STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
AXA VERSICHERUNG AG	:	DETERMINATION DTA NO. 825518
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, AXA Versicherung AG, filed a petition 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.

On January 14, 2015, petitioner, appearing by McDermott, Will & Emery LLP (Arthur R. Rosen, Esq., and Maria P. Eberle, Esq., of counsel), and the Division of Taxation, appearing by Amanda Hiller, Esq. (Clifford Peterson, Esq., and Ellen K. Roach, Esq., of counsel) waived a hearing and submitted this matter for determination based on documents and briefs to be submitted by June 5, 2015, which date commenced the six-month period for issuance of this determination. By a letter dated November 25, 2015, this six-month period was extended for an additional three months (Tax Law § 2010[3]). After review of the evidence and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether petitioner, AXA Versicherung AG, has established that it was a *life* insurance corporation and, as such, was therefore entitled to the interpretation of Tax Law § 1505(a)(2) that the Division of Taxation (Division) accorded with respect to the taxation of both *authorized* and

unauthorized life insurance corporations during the years ended December 31, 2006 and 2007 (the audit years or the audit period).

II. Whether, if not, the Division correctly determined upon audit that petitioner was an *unauthorized non-life* insurance corporation, was therefore 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 and, consequently, was required to compute its Article 33 tax liability pursuant to Tax Law § 1502.

III. Whether, if petitioner was required to compute its tax liability pursuant to Tax Law § 1502, as above, the Division also correctly determined that petitioner's business and investment capital allocation percentage (2006) and its entire net income allocation percentage (2007) should not be computed pursuant to the allocation method set forth under Tax Law Article 33, § 1504(a), but rather should be computed pursuant to an alterative method under the discretionary authority of Article 33, § 1504(d).

FINDINGS OF FACT [1]

I. General Facts

1. Petitioner, AXA Versicherung AG (AXA), is incorporated in Germany and has many employees in Europe, whom it compensates. Petitioner's Articles of Association provide that its purposes, both domestically and internationally, include: a) "directly and indirectly operating all

[1] The parties executed and submitted a Stipulation of Facts, setting forth 17 numbered stipulated facts including, therewith, 23 agreed-upon exhibits (identified as Exhibits A through W). The parties have agreed that such facts and exhibits, together, comprise the complete record for consideration and review herein. Information in the Findings of Fact that is in addition to that set forth in the parties' stipulated facts is taken from the parties' agreed upon exhibits, is consistent with the parties' briefs, and is necessary to more fully reflect the record so as to allow for proper resolution of this matter. The second and third issues presented in this matter mirror those presented and addressed in ***Matter of Bayerische Beamtenkrankenkasse AG*** (DTA No. 824762) and ***Matter of Landschaftliche Brandkasse Hannover*** (DTA No. 825517), each of which cases are decided of even date herewith.

branches of private insurance in life insurance, legal protection insurance and health insurance, but only in reinsurance;" and b) "offering insurance of all types, building loan contracts and other savings contracts" (***see*** Exhibit E, p 4). Petitioner's annual reports for the years in issue specify in total some 23 classes of insurance provided by petitioner, including therein life insurance (though "only accepted for reinsurance") (***see*** Exhibit C, p. 60 [2006], p. 61 [2007]).

2. During the years in issue petitioner provided health, property and casualty insurance services (i.e., *non-life* insurance services) in Europe. Petitioner received consideration, or premiums, in exchange for providing such non-life insurance in Europe. During the audit years, petitioner also accepted reinsurance for which it received and reported premiums. Life insurance was one type of insurance that petitioner accepted as a reinsurer.

3. Petitioner is licensed by the German supervisory authority for insurance corporations, Bundesanstalt fur Finanzdienstleistungen (BaFin), to operate a life insurance business as a reinsurer. Pursuant to this authority, petitioner has entered into life reinsurance "treaties" with both related and unrelated parties in Europe and the United States. A reinsurance treaty is a contractual agreement between a ceding insurance corporation and an assuming insurance corporation under which the assuming insurance corporation (here, petitioner) assumes the obligation to pay claims arising from the ceding insurance corporation's original insurance contracts, i.e., an agreement whereby an insurance corporation agrees to make monetary payments (claims) to an insured party upon the happening of an event beyond the control of either party. A life reinsurance treaty is a reinsurance treaty with respect to life insurance contracts of a ceding insurer.

4. The large majority of the consideration, or premiums, petitioner received in each of the

audit years resulted from petitioner's provision of non-life insurance. However, as noted, petitioner did receive consideration or premiums from reinsurance. According to its annual reports, petitioner received 90 million euro in premiums from reinsurance in 2006 and 123 million euro in premiums from reinsurance in 2007, representing, respectively, approximately 3% and 4.5% of its total premiums for such years. Petitioner reinsured both life and non-life insurance risks for such years. Its annual reports do not specify what proportion of its reinsurance premiums were derived from life insurance.

5. During the audit years, petitioner was a party to a reinsurance treaty with Executive Life Insurance Company (Executive Life), a life insurance corporation located in Los Angeles, California. Under the terms of this treaty (and amendments thereto) petitioner was one member of a pool of reinsurers that assumed the responsibility for paying claims for some of Executive Life's life insurance policies that were in effect during 1991. This was the only life reinsurance treaty in the United States of which petitioner was a member during the audit years. Executive Life's life insurance policies subject to the reinsurance treaty were written on residents of the United States, its territories, or Canada. Originally, the block of policies ceded to the reinsurers included a small block of policies on residents of the state of Michigan. In 2005, Executive Life recaptured the "Michigan Policies." Members of the reinsurer pool, including petitioner, remained liable, however, for claims incurred prior to July 1, 1995 on the "Michigan Policies."

6. Petitioner's affiant, Dr. Patrick Dahmen, was petitioner's Head of Accounting in 2006 and its Chief Finance Officer in 2007. He stated that "I recall that in 2006 and 2007 [petitioner] was party to contracts that it entered into in Europe and the United States by which it assumed the obligation to pay claims arising from various ceding insurance corporation's original life

insurance contracts (i.e., life reinsurance contracts) and received payments in the form of premiums from those contracts. I also recall that [petitioner] made payments on claims arising from the life insurance risks that it reinsured." Petitioner's affiant, Werner Timmerscheidt, was the Head of the Life Reinsurance Department of petitioner's sole shareholder (AXA Konzern AG). His duties included management of all of petitioner's assumed life reinsurance treaties. He stated that the reinsurance treaty with Executive Life "was the only life reinsurance treaty in the United States that [petitioner] was a member of during 2006 and 2007."[2]

7. 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 the state.

8. The New York Superintendent of Financial Services has never authorized petitioner to transact an insurance business in the state.

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

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

11. Petitioner did not conduct an insurance business in New York during the audit period. Likewise, petitioner has never conducted an insurance business, nor has it ever provided non-life insurance services or life insurance services in New York.

12. During the audit period, petitioner's business activity in New York was limited to its

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[2] That treaty was the Yearly Renewable Term Reinsurance Agreement and Amendments, and the risk assumed thereunder was that of entities unrelated to petitioner.

participation in four partnerships: U.S. Property Fund GMBH & Co. KG (USPF), U.S. Property Investment Fund L.P., Millennium Entertainment Partners, L.P., and Millennium Entertainment Partners II, L.P. (the Partnerships). USPF, in turn, held an interest in another partnership, 666 Fifth, LP (666 Fifth). The Partnerships' 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.

II. Procedural Facts

13. On or about September 14, 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, 2006 (the 2006 Returns).

14. On or about December 17, 2010, 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).

15. 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. On the latter forms, petitioner determined its MTA surcharge liability by employing the allocation formula applicable to life insurance corporations. On its federal and New York State tax returns, petitioner generically listed its "business activity" as "insurance," and its "product or service" as "accident and health."

16. Petitioner's federal effectively connected income (ECI) reported pursuant to Internal Revenue Code § 882 on its form 1120-F (U.S. Income Tax Return of a Foreign Corporation) for the years at issue, consisted primarily of the distributive share of the Partnerships' income

reported on federal Form 1065 (U.S. Return of Partnership Income) via Schedule K-1 (Partner's Share of Income, Deductions, Credits, etc.) issued to petitioner by the Partnerships for the years at issue. Some 90% of petitioner's ECI and of its federal taxable income (FTI) resulted from its participation in USPF. Notwithstanding that petitioner's affiant, Dr. Dahmen, recalls the receipt of premiums based on both European and United States contracts, petitioner did not report any premium income on its federal income tax returns for the years in issue.

17. By a letter dated April 12, 2011, the Division notified petitioner that it was examining the Partnerships' tax returns. The Division's examination encompassed an audit review of some of the partnerships' partners, including petitioner, and of 666 Fifth.

18. On November 23, 2012, the Division issued to petitioner a Notice of Deficiency (L-038827582-2), asserting additional tax due for the audit period in the amount of $2,883,475.00 plus interest, computed through December 14, 2012, and penalties, for a (then) total amount due of $4,440,500.72. The tax asserted per the Notice of Deficiency ($2,883,475.00) is that imposed under Tax Law § 1501 (computed under Tax Law § 1502) in the amounts of $30,463.00 (2006) and $2,342,902.00 (2007), plus the Metropolitan Commuter Transportation District (MCTD) tax surcharge imposed and computed under Tax Law § 1505-a, in the amounts of $5,221.00 (2006) and $504,889.00 (2007).[3] Petitioner does not object to the accuracy of the mathematical calculations that underlie the assessment of additional tax, including the mathematical

[3] The Division's calculations are 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, and Schedules E and E-1 thereto), and are set forth as Addendum I at the end of this determination. 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-exhibit M thereto) is set forth as Addendum II at the end of this determination.

calculation of its business and investment capital (for 2006), or its entire net income (for 2007), or the allocation percentages that would apply to petitioner for the years at issue under the rules of Tax Law Article 9-A (if relevant).

19. The Division has since abated the penalties in the amount of $288,346.00, as reflected in the Notice of Deficiency.

20. On February 13, 2013, petitioner timely filed a petition for redetermination of the foregoing Notice of Deficiency with the Division of Tax Appeals, and therein described its business as "non-life insurance."[4]

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

22. By a letter dated November 26, 2014, petitioner asserted that it was a life insurance corporation, and that its Article 33 tax liability should therefore be limited, pursuant to Tax Law § 1505(a)(2), in accordance with the Division's interpretation of that provision and its resulting treatment afforded thereunder to all life insurance corporations, authorized and unauthorized, for years beginning prior to January 1, 2012.

III. Waiver

As noted, the parties waived their right to a hearing and agreed to have this matter determined on submission based upon their Stipulation of Facts and Attached Exhibits.

IV. The Record

[4] The fact that petitioner described its business (in its petition) as "non-life insurance" is of no particular moment given that it did not, consistent with its lack of authority to do so, conduct *any* insurance business in New York (***see*** Findings of Fact 7, 8 and 11).

23. The parties agree that their 17 stipulated facts (as included in the foregoing Findings of Fact set forth above [***but see*** n 1]), together with the 23 exhibits listed and identified below, comprise the complete record for consideration or review herein:

A. Affidavit of Dr. Patrick Dahmen, an employee of petitioner serving (among other posts) as its head of accounting (during 2006) and as its Chief Finance Officer (during 2007), and attached exhibits. The Division does not object to the validity of the notarization of this Affidavit.

B. Affidavit of Mr. Werner Timmerscheidt, an employee of petitioner serving as the head of its life reinsurance department (during 2006 and 2007), and attached exhibits. The Division does not object to the validity of the notarization of this Affidavit.

C. English Translation of petitioner's 2006 Annual Report. The Division does not object to the accuracy of the translation of this Annual Report from German to English.

D. English Translation of petitioner's 2007 Annual Report. The Division does not object to the accuracy of the translation of this Annual Report from German to English.

E. English Translations of petitioner's Articles of Association as in effect during the audit period. The Division does not object to the accuracy of the translation of these Articles of Association from German to English.

F. English Translations of excerpts from the Cologne Local Court's Commercial Register regarding petitioner. The Division does not object to the accuracy of the translation of these excerpts from German to English.

G. English Translations of the German supervisory authority's letter of April 16, 1991 regarding petitioner. The Division does not object to the accuracy of the translation of this letter from German to English.

H. English Translation of excerpts from the Cologne Local Court's Commercial Register regarding petitioner. The Division does not object to the accuracy of the translation of these excerpts from German to English.

I. English Translations of section 181 of the German Stock Corporation Act as in effect during 2006 and 2007. The Division does not object to the accuracy of the translation of this statute from German to English.

J. Petitioner's partnership agreement in U.S. Property Fund GMBH & Co. KG (without Schedule A), with identifying information of entities other than petitioner redacted. The Division does not object to the accuracy of the translation of this Partnership Agreement from German to English.

K. Petitioner's Agreement of Limited Partnership (with first and second amendments) in U.S. Property Investment Fund L.P., with identifying information of entities other than petitioner redacted. The Division does not object to the accuracy of the translation of this Agreement of Limited Partnership from German to English.

L. Certificate of Cancellation for U.S. Property Investment Fund L.P.

M. Petitioner's Second Amended and Restated Agreement of Limited Partnership in Millennium Entertainment Partners, L.P., with identifying information of entities other than petitioner redacted. The Division does not object to the accuracy of the translation of this Agreement of Limited Partnership from German to English.

N. Petitioner's Amended and Restated Agreement of Limited Partnership in Millennium Entertainment Partners II, L.P., with identifying information of entities other than petitioner redacted. The Division does not object to the accuracy of the translation of this Agreement of Limited Partnership from German to English.

O. U.S. Property Fund GMBH & Co. KG's Second Amended and Restated Limited Partnership Agreement in 666 Fifth, L.P., with identifying information of entities other than U.S. Property Fund GMBH & Co. KG redacted. The Division does not object to the accuracy of the translation of this Limited Partnership Agreement from German to English.

P. Petitioner's form CT-33-M (Insurance Corporation MTA Surcharge Return) and form CT-33-NL (Non-Life Insurance Corporation Franchise Tax Return) including petitioner's federal form 1120-F, filed for the tax year ended December 31, 2006

Q. Petitioner's form CT-33-M (Insurance Corporation MTA Surcharge Return) and form CT-33-NL (Non-Life Insurance Corporation Franchise Tax Return), including petitioner's federal form 1120-F, filed for the tax year ended December 31, 2007.

R. Affidavit of Choi Y. Downes, a Division employee who served as the auditor in this matter, and attached exhibits.

S. Affidavit of Elizabeth Knaggs, a Division employee who served as the auditor's supervisor in this matter.

T. The petition filed in this matter dated February 13, 2013.

U. The Division's answer dated May 14, 2013.

V. Petitioner's letter[5] dated November 26, 2014 addressed to the Division regarding Matter of AXA Versicherung AG, DTA No. 825518, with identifying information of entities other than petitioner and other irrelevant information redacted.

W. The Division's response dated January 9, 2015 to petitioner's letter dated November 26, 2014 addressed to the Division regarding Matter of AXA Versicherung AG, DTA No. 825518.

CONCLUSIONS OF LAW

A. This matter presents the initial issue of whether petitioner may properly be classified as a *life* insurance corporation as opposed to a *non-life* insurance corporation (the Classification Issue). If the Classification Issue is resolved in petitioner's favor, then the question becomes whether petitioner's Article 33 tax liability is limited (or here eliminated) by Tax Law § 1505(a)(2) as that provision was interpreted and applied by the Division prior to January 1, 2012. However, if the Classification Issue is resolved in the Division's favor, then the question becomes whether petitioner's tax liability is properly determined under Tax Law § 1502-a, as asserted by petitioner, rather than under Tax Law § 1501, as asserted by the Division under its Notice of Deficiency (the Taxation Issues). Finally, and if Tax Law § 1501 is applicable, an additional issue arises concerning whether the Division may properly determine the portions of petitioner's business and investment capital (2006) and its entire net income (2007) that are

[5] The parties' stipulation of facts refers, apparently inadvertently, to Exhibit V as "plaintiff's" letter.

subject to New York taxation pursuant to an alternative allocation formula that differs from that set forth at Tax Law § 1504(a) (the Allocation Issue). Each issue will be discussed in turn. However, in order to address each of the foregoing issues, a review of the taxation of insurance corporations is necessary.

Taxation of Insurance Corporations Prior to January 1, 1974

B. As is relevant to this matter, and prior to its repeal effective January 1, 1974, Tax Law Article 9, former § 187, subjected insurance corporations, including domestic non-life insurance corporations (Tax Law former § 187[1]), domestic and authorized foreign (i.e., other states') life insurance corporations (Tax Law former § 187[2]), and authorized foreign (i.e., other states') casualty or surety insurance corporations (Tax Law former § 187[3]), to tax computed as a percentage of gross direct premiums less return premiums.

Enactment of Tax Law Article 33 (Franchise Taxes on Insurance Corporations)

C. In 1974, the Legislature enacted Tax Law Article 33 (Franchise Taxes on Insurance Corporations) in place of Tax Law former § 187 (***see*** L 1974, ch 649, [eff May 30, 1974 and applicable to taxable years beginning on or after January 1, 1974]). As enacted, Tax Law § 1500 broadly defined the term "insurance corporation" as "a corporation, association, joint stock company or association, person, society, aggregation or partnership, by whatever name known, *doing an insurance business* . . . (italics added)," and provided definitions for "domestic insurance corporation," "foreign insurance corporation," and "alien insurance corporation," without distinctions therein between *authorized* versus *unauthorized* insurance corporations.

D. Article 33 imposed a two-part tax, as follows:

First, and pursuant to Tax Law § 1501, franchise tax was imposed on *every* domestic,

foreign and alien insurance corporation (except those specified in Tax Law § 1512[a]): "for the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity, or of maintaining an office in this state . . . ."

The tax thus applied to both *life* insurance corporations and *non-life* insurance corporations, and there was no specific distinction in Tax Law § 1501 between *authorized* versus *unauthorized* insurance corporations.[6] Tax Law § 1502 provided the method by which the tax was to be computed. It directed that the tax due was to be the greatest amount of the tax computed as due on a corporation's allocated entire net income, or its allocated business and investment capital, or a percentage of its entire net income plus certain wage expenses and issued capital stock, or a minimum amount of $250.00, respectively (Tax Law § 1502[a][1] - [4]), plus a tax computed on subsidiary capital (Tax Law § 1502[b]).

Second, an additional tax was imposed on gross premiums less return premiums thereon (Tax Law § 1510[a], [b]). Tax Law § 1510(a) and (b) specified that this tax was imposed, respectively, upon both *life* insurance corporations and *non-life* insurance corporations that were "*authorized* to transact business in this state under a certificate of authority issued by the superintendent of financial services (italics added)."

The Limitation

E. Effective January 1, 1977, the combined total amount of tax liability on *all* insurance corporations, i.e., *life* and *non-life* insurance corporations, due under the foregoing two-part tax

[6] Tax Law § 1501(b) did note that life insurance corporations, whose certificate of authority (either initial or as renewed) had expired, were nonetheless required to continue paying tax as calculated under Tax Law § 1502 upon any business in New York State remaining in force.

provisions was limited or "capped" (Tax Law former § 1505). As capped, the tax due was not to exceed "an amount computed as if such taxes were determined solely under" Tax Law § 1510(a) and (b), i.e., the premiums-based additional tax, though at a rate of tax set under Tax Law § 1505 that was substantially higher than was imposed under Tax Law § 1510(a) and (b) (Tax Law former § 1505).

F. In sum, and pursuant to the terms found in the foregoing provisions, effective as of January 1, 1977, in order to determine their *total* Article 33 tax liability, all *authorized* and *unauthorized life* and *non-life* insurance corporations had to compute both the section 1502 tax, and the section 1510 tax (if any) on premiums, and also compute the § 1510 tax (if any) on premiums but at the section 1505 tax rate. This process entailed the following steps:

> a) *all life* insurance corporations and *non-life* insurance corporations, *authorized* and *unauthorized*, had to compute their tax liability under Tax Law § 1502;
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> b) *all life* insurance corporations and *non-life* insurance corporations, *authorized* and *unauthorized*, had to (in addition) compute their tax liability (if any) based on (net) gross premiums (if any) under Tax Law § 1510(a) and (b) (L 1974, ch 649, § 1);
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> c) *all life* insurance corporations and *non-life* insurance corporations, *authorized* and *unauthorized*, had to compute their total liability by adding together the foregoing two amounts as determined above;
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> d) *all life* insurance corporations and *non-life* insurance corporations, *authorized* and *unauthorized*, had to (separately) compute their tax liability (if any) based on (net) gross premiums (if any) under Tax Law § 1510(a) or (b), as applicable, but at the rate provided under Tax Law former § 1505(a)(1) or (2), in order to determine their total tax liability under Article 33 (L 1974, ch 649, § 1); and
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> e) compare the amount determined at step "c" with that determined at step "d" to arrive at the total amount of tax due, as "capped" under Tax Law

former § 1505.[7]

The 2003 Restructuring of Article 33

G. The Article 33 tax was restructured, effective January 1, 2003 (L 2003, ch 62, part H3). It is this restructuring that most directly impacts the matter at issue for the years in issue. Under the relevant provisions of Article 33, as restructured, a distinction emerged between *non-life* insurance corporations and *life* insurance corporations, *and* between *authorized* versus *unauthorized* insurance corporations of both ilk, as to the manner in which such entities were to be taxed.

In its restructuring, the Legislature enacted a new provision, at Tax Law § 1502-a, as follows:

> "*In lieu of the tax imposed by section fifteen hundred one . . .* , every domestic insurance corporation, every foreign insurance corporation and every alien insurance corporation, *other than such corporations transacting the business of life insurance, (1) authorized to transact business in this state under a certificate of authority from the superintendent of insurance . . .* shall . . . *pay a tax on all gross direct premiums* . . . written on risks located or resident in this state. The tax imposed by this section shall be computed in the manner set forth in subdivision (a) of section fifteen hundred ten of this article" (italics added).

Tax Law § 1502-a is, by its terms, explicitly applicable to *non-life* insurance corporations that are "(1) *authorized to transact business in [New York State]* (italics added)." The tax imposed under this newly enacted provision, while computed according to the method set forth in

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[7] The cap under Tax Law former § 1505(a) was amended thereafter, such that the tax rate (and resulting cap amount) for *life* insurance corporations that were "*subject to* tax under [Tax Law § 1510(b)(1)]" was lower than the rate applicable for *non-life* insurance corporations. This rate differential was "to make New York competitive with other states and to reduce the amount of retaliatory taxes New York companies pay to other states" (New York State Legislative Annual – 1997, pp. 254-255; Tax Law § 1505[a][1], [2]; L 1997, ch 389, part A, § 87, eff January 1, 1998).

Tax Law § 1510(a), i.e., on the basis of gross direct premiums and at the rates set forth therein, served to replace the *additional* premiums-based tax previously imposed against *authorized non-life* insurance corporations under Tax Law § 1510(a) for years that began before January 1, 2003. Likewise, this newly enacted tax on *authorized non-life* insurance corporations was *in lieu of* and thus replaced, at least as to *authorized non-life* insurance corporations, the tax previously imposed against "every" (i.e., both *authorized and unauthorized) non-life* insurance corporation under Tax Law § 1501. Finally, the "cap" formerly available under Tax Law § 1505(a)(1), as a limitation on the total amount of Article 33 tax liability to be paid by *authorized non-life* insurance corporations for years that began before January 1, 2003, expired.

H. It is critical to note that, as restructured under the terms of Tax Law § 1502-a, *authorized non-life* insurance corporations and *authorized life* insurance corporations were taxed differently under Article 33. That is, *authorized non-life* insurance corporations became subject to only one tax, based on their total gross premiums (less return premiums thereon), with a minimum tax of $250.00, rather than two taxes (as such two taxes were capped) as before (***see*** Conclusions of Law F and G). In contrast, *authorized life* insurance corporations remained subject to two taxes, as before. As a consequence, commencing with tax years beginning on or after January 1, 2003, it was not necessary for an *authorized non-life* insurance corporation to perform the computational steps set forth above in Conclusion of Law G, in order to calculate its liability. However, while the language of Tax Law § 1502-a specifically included *authorized non-life* insurance corporations as subject to the tax imposed thereunder, it did not likewise specifically include *unauthorized non-life* insurance corporations as so subject. Since such

unauthorized non-life insurance corporations were therefore not subject to tax under Tax Law § 1502-a, the "*in lieu of* the tax imposed by section [1501]" language in Tax Law § 1502-a was inapplicable to such corporations and did not serve to preclude them from being subject to the tax imposed under Tax Law § 1501. Accordingly, such *unauthorized non-life* insurance corporations: a) remained subject to Tax Law § 1501; b) were required to compute their tax liability under Tax Law § 1502; c) were not subject to the additional tax based on premiums under Tax Law § 1510(a)(1) (since the same applied to *authorized non-life* insurance corporations and to taxable years that began before January 1, 2003); and d) were not impacted by the limitation set forth under Tax Law § 1505(a)(1) since the same was (likewise) applicable to taxable years that began before January 1, 2003.

I. In contrast to the foregoing, *authorized life* insurance corporations were not directly impacted by the enactment of Tax Law § 1502-a, but rather remained subject to the two taxes imposed, respectively, under Tax Law §§ 1501and 1510(b). While the two taxes are combined, the total *amount* of tax liability for such *authorized life* insurance corporations is subject to and limited by: a) a cap ("ceiling") under Tax Law § 1505(a)(2) based on the tax on premiums imposed under Tax Law § 1510(b) (at the rate of two percent); and b) to a minimum ("floor") under Tax Law § 1505(b) based on the tax on premiums imposed under Tax Law § 1510(b) (at the rate of one and one half percent).

J. The relevant statutory provisions discussed above explicitly identify the specific types of insurance corporations to which they pertain, via their "applicability" language, as *authorized* insurance corporations (***see*** Tax Law §§ 1510, 1502-a). At the same time, none of the relevant

provisions explicitly differentiate between *authorized* and *unauthorized* insurance corporations by any specific reference to *unauthorized* insurance corporations. Simply put, the statutes enumerate *authorized* insurance corporations and do not enumerate (or otherwise refer to) *unauthorized* insurance corporations. Likewise, and consistently, in its memoranda summarizing the Article 33 changes enacted in 2003, including the restructuring described above, the Division made no explicit differentiation between *authorized* versus *unauthorized* insurance corporations (***see*** TSB-M-03[5]C; TSB-M-03[9]C).[8] Presumably then, such memoranda were intended to speak to those corporations specifically and explicitly referenced in and covered by the relevant statutory provisions (i.e., *authorized* insurance corporations).

The Division's Initial Interpretation as to All Life Insurance Corporations

K. Prior to 2012, and notwithstanding the foregoing, the Division issued a number of advisory opinions setting forth its interpretation indicating that *unauthorized life* insurance corporations would have no franchise tax liability under Article 33 because the cap and floor under Tax Law § 1505(a)(2), (b) effectively eliminated any such liability.[9] The Division's reasoning behind this interpretation appears to have been that while *unauthorized life* insurers were "taxpayers" for purposes of Article 33, they were not authorized to transact an insurance

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[8] Petitioner refers to this failure to explicitly reference or differentiate between *authorized* versus *unauthorized* insurance corporations in the statutory provisions as "silence" (***see*** Conclusion of Law EE).

[9] Such opinions, issued both before and after the 2003 restructuring of Article 33, but before the Division's March 2, 2009 Advisory Opinion in ***Service Lloyds Ins. Co.*** (TSB-A-09[2]C), included ***Mound, Cotton & Wollan***, [TSB-A-88(20)C]; ***Manufacturers Life Ins. Co. (USA)***, (TSB-A-97[23]C); ***Pacific Life Ins. Co.***, (TSB-A-99[28]C); ***Bankers Life & Casualty Co.*** (TSB-A-04[2]C); ***Conseco Annuity Assurance Co.*** (TSB-A-04[3]C; ***Conseco Senior Health Ins. Co.*** (TSB-A-04[4]C); ***Washington National Ins. Co.*** (TSB-A-04[5]C; ***State Farm Life Ins. Co.*** (TSB-A-05[16]C; and ***Service Life Ins. Co.*** (TSB-A-08[3]C). Petitioner also makes reference to ***Lansdown Altlantic Ltd.*** (TSB-A-06[9]C). This Advisory Opinion addressed the broader question of whether ***Lansdown*** was subject to tax under either Article 33 or Article 9-A, and not the more particular issue of how the Article 33 tax itself was to be applied to entities (unlike ***Lansdown***) who were subject to tax under Article 33.

business in New York, and therefore were not *subject to* the premiums-based tax under Tax Law § 1510(b) (applicable by its specific terms only to *authorized life* insurance corporations). Consequently, they had zero liability for such tax. As a result, when the cap and floor provisions under Tax Law § 1505(a)(2); (b) were applied, the resulting total tax (at the rate specified therein) could only, likewise, be zero. Thus, with a maximum possible tax liability capped at zero, neither part of the two-part Article 33 franchise tax could result in any tax liability (***see e.g.*** TSB-A-04(2)C [April 1, 2004]), notwithstanding that such *unauthorized life* insurance corporations could have New York income from other sources including, as here, income from real estate investments.[10]

The foregoing conclusion and advice as set forth in the noted advisory opinions, for years both before and after 2003, addressed itself specifically to queries from *unauthorized life* insurance corporations. No similar guidance was published with respect to *unauthorized non-life* insurance corporations, at least until 2009 (***see Service Lloyds Ins. Co.***, [Advisory Opinion] TSB-A-09[2]C, March 2, 2009 [concluding that an *unauthorized non-life* insurance corporation was not subject to Tax Law § 1502-a, and that its Article 33 liability, if any, would be computed per Tax Law § 1501]).

L. In summary, and *prior to* the Division's 2009 ***Service Lloyds*** advisory opinion:

> 1) under the explicit language of Tax Law § 1502-a, *authorized non-life* insurance corporations were no longer subject (as of January 1, 2003) to the two part tax system formerly imposed under Tax Law § 1501 and 1510(a), as capped under Tax Law former § 1505(a)(1), and instead were subject only to the premiums-based tax

[10] It is recognized that an *unauthorized* insurance corporation could conceivably have premium based income in New York State (e.g., premiums generated from policies initially written by an insurer with respect to risks appurtenant to its insureds who were located outside of New York, but who subsequently moved into New York and remained so insured). Such circumstances are not presented here.

as imposed per Tax Law § 1502-a, at the rate of tax set by Tax Law § 1510(a) as in effect for years prior to January 1, 2003. The cap formerly imposed by Tax Law § 1505(a)(1), having expired, was no longer a factor.

2) by contrast *authorized life* insurance corporations remained subject to the two-part tax system under Tax Law §§ 1501 and 1510(b), with the amount of tax due limited by the terms of Tax Law §§ 1505(a)(2) and 1505(b).

3) the Division, in its published guidance specifically pertaining to *life* insurance corporations, treated *authorized life* insurance corporations and *unauthorized life* insurance corporations as follows:

a) the liability of *authorized life* insurance corporations would be the lesser of the combined total of the two taxes under Tax Law §§ 1501 and 1510(b), or of the amount of premiums-based tax as computed under Tax Law § 1510(b) but (capped) at the rate specified under Tax Law § 1505(a)(2), while,

b) the liability of *unauthorized life* insurance corporations for either of the two Article 33 taxes would be zero because the cap and floor under Tax Law § 1505(a)(2), (b) effectively eliminated their liability, i.e., since such insurers were *not authorized* to transact an insurance business in New York State, their tax on premiums under Tax Law § 1510(b) would be zero, their tax under Tax Law § 1505(a)(2), (b) would also be zero, and thus (as a mechanical computational matter) the cap under Tax Law § 1505(a)(1), pertaining to their entire combined tax liability, would be zero.

4) the liability, if any, for *unauthorized non-life* insurance corporations was not specifically addressed by any published guidance issued by the Division.

The Division's Changed Interpretation as to Unauthorized Life Insurance Corporations

M. In 2012, the Division changed its interpretation as to the tax treatment of *unauthorized life* insurance corporations under Article 33, based upon the conclusion that Tax Law § 1505(a)(2) could *apply* only to *authorized life* insurance corporations, i.e., only to those "taxpayers *subject to* [the premiums-based] tax" under Tax Law § 1510(b). In fact, only *authorized life* insurance corporations, but not *unauthorized life* insurance corporations, were subject to tax under the explicit terms of Tax Law § 1510(b). The Division reasoned that since

such *unauthorized life* insurance corporations were *not subject to* the section 1510(b) tax on premiums, then the cap of Tax Law § 1505(a)(2) simply had *no application* in determining or limiting their Article 33 liability. From this result, it follows that Tax Law § 1505(a)(2) did not bar such *unauthorized life* insurers from being subject to liability under Tax Law § 1501 (the first part of the two-part Article 33 tax) on their allocated entire net income or other tax base, with no cap on their overall tax liability as imposed and computed thereunder. Thus, while the "cap" and "floor" provisions of Tax Law § 1505(a)(2) and (b) continued to apply to *authorized life* insurance corporations, they did not apply to *unauthorized life* insurance corporations.

N. The Division provided notice of this change of interpretation as to *unauthorized life* insurance corporations via a Technical Memorandum, dated February 17, 2012 and titled "Filing Requirements and the Calculation of Tax for *Unauthorized* Insurance Corporations" (TSB-M-12[4]C; emphasis added). The Division recognized the change in interpretation concerning *unauthorized life* insurance corporations represented a major change from its earlier interpretation (***see*** Conclusions of Law L and M), and so expressly limited its effect to taxable years beginning on or after January 1, 2012.

The Classification Issue

O. Addressed first is the question of whether petitioner may properly be classified as a *life* insurance corporation. Tax Law Article 33 applies to and imposes a franchise tax upon every domestic, foreign or alien insurance corporation (Tax Law § 1501[a]), unless otherwise excepted therefrom (***see*** Tax Law § 1502-a). An "insurance corporation" is generally defined to include all corporate entities that are "doing an insurance business" (Tax Law § 1500[a]). The phrase "doing an insurance business" is not defined under Article 33. It is, however, broadly defined

under the Insurance Law as performing certain acts in New York State, including making insurance contracts, collecting premiums as an insurer and doing a reinsurance business (***see*** Insurance Law § 1101[b][1][A] - [E]). The foregoing provisions include *both* performing the prescribed acts (i.e., "doing an insurance business") *and* doing such acts in the State of New York. In turn, performing the same prescribed acts, but *outside* of the State of New York, would constitute "doing an insurance business" outside of the State of New York. For purposes of being subject to tax under Article 33, the Division has looked to whether a corporation is doing a business which, *if done in New York State*, would require the corporate entity to be licensed (i.e., authorized) by the Superintendent of Insurance (***see Lansdown Atlantic Ltd.***, TSB-A-06[9]C; December 28, 2006). Petitioner admittedly engages in a number of acts that would, if performed in New York State, constitute "doing an insurance business" (***see*** Findings of Fact 1, 2). Thus, petitioner does not dispute that it is an insurance corporation for purposes of Tax Law Article 33, and therefore may be subject to the taxes imposed thereunder.

P. Tax Law Article 33 generally classifies insurance corporations based upon: a) the *kinds* of insurance they provide, i.e., *life* insurance versus *non-life* insurance, and b) whether they are *authorized* or *unauthorized*. Article 33 provides differing tax treatment for insurance corporations based upon such classifications (Tax Law §§ 1501, 1502-a, 1505, 1510). In distinguishing the foregoing classifications, the text of the relevant statutes explicitly refers to insurance corporations that are *authorized*, but does not likewise explicitly refer to *unauthorized* insurance corporations by using the term *unauthorized*. By process of elimination, then, an *unauthorized* insurance corporation is simply one that has not been *authorized* (i.e., has not been

licensed to transact an insurance business in New York State via receipt of a certificate of authority issued by the Superintendent of Financial Services). The parties agree that petitioner is not an *authorized* insurance corporation (***see*** Findings of Fact 7, 8), and that it is therefore properly classified as an *unauthorized* insurance corporation. The dispute here, and the manner in which petitioner's tax liability, if any, is imposed turns on whether petitioner is properly further classified as an *unauthorized life* insurance corporation as opposed to an *unauthorized non-life* insurance corporation.

Q. The term "*life* insurance corporation" is not defined under Tax Law Article 33. Thus, and as above with regard to the lack of a definition of the phrase "doing an insurance business" in Article 33, the parties do not dispute that the Insurance Law definition of "life insurance company" controls for purposes of Tax Law Article 33.

R. Insurance Law § 107(a)(28) provides as follows:

"'Life insurance company' means any corporation having *power to do either one or both of the kinds* of insurance business specified in paragraphs one and two of subsection (a) of [Insurance Law] section [1113] (italics added)." The *kinds* of insurance business specified in paragraphs one and two of Insurance Law § 1113(a) are "Life Insurance" and "Annuities." As is relevant here, Insurance Law § 1113(a)(1) defines "Life Insurance" to mean "every insurance upon the lives of human beings, and every insurance appertaining thereto . . . ." The terms of section 1113(a)(1) very broadly include a number of situations, circumstances and activities the insurance of which falls within the ambit of "life insurance." Insurance Law § 1113(a)(2) defines "Annuities" to mean "all agreements to make periodical payments for a period certain or where the making or continuance of all or some of a series of such payments, or the amount of any such

payments, depends upon the continuation of human life, except payments made under the authority of paragraph one hereof." Life Insurance and Annuities are two defined "kinds" of insurance among some 32 different defined "kinds of insurance" authorized under Insurance Law § 1113(a). An alien insurance corporation may engage in the business of reinsuring the *kinds* of insurance which it is authorized to do (under Insurance Law § 1113), and may confine its business to the reinsurance of such *kinds* of insurance (Insurance Law § 1114[b]). Thus, the Insurance Law draws a distinction between "kinds" of insurance, and the "methods" by which such "kinds" of insurance may be provided (i.e., through direct insurance *or* through reinsurance). This distinction plainly emerges from the fact that Insurance Law § 1113, in defining "kinds of insurance," does not include reinsurance as a "kind" of insurance, but instead provides that an insurance corporation may engage in the business of "reinsurance of the *kinds of insurance* which it is licensed to do" and "may confine its business to reinsurance." Petitioner was licensed by BaFin to provide life insurance as a reinsurer, and it in fact provided such insurance in Europe and the United States (***see*** Finding of Fact 3). As such, petitioner clearly has the *power* and authority to provide "insurance upon the lives of human beings" (Insurance Law § 1113[a][1]), and therefore falls within the definition of a *life* insurance corporation under Insurance Law § 107(a)(28).

S. Article 33 distinguishes *life* insurance corporations from *non-life* insurance corporations in a manner similar to how it distinguishes *authorized* from *unauthorized* insurance corporations (***see*** Conclusion of Law P). That is, the text of the relevant statutes identify a *life* insurance corporation either: a) directly by explicit use of the term "life insurance corporation" (***see*** Tax Law former § 187[1]; Tax Law §§ 1501[b]; 1505[a][2]; 1510[b]), or b) indirectly by employment

of the phrase "*other than* such corporations transacting the business of *life insurance*" (***see*** Tax Law §§ 1510[a]; 1502-a), and the phrase "*except life insurance* corporations" (***see*** Tax Law §§ 1505[a][1]; 1510[a]. Thus, and in simplest terms, a *non-life* insurance corporation is an insurance corporation that is not explicitly identified as a *life* insurance corporation, or that *does not transact the business of life* insurance. In this latter respect, since petitioner is empowered to transact a life insurance business, albeit by reinsurance, and does so, it cannot be classified under Article 33 as a *non-life* insurance corporation (***see Matter of First Fortis Life Insurance Company***, Tax Appeals Tribunal, June 11, 1998).[11]/[12]

T. The Division argues that since petitioner was not *authorized* to transact any insurance business in New York, its *life* versus *non-life* insurance corporation classification for Article 33 purposes must take into account all of its insurance activities outside of New York. The Division maintains, upon this basis, that petitioner may not be classified as a *life* insurance corporation for purposes of Tax Law Article 33 because it engages in a number of *non-life* insurance activities outside of NewYork. This argument essentially overlooks the foregoing reasoning, as well as the controlling definition of a "life insurance company" as "any corporation having the power to do

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[11] The Tax Law refers to insurance "corporations" while the Insurance Law refers to insurance "companies." This distinction is of no apparent consequence for purposes of deciding the issues presented herein.

[12] The Division asserts that petitioner may not cite to the Tribunal's ***First Fortis*** decision for purposes of then setting forth and relying upon the reasoning and conclusions of the administrative law judge in the original determination in that matter (***Matter of First Fortis Life Insurance Co.***, Division of Tax Appeals, June 5, 1997). Petitioner did not improperly rely upon the Tax Appeals Tribunal's decision in ***First Fortis*** or, by implication, upon the analysis and conclusion reached in the original determination therein. Tax Tribunal decisions are precedential (Tax Law § 2016). In ***First Fortis***, the Tribunal stated that the administrative law judge "correctly applied the applicable law" in arriving at her conclusion that petitioner "was a 'life insurance company' under Insurance Law § 107(a)(28) (i.e., a corporation having power to do either the business of life insurance or annuities or both)." The Tribunal specifically affirmed the determination of the administrative law judge "for the reasons set forth therein." In so doing, the Tribunal adopted and clearly incorporated the administrative law judge's determination and analysis by reference into its own precedential decision, and it was proper for petitioner to rely upon and set forth the same herein.

either one or both of [a life insurance business or an annuities business]." Petitioner was licensed to do a *life* insurance business and it did so (***see*** Finding of Fact 3). Hence, it may be classified as a *life* insurance corporation.

U. The Division also argues that petitioner may not qualify as a life insurance corporation because its authority to engage in a *life* insurance business is limited to the reinsurance of life insurance contracts (in Europe and the United States), such that it is not authorized to issue "direct writings in the life insurance area." Providing *life* insurance as a reinsurer involves simply the reinsurance of a *life* insurance contract, thereby facilitating a wider distribution of the insurable or insured risks by ceding some portion of the same to another insurance corporation or among a pool of insurers. This does not change the underlying risk of being insured, and insurance corporations either individually or in a pool of reinsurers, as petitioner was (***see*** Findings of Fact 3 - 6), simply assume and undertake the obligation of covering the insurance risks ceded by the originating insurance writer (***People v. Miller***, 177 NY 515, 522 [1904]). It is appropriate to "look through" a reinsurance contract to the underlying risk in order to determine what the contract covers (***see Guardian Life Ins. Co. of Am. v. Chapman***, 302 NY 226 [1951]). Thus, the reinsurance of a *life* insurance contract remains the provision of *life* insurance. As noted, an insurance corporation may engage in the business of reinsuring of the *kinds* of insurance which it is authorized to do, and may confine its business to the reinsurance of such *kinds* of insurance (***see*** Conclusion of Law R). Petitioner is authorized to reinsure *life* insurance contracts, and in doing so it thereby provides life insurance. Providing life insurance via reinsurance is not a bar to being classified as a *life* insurance corporation for purposes of taxation under Article 33.

V. The Division also posits that petitioner does not have the power to conduct a life insurance business in New York because it does not have the power to do "*every* [type of] insurance upon the lives of human beings," as required by Insurance Law § 1113(a)(1). This argument is rejected as it conflates the very broad definition of "life insurance" under Insurance Law § 1113(a)(1), with a requirement that an insurance corporation must have the power to engage in all of the varying circumstances included in such a broad definition of life insurance in order to be classified as a *life* insurance corporation. Moreover, under Insurance Law § 107(a)(28), a "Life insurance company" is defined as an insurance corporation that has the power to do *either* "life insurance" or "annuities" (Insurance Law § 1113[a][1], [2]). Insurance Law § 107(a)(28) does not require that an insurance corporation must have the power to do all forms of life insurance in order to be classified as a life insurance corporation. Consistent with the fact that "[n]othing [in Insurance Law section 1113] shall require any insurer to insure *every* kind of risk which it is authorized to insure," is the corollary fact that nothing requires any insurance corporation to be authorized to provide *every* conceivable type of insurance upon the "lives of human beings" in order to qualify as a *life* insurance corporation. As petitioner points out, under the Division's argument, a company that has the power to do *every* type of life insurance but one could not qualify as a life insurance corporation. In fact, and again as petitioner points out, an insurance corporation does not even have to possess the power to conduct "life insurance," as defined, to qualify as a "life insurance corporation." That is, an insurance corporation with the power to conduct only an "annuities" business, as defined at Insurance Law § 1113(a)(2), qualifies as a "life insurance corporation" even though it does no "life insurance" as defined at Insurance Law § 1113(a)(1). In sum, Insurance Law § 1113(a)(1) very broadly defines "life

insurance" to ensure that all variations of "insurance upon the lives of human beings" are covered by that definition. It is plainly not meant to require that an insurance corporation must provide "every type of insurance upon the lives of human beings" in order to qualify as a life insurance corporation, but rather is meant to ensure that an insurance corporation engaging in at least one type of life insurance qualifies as a "life insurance corporation."

W. Additionally, the Division argues, in reliance on Insurance Law § 4205, that an insurance corporation "cannot be licensed as a life insurance corporation in New York if it directly writes non-life insurance, *e.g.*, property and casualty insurance." In relevant part, Insurance Law § 4205 states that, "No *life insurance company* licensed to do a *life insurance business* in this state shall do any business other than [life insurance business] . . . ." First, petitioner is not licensed to do *any* insurance business in this state, nor does it seek such licensure. More importantly, section 4205 by its terms applies to entities that are *life insurance companies*. Thus, for section 4205 to apply, petitioner must be a *life* insurance company in the first instance.

X. Finally, the Division notes that petitioner's total premiums from reinsurance never exceeded 5% of its total premiums, and that life insurance admittedly made up only a "minimal" fraction of its total business. According to the Division, this fact "buttresses" the argument that petitioner may not be classified as a life insurance corporation. This argument is rejected. Article 33 does not specify any relative percentage, minimum amount or other measure of the quantity of any given *kind* of insurance, including *life* insurance, in which an insurance corporation must engage, nor is there any "principally engaged in" or "most significantly engaged in" language under Article 33, for purposes of classifying an insurance corporation as a *life* or

non-life insurance corporation under Article 33. Here, petitioner clearly possesses the power to engage in the business of *life* insurance and does so. The fact that the dollar (or euro) amount of *life* insurance business in which it engages is small in comparison to the amounts of its other insurance business does not preclude a conclusion that petitioner may properly be classified as a *life* insurance corporation.[13]

Y. In sum, petitioner is subject to tax under Article 33 as an insurance corporation by virtue of the fact that it engages in activities that constitute doing an insurance business. It is subject to Article 33 notwithstanding that it is an alien corporation, does not possess a certificate of authority to conduct an insurance business in New York State (i.e., is not licensed as an insurance company in New York State by the Superintendent of Financial Services), and in fact conducts no insurance business in New York State. Performing such activities as constitute doing an insurance business for purposes of Article 33 is not limited to performing or engaging in such activities in New York State (***see*** Conclusion of Law O). Among such activities, the *kinds* of insurance business in which petitioner is empowered to engage is the business of providing *life* insurance. It is empowered to so by BaFin, the governing authority in its home country (Germany). The fact that the *method* by which petitioner provides *life* insurance is via reinsurance is not a bar to being classified as a *life* insurance corporation under Tax Law Article 33. Even if reinsurance is, as the Division posits, a separate insurance activity or type of

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[13] This may lead to a perceived anomaly where an *unauthorized* alien insurance corporation with the authority under its home jurisdiction to engage in a variety of *kinds* of insurance, including *life* insurance may, as here, be entitled to classification as a *life* insurance corporation under Article 33 notwithstanding that its *life* insurance business represents (as here) only a very small fraction of its overall insurance business. While such classification allows for the tax "benefit" resulting from the Division's prior interpretation and application of Tax Law § 1505(a)(2), the availability of any such benefit would appear to be limited given the Division's disavowal of its prior interpretation in conjunction with the impact of the applicable period of limitations on assessments and claims for refund.

insurance activity in Europe, it nonetheless remains an insurance activity, and engaging in insurance activities as defined remains the linchpin under which a corporation is considered to be "doing an insurance business" for purposes of Article 33. Here, petitioner is empowered to engage in activities that constitute doing an insurance business, as defined, and such activities include engaging in a *life* insurance business. Petitioner in fact engages in a *life* insurance business and therefore, by process of elimination, cannot be classified as a *non-life* insurance corporation under the classification scheme of Article 33. In sum, petitioner is entitled to be classified as a *life* insurance corporation.

The Taxation Issues

Z. Having concluded that petitioner is properly classified as a *life* insurance corporation for purposes of taxation by New York State under Tax Law Article 33, the next specific questions become how, and to what extent, is petitioner as an *unauthorized life* insurance corporation, subject to tax for the years ended December 31, 2006 and 2007. Most specifically, the first question is whether the limitation on liability afforded to *authorized life* insurance corporations under Tax Law § 1505(a)(2) is likewise available and applicable to petitioner, an *unauthorized life* insurance corporation, during the years at issue. Since, as determined above, petitioner is properly classified as an *unauthorized life* insurance corporation (***see*** Conclusion of Law Y), and since the years at issue here (2006 and 2007) are before January 1, 2012, petitioner is entitled to the benefit of the Division's interpretation and application of Tax Law § 1505(a)(2) during such years (***see*** Conclusions of Law M and N). Accordingly, the petition will be granted, the Notice of Deficiency dated November 23, 2012 will be canceled, and petitioner will be entitled to a refund of the amounts it paid ($250.00 and $43.00) for each of the years in issue; ***see***

Finding of Fact 15).

The Parties' Additional Challenges

AA. As above, resolution of the Classification Issue in petitioner's favor is dispositive with regard to the first of the Taxation Issues. At the same time, should the foregoing resolution of the Classification Issue be reversed upon any appeal, such that petitioner is found to be properly classified as an *unauthorized non-life* insurance corporation, then the second of the Taxation Issues would emerge.[14] Therefore, in order to fully address the parties' challenges herein, as well as to provide a complete record and analysis for review, the following conclusions addressing the Taxation Issue as applicable to an *unauthorized non-life* insurance corporation are provided.

BB. In addition to its change of interpretation regarding *unauthorized life* insurance corporations, and as specifically relevant hereto, the Division further explained in Technical Memorandum (TSB-M-12[4]C) that its change in interpretation had no effect on *non-life* insurance corporations. In this latter respect, the Division noted that all such *non-life* insurance corporations ceased being subject to the two-part Article 33 tax as of January 1, 2003, with *authorized non-life* insurance corporations becoming subject at that time to the premiums-based tax under Tax Law § 1502-a only (as computed per Tax Law former § 1510[a][1]), in lieu of the two-part tax. The Division's Technical Memorandum specifically states that the provisions of section 1502-a do *not* apply to *unauthorized non-life* insurance corporations, and further notes that the "cap" under Tax Law § 1505(a)(1) that had previously applied to *non-life* insurers

[14] That issue is whether petitioner's Article 33 tax liability, if any, is properly determined under Tax Law § 1502-a and not under Tax Law § 1501 (***see*** Conclusion of Law A).

expired as of taxable years beginning on or after January 1, 2003. Consequently, and by contrast to *authorized* *non-life* insurance corporations, *unauthorized* *non-life* insurance corporations simply continued to be subject to the first part of the Article 33 tax on allocated entire net income or other tax base only, per Tax Law § 1501, as before and without limitation or cap. Notably, the summary introduction to this memorandum provides the following:

> "This memorandum provides guidance regarding the filing requirements and the calculation of the Article 33 franchise taxes for *unauthorized* insurance corporations. An *unauthorized* insurance corporation is one that does not have a certificate of authority from the Superintendent of Financial Services to conduct an insurance business in New York State.
>
> *This memorandum also announces a change in the department's interpretation of the Tax Law with respect to unauthorized* ***life*** *insurance corporations* (emphasis added)."

CC. In view of the Division's February 17, 2012 change of interpretation pertaining specifically to *unauthorized life* insurance corporations:

> 1) the treatment of *authorized non-life* insurance corporations and of *authorized life* insurance corporations remained the same as set forth above (***see*** Conclusion of Law L [1],[2]).
>
> 2) the treatment of *unauthorized life* insurance corporations changed, as set forth in Conclusion of Law M, above, upon the premise that since such insurers were not *subject to* the tax on premiums in any event because they were not *authorized*, the "cap" and "floor" under Tax Law § 1505(a)(2); (b) were inapplicable, and such *unauthorized life* insurance corporations were to compute their Article 33 liability (if any) per Tax Law § 1501.[15]
>
> 3) the treatment of *unauthorized non-life* insurance corporations remained as before, whereunder such corporations were not subject to the provisions of Tax Law § 1502-a, and were required to compute their Article 33 liability (if any) per

[15] Again, this result differs from the Division's earlier interpretation that *unauthorized life* insurance corporations were taxpayers subject to tax under Article 33, but who would have no actual tax liability thereunder because, as *unauthorized* to transact insurance business, they were *not subject to* the second (or additional) premiums based tax under Tax Law § 1510[b] thus leaving their actual or total tax liability effectively, or functionally, capped at zero.

Tax Law § 1501 (***see*** Conclusion of Law G; ***Service Lloyds Ins. Co.***, [Advisory Opinion] TSB-A-09[2]C, March 2, 2009).

Thus, the Division maintains, if petitioner is properly classified as an *un*authorized *non-life* insurance corporation, then Tax Law § 1501 and not Tax Law § 1502-a applies such that petitioner should have computed its tax on its allocated business and investment capital (for 2006) and its allocated entire net income (for 2007). The Division further maintains that the method of allocation should consist of a three factor weighted formula (for 2006) and a single receipts factor formula (for 2007), consistent with Tax Law Article 9-A, rather than the weighted premiums and wages allocation formula set forth under Tax Law Article 33, § 1504(a), or (as an alternative thereto) of a single wage factor formula under Tax Law § 1504(a), i.e., without the weighted premiums portion of such formula. 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 (2006) or its entire net income (2007) or the allocation percentages that would result under Tax Law Article 9-A (if relevant). While petitioner does not object to the mathematical (computational) accuracy of the alternative (single wage factor) allocation method as performed by the Division, petitioner does not agree that the same, without accounting for worldwide factors (premiums and wages), is a proper application of the statutory allocation formula set forth at Tax Law § 1504(a).

DD. The parties spar, in their written arguments, over certain statutory language denominated by petitioner as the "operative phrase." Petitioner's "operative phrase" consists of the "applicability" language imposing the tax under Tax Law § 1502-a upon, "every domestic, [foreign, and] alien insurance corporation, other than such corporations transacting the business

of life insurance, *(1) authorized to transact business in this state under a certificate of authority from the superintendent of insurance . . .* (italics added)," as accompanied by the *limitation* (or cap) language by which the amount of tax is computed as that which would be imposed on New York-source premiums under Tax Law former § 1510(a), as that provision applied for taxable years prior to January 1, 2003, or a minimum amount of $250.00.

Petitioner points out that the tax imposed under Tax Law former § 1510(a) had been imposed using similar "applicability" language, i.e., upon domestic, foreign, and alien insurance corporations "other than such corporations transacting the business of life insurance, *(1) authorized to transact business in this state under a certificate of authority from the superintendent of insurance . . .* (italics added)." Petitioner notes further, and critically, that this same "operative phrase" language is found in the "applicability" language imposing tax under Tax Law § 1510(b)(1) upon "every domestic life insurance corporation, and every foreign and alien *life* insurance corporation *authorized to transact business in this state under a certificate of authority from the superintendent of insurance,*" as accompanied by the limitation (or "cap" and "floor") language under Tax Law § 1505(a)(2) and (b).

EE. Upon the foregoing, petitioner maintains that *unauthorized non-life* insurers are not *explicitly excluded* from being subject to the tax imposed under Tax Law § 1502-a in lieu of the tax imposed under Tax Law § 1501, because the language of Tax Law § 1502-a does not *explicitly* mention such *unauthorized non-life* insurance corporations. Petitioner interprets this statutory "silence" as to *unauthorized non-life* insurers, as akin to the statutory "silence" concerning *unauthorized life* insurers. Petitioner argues that both types of *unauthorized* insurers (non-life and life) should be treated in like fashion, at least for years prior to 2012, thus leaving

all *non-life* insurers subject to one tax on premiums (under Tax Law § 1502-a), and all *life* insurers subject to the two taxes under Tax Law §§ 1501, and 1510(b), but as limited by the cap (Tax Law § 1505[a][2]) and floor (Tax Law § 1505[b]).

EE. Petitioner's argument proceeds from the position that for many years the Division treated *life* insurance corporations, both *authorized and unauthorized*, in the same manner (i.e., as subject to the tax limitation [cap] set forth above under Tax Law § 1505[a][2]), notwithstanding that the applicability provision (i.e., the operative phrase) specified only *authorized life* insurance corporations. From this starting point, petitioner points out that the applicability provision pertaining to *non-life* insurance corporations under Tax Law § 1502-a likewise specifies only *authorized non-life* insurance corporations, and (like the *life* insurance corporation applicability provisions) is silent as to *unauthorized non-life* insurance corporations. Petitioner argues that such symmetry in the statutory language, coupled with the Division's published interpretation and guidance as to *life* insurance corporations (***see*** Conclusion of Law K, n 9) demands like treatment for *non-life* insurance corporations, *authorized and unauthorized*, such that both should be subject to the tax imposed under Tax Law § 1502-a, at least for the year here at issue and, in fact, until the point in time when the Division *explicitly* reversed its prior published interpretation and guidance regarding *life* insurance corporations. Distilled to its essence, petitioner's argument is that notwithstanding the explicit statutory language, there was no recognized or functional difference in treatment between *authorized* and *unauthorized* insurance corporations before the Division's explicit repudiation of such interpretation effective January 1, 2012 (***see*** TSB-M-12[4]C; Conclusions of Law M and N) or, at the very earliest, as of March 2, 2009, based on the Division's issuance of its ***Service Lloyds Ins. Co.*** Advisory Opinion

(TSB-A-09[2]C; ***see*** Conclusion of Law K).

GG. The primary thrust of petitioner's argument hinges, as noted, on the absence of a specific and explicit distinction between *authorized* and *unauthorized* insurance corporations in the "operative phrase," or more precisely upon the absence of any specific and explicit language, i.e., "statutory silence," concerning the treatment of *unauthorized* insurance corporations. Petitioner's operative phrase argument is rejected. First, Tax Law § 1502-a explicitly sets forth a limitation on applicability by specifying that those to whom the tax applies must be "authorized" (***see*** Conclusion of Law G). Further, any purported reliance by petitioner on the Division's advisory opinions must be tempered by the fact that none of the opinions cited by petitioner address the circumstances of an *unauthorized non-life* insurance corporation, i.e., the opinions listed speak to *unauthorized life* insurance corporations that were taxed under a different (two-part) taxing regime for the year at issue.[16] In fact, the only published guidance pertaining to the circumstances of an *unauthorized non-life* insurance corporation reached the conclusion advanced by the Division herein (***see Service Lloyds Ins. Co.***, Advisory Opinion [TSB-A-

[16] Petitioner accords substantial weight to the Division's advisory opinions (***see*** Conclusion of Law K, n 9). Tax Law § 171 and 20 NYCRR 2376.1 provide for the issuance of advisory opinions of the Commissioner of Taxation and Finance. An advisory opinion is issued at the request of a person who is or may be subject to liability under the Tax Law, presents the Division's interpretation of the Tax Law at a specific point in time, and is binding upon the Commissioner only with respect to that person and only at that specific point in time and only as to the facts specified therein (20 NYCRR 2375.5; 2376.1[a]; 2376.4). In fact, a "note" appearing at the end of each advisory opinion sets forth this same advice (***see*** Conclusion of Law O). In this context, it must be noted that advisory opinions issued by the Division of Taxation are not duly promulgated and adopted regulations and do not carry the force and effect of law (***see Downey v. Allstate Ins. Co.***, 638 Fed Supp 322 [SD NY 1986]; ***Matter of AIL Systems, Inc.***, Tax Appeals Tribunal, May 4, 2006; ***Matter of Stuckless and Olsen [Stuckless II]***, Tax Appeals Tribunal, August 17, 2006). The Tax Appeals Tribunal has reviewed advisory opinions to determine if the Division has been consistent in its interpretation of the law (***see Matter of Bausch & Lomb, Inc.***, Tax Appeals Tribunal, December 20, 2007). In this case, the advisory opinions cited by petitioner pertain specifically to *unauthorized life* insurance corporations. Since the second Taxation Issue here involves consideration of petitioner as an *unauthorized non-life* insurance corporation, such advisory opinions (notwithstanding that they consistently elucidated the Division's initial interpretation and application of the law as to *unauthorized life* insurance corporations) are not entitled to be accorded significant weight or deference herein with respect to *unauthorized non-life* insurance corporations.

09(2)C, March 2, 2009]). It is noteworthy that petitioner itself does not appear to have sought any guidance, including making any request for an advisory opinion, specifically addressing its particular circumstances. There are distinctions between *life* and *non-life* insurance corporations, and between *authorized* and *unauthorized* insurance corporations of both ilk. Such distinctions cannot be ignored as superfluous or meaningless, and in fact bear directly on the outcome herein. In ***Matter of Helmsley Enterprises, Inc.*** (Tax Appeals Tribunal, June 20, 1991, ***confirmed*** 187 AD2d 64 [1993], ***lv denied*** 81 NY2d 710 [1993]), the Tribunal stated:

> "As a general rule, the maxim *expressio unius est exclusio alterius* is applied in interpreting statutes, so that where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded [citations omitted]."

By specifying *authorized non-life* insurance corporations in the text of Tax Law § 1502-a, the Legislature distinguished such corporations from *unauthorized non-life* insurance corporations. Such specific applicability language establishes the fact that no other type of *non-life* insurance corporation (including those that were *unauthorized*) were contemplated as falling within the ambit of that statutory provision. Since Tax Law § 1502-a, by its specific terms, applied only to *authorized non-life* insurance corporations, and imposed its tax on such corporations in lieu of the two taxes formerly imposed on such corporations under Tax Law §§ 1501 and 1510, it follows that Tax Law § 1502-a simply did *not* apply to *unauthorized non-life* insurance corporations. Such *unauthorized non-life* insurance corporations therefore were, and remained, subject to tax under Tax Law § 1501, without limitation.

HH. Petitioner recognizes that Tax Law § 1502-a is specifically made applicable, by its terms, only to *authorized non-life* insurance corporations. Nonetheless, petitioner argues that

because the same type of language found in Tax Law § 1502-a was employed in other provisions (***see*** Tax Law §§ 1510, 1505), the Legislature (in enacting Tax Law § 1502-a) in fact *acquiesced* to an interpretation that such provision was to apply equally to both *authorized* (as specified) and *unauthorized non-life* insurance corporations, consistent with the Division's prior interpretation concerning both *authorized* and *unauthorized life* insurance corporations (***see*** Conclusion of Law K).

Accepting petitioner's argument that the Legislature "acquiesced" to the Division's prior interpretation and application of such provisions concerning *life* insurance corporations, and so acquiesced and adopted that view with its enactment of Tax Law § 1502-a, requires ignoring the clear terms of the statute, and its specific linguistic limitation of applicability only to *authorized non-life* insurance corporations. It further requires a conclusion that the Legislature agreed with and approved that interpretation, and made the same applicable by using language that on its face requires an entirely different result. To agree with petitioner's argument requires:

> a) accepting that the Legislature was specifically aware of the Division's interpretation and application of the Tax Law treating *unauthorized* and *authorized life* insurance corporations as though there was no statutory distinction between the two, as described in detail above;
>
> b) accepting that the Legislature approved of such interpretation and application and acquiesced thereto; and
>
> c) accepting that the Legislature indicated its acquiescence, approval and adoption of the same by enacting a statutory provision (Tax Law § 1502-a) the explicit terms of which drive an entirely opposite result.

Petitioner's argument that the Legislature's "silence" in Tax Law § 1502-a (or its failure to *affirmatively* and *specifically* exclude *unauthorized non-life* insurance corporations therefrom), simply does not overcome the clear wording of the statute and its enumeration of the particular

type of entity (an *authorized non-life* insurance corporation) to which the provision applied from the outset. As such, and if petitioner is not properly classified as an *unauthorized life* insurance corporation but rather is an *unauthorized non-life* insurance corporation, petitioner would be subject to tax under Tax Law § 1501, and not Tax Law § 1502-a, for the years 2006 and 2007.

The Allocation Issue

II. If, as above, petitioner is properly classified as an *unauthorized non-life* insurance corporation subject to tax pursuant to Tax Law §1501 based on its allocated business and investment capital (2006) and its allocated entire net income and, as such, is not subject to the premiums-based tax under Tax Law § 1502-a (or to any "operative phrase-based limitation thereunder), then the additional issue of how to allocate to New York the appropriate portion of petitioner's business and investment capital and its entire net income subject to tax arises. Article 33 provides a formula by which an insurance corporation's entire net income is allocated to New York via an income allocation percentage comprised of a premiums factor and a wage factor, as follows:

> "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]).

JJ. The Tax Law goes on, however, to provide the Division with the discretion to calculate a taxpayer's income allocation percentage by resort to an alternative method that differs from that set forth above, as follows:

> "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]; italics added).

KK. The Division would invoke the Commissioner's discretionary authority under Tax Law § 1504(d) to employ a method of allocation different from that statutorily prescribed. Turning to this separate issue of proper allocation, as now presented, it is initially noted that departure from the statutorily prescribed method requires a strong justification by the proponent of the departure. Thus, the Division must show that the statutorily prescribed method for allocating entire net income does not properly reflect petitioner's business, activities or income in New York, resulting in an allocation that is "out of all appropriate proportions 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 [Maryland], Inc. v. Tax Appeals Tribunal,*** 85 NY2d 139, 146 [1995]). In short, the Division must show that the Article 33

statutory formula does not properly reflect petitioner's New York activity, business or income *and* that its proposed alternative formula does.

LL. Tax Law § 1504(b)(1) defines "premiums" to mean:

> "[f']or purposes of [allocation of entire net income], the term 'premium' includes all amounts received as consideration for insurance contracts, reinsurance contracts and annuity contracts and shall include premium deposits, assessments, policy fees, membership fees and every other compensation for such contract. The term 'total premiums' means total gross premiums or deposit premiums or assessments, less returns thereon, on all policies, annuity contracts, certificates, renewals, policies subsequently cancelled, insurance and reinsurance executed, issued or delivered on property or risks, including premiums for reinsurance assumed, less dividends on such total premiums, including unused or unabsorbed portions of premium deposits paid or credited to policyholders but not including deferred dividends paid in cash to policyholders on maturing policies, nor cash surrender values, and less premiums on reinsurance ceded."

Tax Law § 1504(b)(2)(A), in turn, defines "New York premiums" to mean:

> "that portion of total premiums written, procured or received on property or risks located or resident in New York and shall also include premiums written, procured or received in this state on business which cannot be specifically assigned as located or resident in any other state or states,"

MM. The statutory income allocation formula set forth at Tax Law § 1504(a) consists of (1) a premiums factor and (2) a wage factor. This statutory formula is weighted most heavily on premiums, carrying a premiums factor multiplier of nine, with wages carrying a wage factor multiplier of one (***see*** Conclusion of Law HH). The income subject to allocation here was not income from premiums. In fact, it is undisputed that petitioner had no income from premiums in New York State, and petitioner reported no income from premiums in the United States. Thus, the numerator of the premiums factor would be zero and would result (regardless of the denominator) in a zero premiums allocation factor. The tax imposed under Tax Law § 1502-a

(that which petitioner alternatively *sought* to be applicable herein) is based solely on "gross direct premiums, less return premiums thereon, written on risks located or resident in [New York] State" (Tax Law § 1502-a). At the same time, the tax to which petitioner *would be* alternatively subject under Article 33 (as concluded above) is *not* a tax based on premiums, but rather is one (in this instance) based upon allocated investment and business capital (2006) and allocated entire net income (2007).[17] Allocating non-premium-based entire net income to a given jurisdiction under a formula based almost entirely upon premium income in that jurisdiction, in an instance where, as here, the taxpayer had no premium-based income (or premiums) in that jurisdiction, appears questionable at the outset. This is especially true given that the statutory allocation formula here heavily weights the premium factor by assigning a multiplier factor of nine thereto. Thus, there exists a clear and substantial basis for rejecting the appropriateness of applying an income allocation formula resting almost entirely (90%) upon premiums. Instead these circumstances strongly support the Division's resort to alternative allocation, as contemplated and authorized under Tax Law § 1504(d). Any other conclusion renders the statutory authority to depart from the prescribed allocation formula, where justified, essentially meaningless.

NN. Tax Law § 1503(a), "Computation of entire net income," provides that "[t]he entire net income of a taxpayer shall be its total net income from all sources *which shall be presumably the same as the life insurance company taxable income . . . , which the taxpayer is*

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[17] The tax imposed under Tax Law § 1501 is, similar to the tax imposed under Tax Law Article 9-A, the highest resulting amount of tax computed on four bases ([1] allocated entire net income; [2] allocated business and investment capital; [3] 9% of entire net income plus certain officers' and shareholders' salaries and other compensation; or [4] a minimum tax of $250.00, plus tax on allocated subsidiary capital [if applicable]) (Tax Law §§ 1501, 1502).

required to report to the United States treasury department, for the taxable year . . . (italics added)." Petitioner maintains that an allocation of its entire net income, in any event, must be based upon its worldwide income, business and activities, as opposed to the more limited realm of its United States or New York State income, business and activities. This position is perhaps premised upon the theory that petitioner's worldwide activities, business and income provide the wherewithal enabling it to make the types of investments in entities such as the partnerships herein through which the income in question was generated. This premise, however, largely overlooks the New York location of the properties in which the partnerships invested, the ties to the income generated as a result thereof, and the accompanying benefits attendant thereto (such as a regulated system of commerce), each of which facts provides support for the Division's resort to its discretionary authority to apply an alternative method of allocation.

OO. Article 33 imposes a premiums-based tax on *authorized non-life* insurance corporations and on *authorized life* insurance corporations (Tax Law §§ 1502-a, 1510[b]). Article 33 also imposes a tax on all *authorized* and *unauthorized life* insurance corporations and on *unauthorized non-life* insurance corporations computed (among other bases) on allocated entire net income (Tax Law § 1501). As noted, Article 33 does not explicitly differentiate by text between *authorized* and *unauthorized* insurance corporations. To the extent the tax under Tax Law § 1501 is applied to insurance corporations with New York premium based income (i.e., *authorized* insurance corporations), Article 33 provides an allocation formula that, while heavily weighted on premiums (Tax Law § 1504[a]; ***see*** Tax Law § 1504[b][1], [2][A]), is presumed appropriately applicable to such corporations. At the same time, and given that the statutory provisions do not explicitly differentiate between *authorized* and *unauthorized*

insurance corporations, it is not surprising that there is no explicit statutory allocation formula for such latter insurance corporations. Instead, Article 33 affords the discretion to utilize an alternative method of allocation. Such an alternative would, as here, reasonably be utilized in instances where the tax involved is not premium based, and where the income to be allocated is, likewise, not premium income. Since *un*authorized insurance corporations are not licensed to write premiums and consequently may, as here, have no premium-based income, the application of a premium-based allocation formula to allocate non-premium-based entire net income would be, at best, inconsistent.

PP. The question thus devolves to whether the particular alternative method of allocation, as proposed by the Division under Tax Law § 1504(d), in fact effects a proper, fair and reasonable reflection of petitioner's "activity, business or income" within New York. Tax Law § 1500(I), (j) define the terms "investment capital" and "business capital." Tax Law § 1503(a) defines "entire net income," subject to certain modifications not relevant here (***see*** Tax Law § 1503[b]), as follows:

> "[t]he entire net income of a taxpayer shall be its total net income from all sources which shall be *presumably* the same as the life insurance company taxable income . . . , taxable income of a partnership or taxable income, . . . , which the taxpayer is required to report to the United States treasury department, for the taxable year . . . (italics added)."

The dollar amounts of investment capital and business capital (2006) and entire net income (2007) being allocated are not in dispute. Rather, it is the Article 9-A based method and resulting percentages by which such amounts are to be allocated for the years in issue that is challenged.

The presumption that entire net income is federal taxable income, coupled with the fact

that federal taxable income here consists of petitioner's federal ECI (***see*** Finding of Fact 16), means that the same would not (ordinarily) include petitioner's entire world wide income (***compare*** Tax Law § 208[9][c] ["(e)ntire net income shall include income within and without the United States"]). This supports the Division's resort to alternative allocation based on the ratio of petitioner's New York distributive portion of its receipts from the Partnership to its "everywhere" distributive portion of receipts from the Partnership (***see*** Addendum I). Petitioner notes that the Division's alternative method allocates approximately 41% of petitioner's business and investment capital (2006) and approximately 93% of its entire net income (2007) to New York. While true, this result is not surprising given that the great majority of the allocable items are the result of the partnership's holdings in and sale of real estate located in New York. Under all of such factors, it cannot be concluded that the Division's proposed alternative allocation method results in allocating capital (2006) and income (2007) to New York that is out of all appropriate proportion with respect to petitioner's business, *income* or activities in New York in such years. In sum, the Division's resort to the allocation method prescribed under Article 9-A, premised upon receipts-based allocation as set forth under Tax Law § 210(3)(a)(10)(A)(ii); (3)(a)(2) and 20 NYCRR 4-6.5(a)(1), was clearly reasonable under the facts presented.[18]

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[18] As the Division notes by brief, the business allocation formula (BAP) calculation under Article 9-A was based, for the first year at issue (2006), on a the then-applicable three factor (property, payroll and receipts) formula and for the second year at issue (2007) on the applicable single one factor (receipts) formula (Tax Law §§ 210[3][a][10][A][ii]; [3][a][2]). Further, a taxpayer (such as petitioner) that is a corporate partner in a partnership "takes into account its distributive share of the partnership's receipts and payroll within and without New York," together with its distributive share of the partnership's property in computing its BAP (20 NYCRR 4-6.5[a][1]). The Division computed petitioner's BAP upon the basis of the foregoing language and petitioner does not contest the Division's mathematics or the dollar amounts resulting therefrom. It is further noted that Audit Schedule E carries the following language: "Since the taxpayer is not authorized to write premiums in NY and its activity is exclusively from real estate investment partnerships, the business allocation percentage was recomputed based on article 9A rules as this more closely reflects the taxpayer's activity in NY. The adjustment was made per Sec. 1504(d)."

QQ. In sum of the foregoing, petitioner is properly classified as an *unauthorized life* insurance corporation (***see*** Conclusion of Law X). As such, its Article 33 liability must be determined under Tax Law §§ 1501 and 1510(b), but limited under Tax Law § 1505(a)(2) in accordance with the Division's interpretation of that provision prior to January 1, 2012. Accordingly, petitioner's Article 33 liability for the years in issue was zero, the petition must be granted and the Notice of Deficiency must be canceled (***see*** Conclusion of Law Y). To the extent this conclusion may be reversed upon any appeal, such that petitioner is properly classified as an *unauthorized non-life* insurance corporation, then petitioner's tax liability is properly determined pursuant to the provisions of Tax Law § 1501, and not pursuant to Tax Law § 1502-a as sought by petitioner (***see*** Conclusion of Law GG). In addition, the Division properly resorted to its discretionary authority in selecting and correctly applying an allocation formula that differs from the statutorily prescribed formula set forth under Tax Law Article 33 (***see*** Conclusion of Law OO). Finally, and in regard to the foregoing issue of allocation, the Division also provided a second alternative calculation based upon a single wage factor and a consequent 100 percent allocation of entire net income as subject to tax under Tax Law § 1501. This calculation results in the assertion of a deficiency greater than that set forth on the Notice of Determination (***see*** Addendum II). Since the Division's alternative receipts-based allocation has been upheld, as above, the appropriateness of this second alternative calculation (to which petitioner did not in any manner acquiesce) becomes irrelevant.

RR. The petition of AXA Versicherung AG is hereby granted, the Division's Notice of Deficiency dated November 23, 2012 is canceled, and the Division is directed to refund to petitioner the amounts it paid with the filing of its returns ($250.00 and $43.00) for each of the years in issue.

DATED: Albany, New York
March 3, 2016

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

Addendum I (2006)

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 R at sub-exhibit B, schedules E and E1):

2006

Partnerships' Total Amounts (per Schedule E-1)

	Partnership USPF		Partnership MEP	
	NY Total Amt	Everywhere Total Amt	NY Total Amt.	Everywhere Total Amt
Property	$207,508,858	$281,668,353	$65,315,198	$146,382,487
Receipts	$ 37,452,639	$127,798,134	$33,253,610	$164,523,760
Payroll	$ 1,496,204	$ 1,496,204	$ 0	$ 0

	Partnership MEP II		Partnership USPIF	
	NY Total Amt	Everywhere Total Amt	NY Total Amt	Everywhere Total Amt
Property	$ 9,832	$172,041,054	$ 0	$ 0
Receipts	$ 472,908	$ 99,947,631	$ 0	$ 159,615
Payroll	$ 0	$ 0	$ 0	$ 0

Petitioner (AXA) Distributive Shares of Partnerships' Amounts (per Schedule E-1)

	Partnership USPF AXA Distributive Share @ 13.3145%		Partnership MEP AXA Distributive Share @ 14.5449%	
	NY Amt	Everywhere Amt	NY Amt	Everywhere Amt
Property	$ 27,628,767	$ 37,502,733	$ 9,500,030	$ 21,291,186
Receipts	$ 4,986,632	$ 17,015,683	$ 4,836,704	$ 23,929,816
Payroll	$ 199,212	$ 199,212	$ 0	$ 0

	Partnership MEP II AXA Distributive Share @ 11.7429%		Partnership USPIF AXA Distributive Share @ 6.4279%	
	NY Amt	Everywhere Amt	NY Amt	Everywhere Amt
Property	$ 1,155	$ 20,202,609	$ 0	$ 0
Receipts	$ 55,533	$ 11,736,750	$ 0	$ 10,260
Payroll	$ 0	$ 0	$ 0	$ 0

2006 Distributive Share Totals To Be Carried to Schedule E

	New York Total	Everywhere Total
Property	$37,129,952	$78,996,528
Receipts	$ 9,878,869	$52,692,509
Payroll	$ 199,212	$ 199,212

New York Property Factor ($37,129,952 ÷ $78,996,528)	47.0020%
New York Receipts Factor ($9,878,869 ÷ $52,692,509)	18.7481%
New York Receipts Factor as (thrice) Weighted (18.7481% x 3)	56.2444%
New York Wages Factor ($199,212 ÷ 199,212)	100.0000%
Sum of Factors	203.2464%
Number of Factors	÷ 5
Business and Investment Capital Allocation Percentage (2006)	40.6493%

Addendum I (2007)

2007

Partnerships' Total Receipts Amounts (per Schedule E-1)

Partnership USPF		Partnership MEP		Partnership MEP II	
NY Total	Everywhere Total	NY Total	Everywhere Total	NY Total	Everywhere Total
$561,265,742	$577,745,205	$37,726,889	$43,840,008	$162,116	$17,318,015

Petitioner (AXA) Distributive Shares of Partnerships' Receipts Amounts (per Schedule E-1)

Partnership USPF @ 10.1384%		Partnership MEP @ 0%		Partnership MEP II @ 14.8613%	
NY Total	Everywhere Total	NY Total	Everywhere Total	NY Total	Everywhere Total
$56,903,366	$58,574,120	$ 0	$ 0	$24,093	$2,573,682

2007 Distributive Share (Receipts) Totals To Be Carried to Schedule E

New York Partnerships' Receipts:	$56,927,459
Total (everywhere) Partnership Receipts:	$61,147,802
New York Entire Net Income Allocation Percentage: ($56,927,459 ÷ $61,147,802)	93.0981%

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 ($199,212), results in the allocation of 100% of petitioner's capital base for 2006 ($47,222,651) and entire net income base for 2007 ($35,448,777) 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 $75,556 (2006) and $2,516,863 (2007), plus an MTA surcharge tax under Tax Law § 1505-a in the respective amounts of $5,221(2006) and $504,889 (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 $44,843 (2006) and $173,711 (2007), and under Tax Law § 1505-a in the respective amounts of $7,624 (2006) and $37,434 (2007), over the amounts of such taxes asserted as due under the Notice of Deficiency.