NEW YORK CITY TAX APPEALS TRIBUNAL

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In the Matter of

Ark Restaurants Corp.

Petitioner.

DECISION
TAT (E) 16-18 (GC)

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On April 6, 2018, Ark Restaurants Corp. (Petitioner) filed an Exception to an Order/Determination of the Chief Administrative Law Judge (CALJ) dated March 6, 2018 (CALJ Determination) that granted a Motion for Summary Determination[1] (Motion) of the Commissioner of Finance of the City of New York (Movant or Respondent) and sustained the Notice of Determination (NOD) dated May 26, 2016 issued to Petitioner by the New York City Department of Finance (Department), as adjusted consistent with Movant's letter of March 13, 2017, which stated the amounts in controversy as agreed upon by the Parties.[2] The NOD asserted New York City General Corporation Tax (GCT) deficiencies for the tax years ending September 29, 2013 and September 28, 2014 (Tax Years) as described below.[3]

Movant appeared by Andrew G. Lipkin, Esq., Senior Counsel, New York City Law Department. Petitioner appeared by Kenneth T. Zemsky, of Andersen Tax LLC. Oral argument on the Exception was held on September 21, 2018.

Petitioner is a corporation operating in New York City (City) and subject to the GCT and the federal income tax. Under Internal Revenue Code (IRC) §45B an eligible

[1] The Movant filed a Motion to Dismiss under 20 RCNY (Tribunal Rules) §1-05(b)(1)(i) that, with the agreement of the Parties, the CALJ converted into a Motion for Summary Determination under Tribunal Rule §1-05(b)(2)(ii).

[2] See discussion p. 2.

[3] Except as otherwise noted, the CALJ's Findings of Fact, although paraphrased and amplified herein, generally are adopted for purposes of this Decision. Certain Findings of Fact not necessary to this Decision have not been restated and can be found in the CALJ Determination.

employer may claim a credit against its federal income tax for FICA taxes[4] paid with respect to certain tip income of its employees to the extent the taxes exceed the amount that would have been paid had the employee received wages at the minimum wage, as in effect in 2007 (Excess FICA taxes). In lieu of the credit, an eligible employer may take that amount as a deduction pursuant to IRC §162. Petitioner claimed a credit under IRC §45B for the Tax Years for Excess FICA taxes paid instead of taking that same amount as a deduction under IRC §162.

For the Tax Years, in calculating its GCT entire net income (ENI) under New York City Administrative Code (Administrative Code) §11-602, Petitioner deducted $283,233 and $322,010 respectively, which represented the amount of Excess FICA taxes for which it claimed federal income tax credits under IRC §45B for the Tax Years.

On audit, the Department made two adjustments to Petitioner's reported ENI and, therefore, to its GCT liability. The first adjustment, which the Parties later agreed to,[5] required Petitioner to change the reported tax base used to compute GCT from the ENI base to the alternative base of ENI plus officers' and certain stockholders' salaries and other compensation. The amounts asserted in connection with the first audit adjustment have been paid. The second audit adjustment disallowed Petitioner's deduction for Excess FICA taxes paid. The remaining amounts in controversy for the respective Tax Years are $10,951.19 and $25,443.75 for a total liability of $36,394.94 plus interest.

On September 7, 2016 the Tribunal received a corrected Petition (Petition)[6] requesting redetermination of that part of the deficiency representing the disallowance of the deductions for Excess FICA taxes.

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[4] "Employee tip income is treated as employer-provided wages subject to income tax and employment taxes under the Federal Insurance Contributions Act (FICA). Employment taxes under FICA, or FICA taxes, include Social Security and Medicare taxes." "Federal Insurance Contributions Act (FICA) Tip Credit" U.S. Dept. of the Treasury, Office of Tax Analysis (February 3, 2016) https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/FICA-Tip-Credit.pdf (accessed February 19, 2019). Employers are responsible for withholding employee income tax and the employee's share of FICA taxes and paying the employer's share of FICA taxes on the tip income of employees who receive tips on food and beverages of $20 or more in a calendar month. *See* IRC §§3111(a) and 3121(a)(12).

[5] Petitioner's letter to the CALJ dated August 12, 2016.

[6] The Petition corrected a petition received by the Tribunal on August 16, 2016.

In response to the Petition, Movant filed the Motion.

On Exception, Petitioner asserts that, because the GCT does not allow the credit for Excess FICA taxes paid on tips and the IRC does allow a credit, under the "comparable context" principle, ENI for GCT purposes must be calculated using federal taxable income (FTI) as if no federal credit was taken, that is, by allowing a deduction for the Excess FICA taxes paid.

Petitioner also contends that the Department selectively enforced the provision at issue, that is, it has allowed the deduction of Excess FICA taxes in other cases where an IRC §45B credit was taken. Petitioner maintains that the Motion should have been denied insofar as there is factual evidence pertaining to the selective enforcement issue that Petitioner did not have the opportunity to present to the CALJ at a hearing. The selective enforcement issue was not raised in the Petition or Petitioner's "Affirmation in Support of Petitioner's Opposition to Motion to Dismiss" (Petitioner's Affirmation) but only in Petitioner's "Opposition to Motion to Dismiss" (Petitioner's Memorandum), which is a memorandum of law submitted with Petitioner's Affirmation, not a sworn statement.

Finally, Petitioner asserts that it was prejudiced by the timing of the CALJ Determination and that the CALJ erred by not following as precedent the New York State Tax Appeals Tribunal's (State Tribunal) alleged scheduling of a hearing in a corresponding case under the New York State Franchise Tax on Business Corporations on this same issue.

Respondent argues that because FTI is the starting point for determining ENI subject to the GCT and because Petitioner elected to take a credit instead of a deduction for Excess FICA taxes in determining its FTI for the Tax Years, as a matter of law a deduction was not available when computing its GCT and, therefore the Motion was properly granted.

Respondent also contends that unsworn statements contained in Petitioner's Memorandum in support of Petitioner's selective enforcement argument are not sufficient to defeat the Motion and that even if Petitioner could show selective enforcement, Petitioner has never alleged that the selective enforcement was based on an invidious unjustifiable standard such as race, religion or other illegal classification, a necessary element of an unlawful selective enforcement claim.

For the following reasons we affirm the CALJ Determination.

Tribunal Rule §1-05(d)(1) provides that a motion for summary determination:

> "shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows sufficient basis to require a hearing of any issue of fact."

Tribunal Rule §1-05(d)(2) provides that:

> "Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist, but cannot then be stated, the administrative law judge may deny the motion or may order a continuance to permit affidavits or admissions to be obtained and may make such other order as may be just."

Thus, Movant "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], *citing Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) The Petition asserted only that Petitioner was entitled to a deduction for the Excess FICA taxes for GCT purposes. The amount of Excess FICA taxes is not in dispute. The deductibility of those amounts for GCT purposes is solely a legal issue. Petitioner did not raise the issue of selective enforcement in either the Petition or in Petitioner's Affirmation but only in Petitioner's Memorandum, which is not a sworn statement.

We reject Petitioner's contention that the Motion should have been denied. We find that Petitioner never asserted all of the factual elements necessary to support a claim of unlawful selective enforcement and offered no evidentiary support for its claim. A selective enforcement claim requires proof that the law "is applied and administered by public authority with an evil eye and an unequal hand." (*Yick Wo v Hopkins*, 118 US 356, 373-74 [1886].) State and federal courts have uniformly recognized that selective enforcement is unlawful only if coupled with evil intent. In *Matter of G&B Publ. Co. v Dept of Taxation and Finance*, 57 AD2d 18, 20 (3d Dept 1977), the court noted:

> "In support of its alternative claim, petitioner has merely alleged, on undisclosed sources of information and belief, that respondent has not levied this tax on other parties in the same business. This hardly suffices to raise a triable factual dispute, however, for it must be proven that a selectivity in applying the statute arose from some intentional and invidious plan of discrimination on respondent's part and petitioner has not even pleaded such a scheme *(Matter of Di Maggio v Brown*, 19 NY2d 283, 290-291; *see United States v Berrios*, 501 F2d 1207)."

While Petitioner does allege unequal treatment, Petitioner has never claimed that the Department had an invidious motive for its alleged selective enforcement, which motive must be claimed and proven in order to establish discriminatory enforcement. (*Matter of Capitol Cablevision Sys. v State Tax Commn.*, 98 AD2d 100 [3d Dept 1983] citing *G&B Publ. Co.; compare Petro Enterprises, Inc.*, 1991 WL 208471 [NY St Div of Tax Appeals DTA No. 806301, September 19, 1991].)

Moreover, notably absent from Petitioner's Affirmation or Petitioner's Memorandum is any specific example of such evidence of discriminatory treatment or any explanation as to why none of this evidence was submitted in opposition to the Motion. It is well established that "to survive a motion for summary judgment, plaintiff was obliged to produce evidence, not just unsubstantiated allegations or assertions. . . ." (*Alvord & Swift v Muller Constr. Co.,* 46 NY2d 276, 281 [1978].) In *Staatsburg Water Co. v Dutchess County*, 291 AD2d 552 (2d Dept 2002), defendants moved for summary

judgment with regard to plaintiffs' equal protection cause of action. The Appellate Division found that the lower court erred in denying the motion on the grounds that there were issues of fact. The Appellate Division stated that "plaintiffs failed to demonstrate that they were treated in a selective manner. Moreover, the evidence submitted did not raise an issue of fact as to the existence of an impermissible motive . . . and, in any event, was pure conjecture and speculation [citations omitted]." (*Staatsburg, supra* at 554.)

Based on the foregoing, we find that there are no triable issues of fact in the present case and therefore we conclude that the Motion was properly granted. We now turn to the legal question of whether, as a matter of law, Petitioner was entitled to deduct the Excess FICA taxes in determining ENI for the Tax Years.

The IRC permits a deduction from gross income for "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. . . ." (IRC §162[a].) If an eligible employer does not take the credit for Excess FICA taxes paid under IRC §45B, that amount is allowable as IRC §162(a) deductible business expenses. IRC §45B(c) specifically states: "No deduction shall be allowed under this chapter for any amount taken into account in determining the credit under this section." IRC §45B characterizes this disallowance as the "Denial of a double benefit".

A corporation doing business in the City computes GCT on the ENI base or another alternative base. (Administrative Code §11-602.8.)[7] ENI is defined as "total net income from all sources, which shall be presumably the same as the entire taxable income . . . which the taxpayer is required to report to the United States treasury department. . . ." (Administrative Code §11-602.8[i].) Section 11-27(b) of 19 RCNY Ch. 11 (GCT Rules) states "Federal Taxable Income is the starting point in the computation of entire net income." FTI is defined generally as "gross income minus [allowed] deductions." (*see* IRC §63.) The Administrative Code and the GCT Rules contain

[7] Those Administrative Code provisions cited throughout this Decision have counterparts in the Tax Law governing the New York State Franchise Tax on Business Corporations.

numerous additions to and subtractions from FTI in computing ENI. (Administrative Code §11-602.8[a] and [b] and GCT Rule §11-27[b].)

The IRC §45B credit is not specifically referenced in either the Administrative Code or GCT Rules. In contrast, Administrative Code §11-602.8(a)(7) provides that ENI shall not include "that portion of wages and salaries paid or incurred for the taxable year for which a deduction is not allowed pursuant to the provisions of section two hundred eighty C of the internal revenue code." IRC §280C denies a deduction from taxable income in an amount representing the sum of specifically enumerated IRC employment credits (e.g. the IRC §45A[a] credit or the IRC §45P[a] credit). IRC §45B credits are not mentioned in IRC §280C. The City enacted Administrative Code §11-602.8(a)(7) in order to specifically allow the IRC §280C deduction where the credit was taken for federal purposes. Administrative Code §11-602.8(a)(7) indicates that the legislature knows how to allow the deduction when it chooses to do so. By implication, in the absence of similar legislation, no deduction at the City level is allowable where an IRC §45B credit was taken for federal purposes.

Petitioner contended during oral argument on the Exception that *Matter of Dreyfus Special Income Fund, Inc. v New York State Tax Commn*, 126 AD2d 368 (3d Dept 1987), *aff'd,* 72 NY2d 874 (1988) (*Dreyfus)* caused a "sea change" in New York State (State) and City jurisprudence requiring the GCT and the IRC provisions to be viewed in a comparable context. Petitioner argues that, as a result, because the GCT does not allow the IRC §45B credit, FTI must be restated as if there were no credit and the corresponding IRC §162 deduction allowed instead. Petitioner asserted during oral argument on the Exception that the decision in *Dreyfus* supported its claimed deduction for Excess FICA taxes even in the absence of a provision such as Administrative Code §11-602.8(a)(7).

For City and State tax purposes, exemptions and deductions are strictly construed. (*Matter of Grace v New York State Tax Commn.*, 37 NY2d 193, 196 [1975].) The same principle applies for federal taxes. A taxpayer seeking a deduction must be able to point

to an applicable statute and show that the taxpayer comes within its terms. (*New Colonial Ice Co. v Helvering*, 292 US 435, 440 [1934].) Administrative Code §11-602.8(a) contains no clear statutory provision for the deduction of IRC §45B payments from ENI.

We find that Petitioner's reliance on *Dreyfus* is misplaced and that no support for Petitioner's position can be found in cases citing *Dreyfus* or in cases cited by Petitioner as "elaborating" or "recognizing" the "comparable context" concept.

The main holding in *Dreyfus* is that, for purposes of computing ENI for the State counterpart to the GCT, FTI is not limited to FTI determined under IRC §63, and that under Tax Law §208(9) "the figure to be used for computing entire net income shall be presumably the same as the 'taxable income' that the taxpayer is required to report to the Federal Government." (*Dreyfus* at 371.)[8] In *Dreyfus*, the taxpayer elected to be treated as a regulated investment company under IRC §852(b)(2), which allows a deduction for dividends paid to shareholders. The court held that because in calculating the taxable income of a regulated investment company required to be reported for federal purposes a deduction for dividends paid to shareholders was allowed, that alternative FTI was the starting point in computing ENI for State tax purposes. (*Dreyfus* at 372.) The present case does not involve an alternative calculation of FTI.

In *Dreyfus,* the State also argued that "dividends paid were considered to be a 'credit' rather than a 'deduction' by the Legislature when it enacted Tax Law §208(9)(b)(1)." *Id.* at 373. The court rejected that argument stating:

> "Terms used in the Tax Law are to be accorded the same meaning as those used in the Internal Revenue Code unless a different meaning is clearly required *(see*, Tax Law §607 [a]; *Matter of Jablin v. State Tax Commn.*, 65 A.D.2d 891, 892, 410 N.Y.S.2d 414). The Legislature is aware of the meaning

[8] The court in *Dreyfus* invalidated a State regulation that provided in relevant part: "Federal taxable income is the starting point in the computation of entire net income. This means taxable income as defined in section 63 of the Internal Revenue Code". (Former 20 NYCRR §3.11.)

> of ‘deductions’ as opposed to ‘exemptions’ or ‘credits’ in the Internal Revenue Code.” (*Id.*)

Tax Law §607(a) provides that “[a]ny term used in this article shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required. . . .”[9] Administrative Code §11-601.14 contains the same language. On appeal, the Court of Appeals did not even mention the Appellate Division’s discussion in *Dreyfus* of terms used in a “comparable context”. The Appellate Division’s rejection of the State’s argument that the federal dividend paid deduction should be treated as a credit for State tax purposes undermines Petitioner’s position that the IRC §45B credit should be applied as a deduction for City tax purposes. It is undisputed that Petitioner availed itself of a credit and was thereby precluded from taking a deduction under IRC §45B; they are distinct and mutually exclusive.

The Appellate Division in *Dreyfus* cited an amendment to Tax Law §208(9)(b)(3) in 1975 as further evidence that where the IRC allows taxpayers to elect a credit or a deduction for an item, the State legislature can adopt specific modifications to FTI to alter the effect of such an elective provision. Under the IRC, taxpayers could elect to deduct or claim a credit for taxes paid to a United States possession or foreign country. Before 1975, if a taxpayer elected to take a federal deduction for taxes paid to a United States possession or foreign country, the State ENI would be correspondingly reduced but, if the taxpayer elected to take a credit for those taxes paid, no corresponding credit was allowed for State tax purposes. The State legislature amended Tax Law §208(9)(b)(3) so that taxpayers could no longer deduct taxes paid to a United States possession or foreign country, regardless of the federal treatment. *(Dreyfus* at 373.*)* In that instance, the State legislature chose to explicitly deny the deduction. They instead could have allowed the deduction for ENI purposes even where the taxpayer took a credit

[9] The reference in Tax Law §607 to “this article” is to Article 22 governing the personal income tax. The cases citing *Dreyfus* have not limited its reading of Tax Law §607 to the personal income tax.

at the federal level, as in the case of the City and State treatment of credits and deductions under IRC §280C. (Administrative Code §11-602.8[a][7] and Tax Law §208[a][7].)

Petitioner contends that the "comparable context" concept was "elaborated on" in *James R. Shorter, Jr.,* 1997 WL 450410 (NY St Div of Tax Appeals DTA No. 813571, July 31, 1997), and "recognized" in *Matter of Accessories by Pearl, Inc.*, 1989 WL 127185 (NY St Div of Tax Appeals DTA Nos. 801583, 803554, February 24, 1989).[10] Neither case cites *Dreyfus*. *Pearl* does not even mention the "comparable context" concept or cite Tax Law §607. Both cases support Respondent's position.

In *Shorter,* the State Tribunal addressed whether the taxpayer properly computed the amount he was required to add back to his FTI under Tax Law §615(c)(1) for the amount of his federal deduction for State and local income taxes where he was subject to the federal overall limitation on itemized deductions in IRC §68. A State regulation, 20 NYCRR §115.2, required the Tax Law §615(c)(1) addback to include the full amount of State and local taxes shown on the federal return before the application of the IRC §68 limitation. The State maintained that the "comparable context" language of Tax Law §607 and a federal revenue ruling applying the federal tax benefit rule as codified in IRC §111 supported the regulation. The State Tribunal disagreed and invalidated the regulation. Thus *Shorter* clearly limited the State's attempt to apply the "comparable context" principle broadly.

Pearl involved Tax Law §210.12-A. which allows a taxpayer to claim an employment incentive tax credit (EITC) for certain amounts for which the taxpayer was allowed an investment tax credit (ITC). The State argued that "allowed" for that purpose meant claimed and granted. The State Tribunal concluded that "allowed" for purposes of the EITC meant the amount granted by the terms of the statute, the correct ITC, and was not limited to the amount actually claimed by the taxpayer. The State Tribunal in *Pearl* did not cite Tax Law §607 or *Dreyfus*.

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[10] Petitioner's Brief in Support of Exception to Determination (Pet. Brief).

Pearl stands for the principle that deductions "allowed" by the IRC are the correct deductions "allowable" not merely those claimed by the taxpayer. Unlike the ITC in *Pearl*, the deduction for the Excess FICA taxes taken by Petitioner in the present case is specifically and irrevocably disallowed at the federal level once a credit is elected. (IRC §45B.) Petitioner did not fail to claim a deduction it was otherwise entitled to by statute; it was not entitled to the deduction at all once it elected to take the credit.

Other cases citing *Dreyfus* do not specifically address the "comparable context" concept or cite Tax Law §607(a). Those cases hold that various provisions in federal tax law govern the definition of ENI for State tax purposes, unless there is a specific State statute or regulation on point that modifies ENI. Those cases do not support a modification to ENI without any specific authority, such as that advocated by Petitioner.

For example, in *Matter of AIL Systems, Inc.,* 2006 WL 1382122 (NY St Div of Tax Appeals DTA No. 819303, May 4, 2006), the taxpayer was a member of a federal consolidated group. Under an election under IRC §338(h)(10), a 1997 sale of the taxpayer corporation's stock was treated as a deemed sale of the corporation's assets for federal income tax purposes and ITCs claimed on certain of those assets were required to be recaptured and included in income. The taxpayer argued that the federal election to treat the stock sale as an asset sale should not apply for State tax purposes and called expert witnesses to testify that State tax policy underlying the State ITC supported the taxpayer's position that no recapture income should be required for State tax purposes. The State Tribunal disagreed and held that the recapture income should be included for State tax purposes under federal conformity. The State Tribunal held "the courts of New York have generally followed the Federal construction of similar provisions found in the Tax Law" citing *Dreyfus* among other cases. *Id.* In the present case, federal conformity requires disallowance of the deduction for the Excess FICA taxes under the GCT.

In another example, the State Tribunal in *Matter of Univisa, Inc.,* 2007 WL 2875490 (NY St Div of Tax Appeals DTA No. 820289, September 20, 2007), addressed whether, in calculating its State ENI, the taxpayer was entitled to a deduction for net

operating losses (NOLs) reattributed to it from a subsidiary under a Treasury Regulation pertaining to federal consolidated filings. The State argued that corporations filing separate State returns must compute their NOLs as if they had filed their federal returns on a separate basis. The taxpayer, citing *Dreyfus*, argued that the calculation of its NOLs must begin with the deduction allowed for federal purposes, which included the reallocated NOLs of its subsidiary. The State Tribunal articulated the general rule that when a consolidated group files separately in the State "the items of income and deduction attributable to each corporation that is subject to New York tax must somehow be disaggregated from the consolidated Federal return in order to determine that corporation's Federal taxable income on a stand-alone basis as the beginning point for the calculation of New York entire net income." *Matter of Univisa, Inc. supra* at 5. The State Tribunal explained that the taxpayer had availed itself of Treasury Regulations governing consolidated federal income tax returns, which provided for an irrevocable election by the parent to reattribute to itself any portion of the NOL carryovers attributable to the subsidiary. The State Tribunal explained further that if separate federal returns had been filed, consolidated return regulations would not have applied and, therefore, no transfer of the NOLs would have occurred. The State Tribunal concluded that *Dreyfus* did not apply.

In *Stewart's Shops Corporation,* 2016 WL 1086062 (NY St Div of Tax Appeals DTA No. 825745, July 27, 2017), another case invoking *Dreyfus*, the State disallowed a deduction for insurance premiums paid by the taxpayer to its captive insurance company. The taxpayer argued that authority for the claimed deduction may be inferred from the structure of the captive insurance laws and from State legislative intent. The State Tribunal disagreed and cited *Dreyfus* for the proposition that federal tax law controls for the purpose of defining ENI and that the taxpayer's payments in question were not deductible for federal income tax purposes. The State Tribunal also relied on the general proposition that tax deductions and exemptions depend upon clear statutory provisions.

Invoking its interpretation of the "comparable context" concept, Petitioner contends that the deduction is disallowed in IRC §45B "only in order to constitute a 'Denial of Double Benefit' [and] [s]ince New York does not allow a credit, the question of double benefit does not arise in Petitioner's case. . . . [R]eading section 45B in a comparable context for New York purposes, the deduction is clearly allowable."[11]

The present case does not involve a term used both for federal and GCT purposes requiring a determination as to whether it is used in a "comparable context" for GCT and federal purposes. Petitioner appears to argue for a more general principle that in the absence of a credit corresponding to the IRC §45B credit, Petitioner should be allowed to modify its FTI for purposes of determining its ENI for the Tax Years as if it had taken a deduction rather than claimed a credit for the Excess FICA taxes. In effect, Petitioner is arguing that the "comparable context" principle dictates *against* federal conformity. None of the case law citing *Dreyfus* or otherwise cited by Petitioner supports such a position.

In *Univisa* and *Stewart's Shops* the State Tribunal rejected arguments that policy considerations should prevail over conformity with federal principles governing separate returns. In *AIL Systems,* the State Tribunal similarly rejected an argument that policy considerations should prevail over federal conformity and cited *Dreyfus* as supporting federal conformity. In *Shorter*, cited by Petitioner, although no specific term used in both the Tax Law and federal tax law was involved, the State Tribunal concluded that the federal income tax authorities cited by the State were inapplicable because they were not used in a "comparable context" to the Tax Law provision at issue. In *Pearl*, also cited by Petitioner, the State Tribunal neither cited *Dreyfus* nor referred to the "comparable context" principle but concluded that federal tax law principles should control.[12]

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[11] Pet. Brief.

[12] While not precedential, in *Matter of General Electric Property Management Co., Inc.,* 1995 WL 69247 (NY St Div Tax App. DTA No. 808039, February 10, 1995) a State Tribunal ALJ held the taxable income that was required to be reported to the IRS should be that amount arrived at by way of IRC §§1033 and 1071 and that the taxpayer subsidiary properly accorded the gain the same treatment for State tax purposes.

Therefore, we find that as a matter of law, in determining its ENI for GCT purposes for the Tax Years, Petitioner is not entitled to a deduction for the Excess FICA taxes paid.

As a separate argument, Petitioner alleges that it was prejudiced by the timing of the CALJ Determination. But the only prejudice it alleges, the denial of Petitioner's right to a hearing, was a consequence of the granting of the Motion and had nothing at all to do with the timing of the CALJ Determination. Moreover, Petitioner fails to identify in what way the timing of the CALJ Determination, rather than the denial of a hearing, was prejudicial.

Finally, Petitioner alleges that another "law error" was the CALJ's "failure to acknowledge that the State Tribunal is allowing this matter to proceed to a full evidentiary hearing." Petitioner explains, incorrectly, that the "error" is failing to follow as precedent decisions of the State Tribunal as required by §170.d of the Charter of the City of New York. However, the City Tax Appeals Tribunal is only bound to follow "precedential decisions" of the State Tribunal and, even then, only with regard to "substantive legal issues" not procedural matters. *Id.*

Based on the foregoing, the CALJ Determination is affirmed.[13]

Dated: March 21, 2019
New York, NY

____________/s/_____________________
Ellen E. Hoffman
President and Commissioner

___________/s/_____________________
Robert J. Firestone
Commissioner

___________/s/_______________________
Frances J. Henn
Commissioner

[13] We have considered all of the other arguments of the Parties and find them unpersuasive.