taxable years ending December 31, 2016 through December 31, 2018.

On September 23, 2024, the Division of Taxation, appearing by Amanda Hiller, Esq. (David Markey, Esq., of counsel), filed a motion seeking summary determination in the above-captioned matter pursuant to 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal and Civil Practice Law and Rules 3212. Petitioner, appearing by Mayer Brown LLP (Leah Robinson, Esq., of counsel), timely requested and was granted an extension of time to respond until January 10, 2025, which date commenced the 90-day period for the issuance of this order. Based upon the motion papers and all pleadings and documents submitted in connection with this matter, Anita K. Luckina, Administrative Law Judge, renders the following order.

ISSUE

Whether the Division of Taxation has established that no material and triable issue of fact exists such that summary determination may be granted in its favor.

FINDINGS OF FACT

1. Pursuant to 20 NYCRR 3000.15 (d) (6), petitioner submitted 32 proposed findings of fact. In accordance with State Administrative Procedure Act § 307 (1), petitioner's proposed findings of facts 13, 14, 21, 23 through 27, and 29 through 32 are supported by the record and have been combined, renumbered and substantially incorporated herein; proposed finding of fact 22 has been modified to more accurately reflect the record; proposed findings of fact 1 through 12 and 15 through 20 have been rejected in their entirety as irrelevant to this order; and proposed finding of fact 28 has been rejected in part as irrelevant to this order.

2. Petitioner, MetLife, Inc., as designated agent, and its combined affiliates (petitioner) filed form CT-3-A, general business corporation combined franchise tax return (form CT-3-A), and form CT-3-M, general business corporation MTA surcharge return, for each of the taxable years ending December 31, 2016 through December 31, 2018 (returns) and paid tax (including MTA surcharge) on its capital base as calculated on its returns.

3. On form CT-3-A (part 1- general corporate information - section C - filing information, line 3, required attachments), petitioner checked the box for the following forms to indicate that each was attached to the return for that taxable year: CT-3.1, CT-3.3, CT-60, and CT-225-A for 2016; CT-3.1, CT-3.3, CT-3.4, CT-60, and CT-225-A for 2017; and CT-3.1, CT-3.3, CT-3.4, CT-60, and CT-225-A for 2018.

4. On each return, petitioner subtracted its investments in insurance company subsidiaries from its computation of business capital as intercorporate eliminations on form CT-

3-A (part 4, line 1 C). Petitioner reported total intercorporate eliminations on form CT-3-A (part 4, line 1 C) for each taxable year as follows: $27,627,958,007.00 for 2016; $77,169,968,029.00 for 2017; and $67,975,664,921.00 for 2018.

5. A disclosure statement advising the Division of Taxation (Division) that petitioner was excluding its investments in insurance company subsidiaries from its business capital tax base was included with each return.[1] That disclosure was identical for each return (except for the tax year referenced thereon) and provided in relevant part:

"**Disclosure**

> MetLife is taking the position on the business capital tax portion of this New York State return that the average value of the stock of [a] unitary corporation is not to be included in the business capital tax. This is because NY Tax Law 208.7(a) expressly says business capital shall include only those assets that produce income or loss or expense. NY Tax Law 208.6-a(a) expressly holds that dividends from an insurance company to a holding company engaging in a unitary business are 'other exempt income' and are not included in a holding company's combined business income. We are aware that this position is contrary to the Business Capital FAQ published by the NY Department of Taxation and Finance. Our legal position is that the FAQ is legally and factually wrong."

6. On or about October 27, 2020, the Division commenced an audit of petitioner for the taxable years ending December 31, 2016 through December 31, 2018 (the tax period). The audit was conducted through correspondence because of the COVID-19 public health emergency.

7. During the audit, petitioner provided a position paper explaining the reasons it subtracted its investments in insurance company subsidiaries from the computation of its capital base on its returns.[2]

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[1] The Division acknowledges that a disclosure statement was included with petitioner's returns, but the 2017 return included with the Division's motion did not include a disclosure statement.

[2] The Division acknowledges that, "[i]n a written response, the taxpayer has provided several reasons for its position on the issue." However, the audit documents provided with the Division's motion do not include petitioner's written response.

8. As a result of the audit, the Division adjusted petitioner's capital base by adding back to it the amount of the investment in insurance company subsidiaries that petitioner included as intercorporate eliminations on its returns. Per the Division's "Computation of Capital Base Tax Schedule B" (schedule B), cross article investment eliminations were added back as follows: $27,001,251,028.00 for 2016; $76,222,761,020.00 for 2017; and $65,515,243,212.00 for 2018. Schedule B references "tpwp" for these amounts. However, there is no supporting document identified as "tpwp" or other documents provided from which to ascertain the source or accuracy of these amounts.

9. On December 16, 2022, the Division sent form DO-356, consent to field audit adjustment, to petitioner, asserting additional tax due under article 9-A in the amount of $9,088,084.00 (including MTA surcharge), plus substantial understatement of liability penalties and interest, for the tax period.

10. On January 10, 2023, petitioner sent an email to the auditor requesting that the Division abate penalty and providing five reasons supporting its request; and on February 3, 2023, petitioner submitted a second letter request.[3] On March 1, 2023, petitioner and the Division had a conference call to discuss the penalty abatement issue. The Division rejected petitioner's request to abate penalties.

11. On March 8, 2023, the Division issued a notice of deficiency, notice number L-057768652, to petitioner, asserting additional tax due under article 9-A of the Tax Law in the amount of $9,088,084.00 (including MTA surcharge), plus substantial understatement of liability penalties and interest, for the tax period (the notice).

[3] Neither written request was included in the audit documents submitted with the Division's motion and no notation regarding these requests was made in the audit log.

12. On May 26, 2023, petitioner timely filed a petition with the Division of Tax Appeals protesting the notice. The petition alleges, in pertinent part, the following:

> "1. The Commissioner erred in including Petitioner's investments in insurance company subsidiaries as taxable business capital under the capital base tax of Article 9-A for the Tax Period.
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> 2. The Commissioner erred in imposing penalties equal to 10 percent of the proposed tax pursuant to N.Y. Tax Law § 1085(k) (substantial understatement of liability), even though Petitioner's Article 9-A tax filings were correct and based on substantial authority, and were adequately disclosed in a statement attached to the returns, or if its filings are determined to be incorrect, were nonetheless based on a reasonable interpretation of Article 9-A and Petitioner acted in good faith in determining its tax positions."

13. On July 26, 2023, the Division timely filed an answer to the petition.

14. On September 23, 2024, the Division filed a notice of motion for summary determination and letter brief alleging that there are no material issues of fact. In support of its motion, the Division submitted an affirmation of David Markey, Esq., dated September 23, 2024. The opening paragraph of the affirmation states that Mr. Markey "affirms under penalty of perjury pursuant to CPLR § 2106 and under the laws of New York, which penalties may include a fine or imprisonment." Paragraph two of the affirmation states that "[t]he statements made in this Affirmation are true to my knowledge, except as to those statements made upon information and belief and, as to those statements, I believe them to be true."

15. The Division's motion also included an affidavit of Timothy Connelly, Tax Auditor 1, sworn to on September 17, 2024, and attachments, including copies of petitioner's returns for the tax period. Those returns include only attached form CT-3.1 (***see*** finding of fact 3).

16. On January 10, 2025, petitioner submitted its response to the Division's motion for summary determination, including an affidavit, sworn to on January 8, 2025, of Phillip Allen, Senior Vice President and Associate Tax Counsel of MetLife Group, Inc.

CONCLUSIONS OF LAW

A. A motion for summary determination "shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented" and the moving party is entitled to a favorable determination as a matter of law (20 NYCRR 3000.9 [b] [1]). A motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212 (***see*** 20 NYCRR 3000.9 [c]). "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853 [1985], citing ***Zuckerman v City of New York***, 49 NY2d 557, 562 [1980]). It is well established that, as the procedural equivalent of a trial, summary judgment is a drastic remedy that should be denied if there is any doubt as to the existence of a triable issue or where a material fact is arguable (***see Glick & Dolleck v Tri-Pac Export Corp.***, 22 NY2d 439, 441 [1968]; ***Museums at Stony Brook v Village of Patchogue Fire Dept***., 146 AD2d 572, 573 [2d Dept 1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (***see Gerard v Inglese***, 11 AD2d 381, 382 [2d Dept 1960]). "In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party" (***Stukas v Streiter***, 83 AD3d 18, 22 [2d Dept 2011], citing ***Pearson v Dix McBride, LLC***, 63 AD3d 895 [2d Dept 2009]). Only after the moving party has met its initial burden does the burden shift to the nonmoving party (***see Alvarez v Prospect Hosp***., 68 NY2d 320, 324 [1986], citing ***Zuckerman v City of New York***, 49 NY2d at 562).

As detailed hereafter, the Division has not made a prima facie showing of entitlement to judgment as a matter of law.

B. Initially, the affirmation of Mr. Markey submitted in support of the Division's motion does not comply with CPLR 2106 and cannot be relied upon as proof of any facts asserted therein. CPLR 2106, as amended effective January 1, 2024, allows any person to submit an affirmation in lieu of an affidavit and provides the following:

> "The statement of any person wherever made, subscribed and affirmed by that person to be true under the penalties of perjury, may be used in an action in New York in lieu of and with the same force and effect as an affidavit. Such affirmation shall be in substantially the following form:
>
> I affirm this ___ day of _____, ___, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.
>
> (Signature)"

Courts have strictly interpreted the language of CPLR 2106 which requires that affirmations "shall be" substantially in the form quoted above, and rejected affirmations that did not contain that precise language (***see Great Lakes Ins. v American Steamship Owners Mut. Protection & Indem. Assn.***, 2024 NY Slip Op 30148[U], *7 [Sup Ct, New York County 2024], ***affd*** 228 AD3d 429 [1st Dept 2024]); ***Grandsard v Hutchison,*** 2024 WL 1957086 [Sup Ct, New York County 2024], ***affd*** 227 AD3d 491 [1st Dept 2024]; ***R.F. v L.K.***, 82 Misc 3d 1221[A] [Sup Ct, Westchester County 2024]).

Mr. Markey's affirmation does not acknowledge that it may be filed in an action or proceeding in a court of law, and it is not made after the "foregoing" statements and immediately preceding his signature, thus, it fails to comply with the particularized requirements of CPLR 2106 and cannot be relied upon as proof of the facts asserted therein (***see id.***). Therefore, the

Division's motion is denied to the extent that the inadequate affirmation cannot be relied upon as proof of the asserted facts. In addition, as discussed below, there are factual issues precluding summary determination.

C. Petitioner alleges that the Division erred in including its investments in insurance company subsidiaries as taxable business capital under the capital base tax of article 9-A for the tax period (***see*** finding of fact 12). Tax Law § 208 (7) (a) provides that:

> "[t]he term 'business capital' means all assets, other than investment capital and stock issued by the taxpayer, less liabilities not deducted from investment capital. Business capital shall include only those assets the income, loss or expense of which are properly reflected (or would have been properly reflected if not fully depreciated or expensed or depreciated or expensed to a nominal amount) in the computation of entire net income for the taxable year."

Thus, there is clearly a question whether Tax Law § 208 (7) (a) required petitioner to include its investments in insurance company subsidiaries in the computation of its capital base and the calculation of tax due thereon for the tax period. However, the ultimate issue to be determined is whether the amount of tax asserted due in the notice is correct — as a matter of fact and law.

Petitioner included with its returns a disclosure statement advising the Division of its position regarding the application of Tax Law § 208 (7) (a) to certain of its investments in insurance company subsidiaries but did not particularize therein which or the amount of the investments it was excluding from its capital base computation (***see*** finding of fact 5). It is evident that the Division added back to petitioner's capital base an amount different from the amount that petitioner included on its returns as intercorporate eliminations (***see*** findings of fact 4 and 8). However, the Division has not presented any documents with its motion that provide the source of and support for its adjustments (***see*** finding of fact 8). The adjustments to petitioner's capital base are the foundation for the Division's assertion of additional tax due for

the tax period. Thus, it cannot be summarily determined that the amount of tax asserted due in the notice is correct.

D. Petitioner also alleges that the Division erred in imposing substantial understatement of liability penalties pursuant to Tax Law § 1085 (k) (***see*** finding of fact 12). Tax Law § 1085 (k), in relevant part, provides that:

> "Substantial understatement of liability. - - (1) If there is a substantial understatement of tax for any taxable year, there shall be added to the tax an amount equal to ten percent of the amount of any underpayment attributable to such understatement. For purposes of this subsection, there is a substantial understatement of tax for any taxable year if the amount of the understatement for the taxable year exceeds the greater of ten percent of the tax required to be shown on the return for the taxable year or five thousand dollars. For purposes of the preceding sentence, the term 'understatement' means the excess of the amount of the tax required to be shown on the return for the taxable year, over the amount of the tax imposed which is shown on the return reduced by any rebate… .
>
> (2) The amount of the understatement under paragraph one of this subsection shall be reduced by that portion of the understatement which is attributable to … (B) any item if the relevant facts affecting the item's tax treatment are adequately disclosed in the return or in a statement attached to the return."

This penalty applies in the first instance only when there is a substantial understatement of tax. In determining whether an understatement of tax is substantial, the amount of the understatement must be reduced by that portion thereof that is attributable to an item for which the relevant facts regarding that item's tax treatment are adequately disclosed in the return or in a statement attached to the return. Again, the supporting detail for the Division's adjustments was not provided. And the returns provided with the Division's motion are incomplete (***see*** finding of fact 15). Thus, there is a material question whether petitioner's returns and disclosure statement provided adequate disclosure of the relevant facts affecting the tax treatment of its investments in insurance company subsidiaries when determining if there was a substantial understatement of tax (***cf. Matter of AIL Sys.***, Tax Appeals Tribunal, May 4, 2006 [adequate disclosure not found where some facts were evident from the return but there was no disclosure

statement on or attached to the return]). Accordingly, it cannot be summarily determined that there was a substantial understatement of tax such that this penalty was properly imposed in the first instance.

E. The Division's motion for summary determination is denied and a hearing will be scheduled in due course.

DATED: Albany, New York
April 10, 2025

/s/ Anita K. Luckina
ADMINISTRATIVE LAW JUDGE