NEW YORK CITY TAX APPEALS TRIBUNAL
ADMINISTRATIVE LAW JUDGE DIVISION

In the Matter of the Petition	:	**ORDER/DETERMINATION**
of	:	**TAT(H)16-18 (GC)**
ARK Restaurants Corp.	:	

Murphy, C.A.L.J.:

Upon the Motion of the New York City (City) Commissioner of Finance (Movant or Department)to Dismiss the Petition for Hearing of Ark Restaurants Corp (Petitioner), pursuant to the Tax Appeals Tribunal (Tribunal) Rules of Practice and Procedure (Rules) §1-05(b) (1) (Motion); the October 24, 2016 Affirmation in Support of Motion to Dismiss Petition by Andrew G. Lipkin, Senior Counsel, NYC Law Department, Movant's representative, and exhibits annexed thereto;[1] Movant's October 24, 2016 Memorandum of Law in Support of Motion to Dismiss the Petition; Petitioner's cover letter dated November 17, 2016 and the undated Opposition to Respondent's Motion to Dismiss of Kenneth T. Zemsky, of Anderson Tax LLC, Petitioner's

[1] Some documents submitted with the Motion bear handwritten pagination starting with the capital letters "T" and "A" and numerals, suggesting that they may be copies of documents included in audit materials. The pagination is referenced where appropriate.

Representative, and the undated Affirmation in Support of Petitioner's Opposition to Motion to Dismiss, each received by the Tax Appeals Tribunal November 22, 2016; Movant's November 28, 2016 Reply Memorandum of Law in Further Support of Motion to Dismiss the Petition; Petitioner's December 14, 2016 Reply in Further Support of Opposition to Respondent's Motion to Dismiss; and, the December 21, 2016 correspondence from Mr. Lipkin to the undersigned.

Oral argument on the Motion to Dismiss was held before the undersigned on March 1, 2017. At Oral Argument, with the prior consent of the representatives, the undersigned converted the motion to dismiss to a motion for summary determination, pursuant to Rules §§ 1-05(b)(2) (ii) and 1-05 (d). Mr. Lipkin appeared for Movant and Mr. Zemsky appeared for Petitioner.

After due consideration of the Motion, the attached affirmation and exhibits, Petitioner's affirmations, opposition statements and written arguments, memoranda, correspondence, pleadings, and proceedings, the following order/determination is issued.

ISSUE

Whether summary determination should be granted as there are no facts in dispute, and as a matter of law, the facts require a determination in Movant's favor.

FINDINGS OF FACT

Giving all reasonable inference to Petitioner, the undisputed material facts in this matter are as follows:

Petitioner Ark Restaurants Corp., located at 85 Fifth Avenue, New York, NY 10003, is engaged in the business of operating restaurants with related corporations.

For the 2012 and 2013 tax reporting periods (the period in issue), Petitioner filed U.S. Corporation Income Tax Returns Forms 1120 on a consolidated basis with several subsidiary corporations. (Forms 1120.)

The Forms 1120 filed by Petitioner include copies of Federal Forms 8846 Credit for Employee Social Security and Medicare Taxes Paid on Certain Employee Tips. (Forms 8846). Form 8846 is used to calculate a credit against federal income tax pursuant to Internal Revenue Code (26 USC or IRC) § 45B. The credit applies only to the specific taxes paid by an establishment "where tipping is customary for providing food or beverages." (26 USC § 45B [b] [2]); Movant's Motion Exhibit 4, introductory statement.)[2] Total tips received are adjusted by tips not "subject to the credit provisions." (26 USC § 45B [b]); Motion Exhibit 4, Line 2.) The result is multiplied by 7.65%, and added to another, separate credit for "employer social

[2] 26 USC § 45B [b] [2] states: ". . . there shall be taken into account only tips received from customers in connection with the providing, delivering, or serving of food or beverages for consumption if the tipping of employees delivering or serving food or beverages by customers is customary."

security and Medicare taxes paid on certain employee tips from partnerships and S corporations." (Motion Exhibit 4, Lines 4, 5.) The amount is reported on Forms 3800 (General Business Credits or Eligible Small Business Credits) and the Form 3800 amount in turn is reported on Form 1120 as a general business credit at Part I, Tax Computation, line 5c (Line 5c).[3] (Motion Exhibit 4, Line 6.)

The submitted Forms 8846 report a credit of $537,367 for 2012 and a credit of $654,836 for 2013. On the 2012 Form 1120, Schedule J, Line 5(c), Petitioner claimed a general business credit against tax of $573,480 that included the amount of the credit computed on the attached Form 8846. On the 2013 Form 1120, Schedule J, Line 5c, Petitioner claimed a general business credit against tax of $664,686 that included the amount of the credit computed on the attached Form 8846 for that period.

Petitioner filed NYC-3L General Corporation Tax (GCT) Returns for the 2012 and 2013 periods. The GCT Returns included copies of the Federal Forms 8846. Also included were copies of schedules "Ark Restaurants Corp and Subsidiaries Schedules M-3, Part III Detail" that comprise computations of various categories of deductions attributed to specific corporations in the Ark group. (Schedules M-3, Motion Exhibit 5 at 'A'41-48, and Motion Exhibit 6 at 'A'51-53.) The Schedules M-3 included the

[3] While the Form 3800 amount was reported on each Form 1120, the 2012 Form 3800 was not included with either party's submissions. For 2013 several pages of Form 3800 were included with the Federal return. Schedule J, Line 5c parenthetically instructs the filer to "attach Form 3800."

category, "Payroll Tax Deduction From Form 8846," for some, but not all, listed affiliates. Finally, each return included a schedule which breaks down specific Federal Insurance Contributions Act (FICA)[4] and depreciation amounts with respect to several of the Ark related corporations ("Fiscal Year 2012: Period Ended 28-Sep-2013 Form NYC-3L Schedule B, Line 17B Attachment," (2012 Breakdown Schedule) Motion Exhibit 5 at page 'A'39; "Fiscal Year 2013: Period Ended 27-Sep-2014, Form NYC-3L Schedule B," (2013 Breakdown Schedule) Motion Exhibit 7 at page 'A'49).

The 2012 Breakdown Schedule lists the following three amounts: "Excess fica [sic] credit" in the amount of $179,065; "Pass through excess fica [sic] credit" in the amount of $104,168; and "Pass through depreciation" in the amount of $669,640. The 2013 Breakdown Schedule lists the following three amounts: "Excess fica [sic] credit," in the amount of $121,819; "Pass through excess fica [sic] credit" in the amount of $200,191, and "Pass through depreciation" in the amount of $669,019.

The Department audited Petitioner's GCT returns for the period in issue. The Department made two principal adjustments to reported entire net income (ENI) and GCT liability. The first adjustment required Petitioner to change the reported tax

[4] The 26 USC § 45B credit is for excess "employer social security taxes paid with respect to employee cash tips." *See* 26 USC § 45B heading. These amounts are often referred to in the parties' submissions as "FICA" or "excess FICA amounts." In this Order they will be referred to as "Excess FICA" amounts.

base used to compute City GCT from the entire net income (ENI) base (Administrative Code § 11- 604 [3]), to the alternative base of ENI plus officers' and certain stockholders' salaries and compensation. (Administrative Code § 11-604.1 [a] [3].) The second audit adjustment disallowed Petitioner's deduction from ENI for amounts identified on the Breakdown Schedules.[5]

On May 26, 2016 the Department issued Petitioner a Notice of Deficiency asserting a GCT deficiency in the base tax amount of $38,484.75 (Notice) and incorporating the two audit adjustments.

Petitioner agrees to the first audit adjustment, and it is no longer in issue. Petitioner submitted a check dated August 8, 2016, made payable to 'New York City Department of Taxation' [sic] in the amount of $11,500.00, and representing payment of liability for this issue.[6] On March 13, 2017, Mr. Lipkin informed the undersigned in writing that the remaining amount in controversy is $36,394.94.

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[5] On the copy of the 2012 NYC-3L Return submitted, a handwritten notation of these amounts appears next to line 17(b). There is no similar notation next to Line 17(b) of the 2013 GCT Return. In some instances the excess amounts are attributed to the subsidiary Ark Bryant Park LLC (fka Ark Bryant Park Corp.) However, the Schedule M-3 details compute "payroll tax reduction(s)" for several subsidiary corporations.

[6] The Notice asserts a "20-Sept-2013" period base tax deficiency of $13,041 with interest for a total on May 26, 2016 of $13,041.00, and asserts a "28-Sept-2014" period base tax deficiency of $25,443.75, with interest for a total on May 26, 2016 of "38,484.75." *See* Mr. Lipkin's March 13, 2017 correspondence which states that the remaining (base tax) liability for "y/e 2013" is $10,951.19, and for "y/e 2014" is $25,443.94, for a total liability of $36,394.94.

Petitioner filed a Petition for Hearing with the Tribunal on August 16, 2016, and a Corrected Petition on September 7, 2016 (together, the Petition). The Petition requests redetermination of that part of the deficiency representing the disallowance of the deductions for Excess FICA taxes which were claimed as credits on the Forms 1120 ("excess FICA Credits," "Passthrough Excess FICA Credits" and "FICA issue").[7]

Several documents were included with the Petition: a copy of the Notice; a copy of the May 26, 2016 City Statement of Audit Adjustment and the Explanation of Audit Adjustment for 2013; a schedule, "Ark Bryant Park, NYC Assessment, Summary of FICA Issue, 9/2013 and 9/2014" which computes the final GCT liability as a result of deducting FICA-related amounts; and a copy of the August 8, 2016 check.

The Motion to Dismiss the Petition was filed on October 26, 2016. The Motion is based on the Commissioner's assertion that he has a defense founded upon documentary evidence pursuant to Rules § 1-05 [b] [1] [i] which requires dismissal of the Petition.

Several documents were submitted with the Motion, including copies of the Notice, and of the 2013 Statement of Audit

[7] Identifying amounts on the Statements of Audit Adjustment as 'Disallowed Credits Reported on Form NYC-3L, Schedule B, Line 17b' is imprecise. Form NYC-3L, line 17b, denominated "Other" deductions does not refer to City GCT tax credits (which appear in several other lines of NYC-3L Schedule A, Computation of Tax). However, these amounts do reflect the amounts of federal taxable income (FTI) credits for Excess FICA taken into account in computing reported federal corporate income tax.

Adjustment and Explanation of Audit Adjustment submitted with the Petition. The Motion submissions also include: copies of Petitioner's Forms 1120, U.S. Corporation Income Tax Returns for 2012 and 2013; copies of Federal Forms 8846; copies of 2012 and 2013 Forms NYC-3L, City General Corporation Income Tax Returns; the Schedules M-3; and the Breakdown Schedules.

STATEMENTS OF POSITION

Movant requests summary determination in the Commissioner's favor, arguing that all the facts are presented in the documents submitted and there is no material triable issue of fact.

Petitioner argues that there remain material triable facts sufficient to defeat the Motion and which require a hearing on this matter. Petitioner alleges that facts exist that will establish the Department has resolved similar matters for unrelated taxpayers by permitting them to treat the federal deduction for Excess FICA as an "allowable" deduction from Petitioner's City ENI. Petitioner's representative generally states that proof to support this position can be submitted, for example, in the form of a Freedom of Information Law (FOIL) request to the Department, from records of and statements by unrelated taxpayers, through the subpoena of statements by City or other jurisdiction's tax personnel whom Petitioner intends to call, and by unspecified informal Department rulings.

CONCLUSIONS OF LAW

Rules Section 1-05 [d] provides that any party to an action before the Tribunal may make a motion for summary determination. The motion must be supported by an affidavit, copies of relevant pleadings and "any other available proof." Rules §1-05 [d] [1]. Rule §1-05 [d] [1] states:

> The motion 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 Rule further states: "The motion shall be denied if any party shows sufficient basis to require a hearing of any issue of fact." (*Id.*)

The threshold issue presented by the Motion is whether there are triable issues of fact which preclude a summary determination and require a hearing. (*Daliendo v Johnson*, 147 AD2d 312 [2d Dept 1989]; *Matter of Emigrant Savings Bank*, TAT(E) 94-130 (BT), City Tribunal [September 18, 1998].)[8]

[8] Submissions in a summary determination proceeding must be viewed "in a light most favorable to the respondent." *In re Brown*, 54 Misc 3d 515 [Civ Ct Kings County 2016]. The Order does not address substantive issues such as whether Petitioner has met its burden to establish that it is entitled to the ENI deduction. (*See Matter of Grace v New York State Tax Commn.*, 37 NY2d 193, 197 [1975]; *Matter of Royal Indem. Co. v Tax Appeals Trib.*, 75 NY2d 75, 78, [1989]; which party bears the burden to establish entitlement to tax deductions *(Matter of Citrin Cooperman & Company, LLP v Tax Appeals Tribunal*

The facts reported in the federal and City corporation income tax filings are not in dispute. The parties agree on the federal and City return positions which are taken by Petitioner. There is agreement with respect to the period in issue, the amounts of Excess FICA which are available as either a federal deduction or credit, the computation of the federal credits, the computation of ENI including a deduction for Excess FICA, and the substance of the Department's audit adjustments.

Summary determination is a "drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue." (*Phillips v Kantor & Co.*, 31 NY2d 307 [1972]; *see also, Daliendo v. Johnson*, 147 AD2d 312 [2d Dept 1989].) A party moving for summary determination must establish that there is no material issue of fact by "tendering sufficient evidence to eliminate any material issue of fact from the case." (*Winegrad v New York Univ. Med. Ctr*, 64 NY2d 851 [1985], citing *Zuckerman v. City of New York*, 49 NY2d 557 [1980].) The movant must "tender evidentiary proof in admissible form." (*Friends of Animals v Associated Fur Mfrs, Inc.*, 46 NY2d 1065 [1979].)

(cont'd) *of the City of New York*, 52 AD3d 228 [1st Dept 2008]; *Matter of Colt Indus. v New York City Dept. of Fin.*, 66 N.Y.2d 466, 471 [1985].); whether the presumption is in favor of the taxing authority (*Matter of Mobil Oil Corp. v Finance Adm'r of City of N.Y.*, 58 NY2d 95, 99 [1983].)) The issue presented in this proceeding is whether there are unresolved issues of material fact that require a hearing, or whether on the facts a summary determination may be made. (*Matter of Goldman & Goldman, P.C.*, TAT(E) 02-12 (CR) [March 24, 2005].)

To defeat the motion, the opponent must produce evidence in admissible form sufficient to raise an issue of fact requiring a trial on the merits. (CPLR 3212 [b]; *Zuckerman; Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) Proof offered by the opponent of the motion, including that offered through affidavits, must be accepted as true and considered in a light most favorable to the opposing party. (*Museums at Stony Brook v Village of Patchogue Fire Department*, 146 AD2d 572 [2d Dept 1989].)

Unsubstantiated allegations or mere assertions are insufficient to raise an issue of fact. (*Matter of Alvord & Swift v Mueller Constr. Co.*, 46 NY2d 276, 282 [1978].)[9] In *Rotuba Extruders v Ceppos*, (46 NY2d 223, 231 [1978]) the Court of Appeals stated: "only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment." This burden is not met by repeating allegations made in pleadings. (*Indig v Finkelstein*, 23 NY2d 728, 729 [1968].) Further, if the question of law presented may be determined on the facts submitted, summary judgment should not be withheld because of the opponent's claim that other not disclosed facts might result in a different determination. (*Lewis v Chase Nat. Bank of City of New York*, 189 Misc 190 [Sup Ct NY Cty 1947]).

[9] While not precedential, see e.g. ALJ Determination in *Matter of Jonis Realty/E. 29th Street LLC* (TAT(H) 09-9 (RP) [July 21, 2010].)

This matter concerns the appropriate ENI base for Petitioner under the circumstances of its tax filings: whether Petitioner in this instance is required to accept reported federal taxable income (FTI) as the ENI base, which, by operation of specific IRC provisions must be computed without a business expense deduction for Excess FICA and therefore whether Petitioner is precluded from deducting that amount from ENI. A correlative inquiry is whether, where a taxpayer exercises the IRC § 45B option to apply Excess FICA as a credit against federal income tax, and not as an IRC § 162 business expense deduction from FTI, the amount remains an 'allowable' deduction which may be deducted from the City ENI base for purposes of calculating GCT pursuant to Administrative Code § 11-602 (8) (i).

A corporation doing business in New York City computes GCT against a City ENI base. (Code § 11-602 [8]; GCT Rules [19 RCNY] § 11-27.) City ENI is defined as

> total net income from all sources, which shall be presumably the same as the entire taxable income . . .
>
> > (i) which the taxpayer is required to report to the United States treasury department . . .. GCT § 11-602(8)(i).

See *Matter of Dreyfus Special Income Fund, Inc. v New York State Tax Commission,* 126 AD2d 368, 372, *aff'd* 72 NY 2d 874 [1988] ["Federal law controls for the purpose of defining 'entire net income'." citing *People ex rel Standard Oil Co. v Law,* 237 NY

142, 147 [1923]; *People ex rel Barcalo Mfg., Co v Knapp*, 227 NY 64 [1919].)[10]

Federal gross income is defined as "all income from whatever source . . . ." (26 USC § 61 [a].) 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 . . .." (26 USC § 162 [a].) Under certain circumstances, Excess FICA will be available as Section 162 [a] deductible business expenses.

FTI, which is the City ENI base, is defined generally as "gross income minus [allowed] deductions." (26 USCA § 63.)

IRC § 45B [a] permits taxpayers to adjust FTI by taking into account "an amount equal to the excess employer social security tax paid or incurred by the taxpayer during the taxable year." (29 USC § 45B [a].) Excess employer social security tax is defined:

> (1) . . . any tax paid by an employer under [IRC] section 3111 with respect to tips received by an employee during any month, to the extent such tips -
>
> > (A) are deemed to have been paid by the employer to the employee pursuant to section 3121(g)(without regard to whether such tips are reported under section 6053), and

[10] Although not precedential, *see the* ALJ Determination *in Matter of Stewart's Shops Corporation*, (2016 WL 1086062 [NY St Div of Tax Appeals, DTA No. 825745 March 10, 2016.])

> (B) exceed the amount by which the wages (excluding tips) paid by the employer to the employee during such month are less than the total amount which would be payable (with respect to such employment) at the minimum wage rate applicable to such individual under section 6(a)(1) of the Fair Labor Standards Act of 1938 (as in effect on January 1, 2007, and determined without regard to section 3(m) of such Act). (26 USCA § 45B [b] [1].)

A taxpayer may account for these payments in either of two ways: (1) the amount may be deducted as an IRC § 162 business expense, or (2) the amount may be taken as a credit against federal income tax due. (26 USC § 45B [a], [c], [d].) Petitioner applied the payments as a credit against its 2012 and 2013 federal income tax.

Section 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. (26 USC § 45B (c). [Emphasis supplied].)

Section 45B [d] states:

> This section shall not apply to a taxpayer for any taxable year if such taxpayer elects to have this section not apply for such taxable year.

Once Petitioner applied the amount as a credit, it was specifically precluded from deducting these amounts from FTI. Section 45B characterizes this disallowance as the denial of a "double benefit." (26 USC § 45B [c].)

The City Administrative Code provides for deductions from FTI in computing ENI. (*See* Administrative Code § 11-602.8.) GCT Rules [19 RCNY] § 11-27 [b] [2] states "Federal Taxable Income is the starting point in the computation of entire net income." The Rules proceed to enumerate additions to and subtractions from FTI. (GCT Rules [19 RCNY] §§ 11-27 [b] [1], [2].)

The IRC § 45B credit is not specifically included in either the Administrative Code or GCT Rules. On the other hand, as Movant correctly notes, Administrative Code § 11-602.8 [a] [7] refers to specific credits or deductions available for wage and salary expenses, and, for example, does not permit ENI to include a deduction for amounts "paid or incurred to 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." (Administrative Code § 11-602.8 [a] [7].)[11]

Petitioner argues that it is entitled to a business expense deduction from ENI for the period in issue in the amount of

[11] *See* IRC § 280C which denies a deduction from taxable income in the amount representing the sum of specifically enumerated IRC employment credits (*e.g.* the IRC § 45A [a] credit [Indian Employment Credit] or the IRC § 45P [a] credit [employer wage credit for employees who are active duty members of uniformed services]. IRC § 45B credits are not mentioned in these listed provisions.

Excess FICA which it computed in calculating its Federal income tax pursuant to IRC § 45B. Petitioner asserts that since these amounts were not subtracted as deductions from FTI, they remain available as "allowable" deductions from ENI. Further Petitioner argues that the deductions should be allowed in order for Petitioner to receive "the . . . economic benefit of the expenses." (Petition, ¶ 4.)

By the specific terms of IRC §45B [b], the deduction is not "allowable" if a credit for the same amounts for the same period is taken against federal income tax: "No deduction shall be allowed under this chapter for any amount taken into account in determining the credit under this section." (26 USC § 45B [c] [Emphasis supplied].) At the point that Petitioner made the accounting choice to claim the amount as a tax credit there was no longer an "allowable" IRC deduction from federal income for Excess FICA. Therefore there is no "allowable" business expense available as a GCT deduction for Excess FICA.

This case is distinguished from cases where a federal deduction is "allowable" in computing FTI and therefore ENI. Caselaw suggests, for example, that an available IRC adjustment to FTI which was not applied at the federal level, remains allowable and could be available as a deduction from ENI. (*See Matter of Accessories by Pearl* (1989 WL 127185 *3 [NY St Tax Appeals Trib. DTA Nos. 801583, 803554, February 24, 1989].)[12]

[12] In *Accessories by Pearl*, the State Tax Appeals Tribunal considered the meaning of the term "allowed" for the State Tax Law § 210.12-A employment incentive credit. Internal Revenue Service rulings concerning the IRC § 172 (c) net operating loss deduction were reviewed by the Tribunal. The Tribunal

These are not the facts of this matter, and there is no evidence that Petitioner neglected to take advantage of an available federal adjustment for Excess FICA.

Petitioner affirmatively applied the Excess FICA as a credit against Federal corporation income tax. IRC § 45B. Petitioner chose not to apply the payments as an FTI business expense deduction. Once computed as tax credits, the amounts were unavailable as deductions from FTI by operation of the provisions of IRC § 45B (c). Contrary to Petitioner's assertion, it must be concluded that Petitioner chose this tax credit as the form of its economic benefit.

There are no material triable issues of fact presented in this matter. In *Tucker v Tucker* (116 Misc2d 76 [Sup Court, Queens County 1982]), the Court noted "When a party fails to submit factual evidence or reveal its proof as differing from the moving party's facts, the motion for summary judgment may be granted." (116 Misc 2d at 78 *citing Arrants v Dell Angelo*, 73 AD2d 633 [2d Dept 1979]; *Erlich v Erlich*, 80 AD2d 882 [2d Dept 1981].) Petitioner avers that there is a Department of Finance audit policy in place which has resulted in similarly-situated taxpayers being permitted to make this adjustment. Petitioner's position is apparently based on evidence which it is merely "prepared to" but did not submit [Tr 41], such as unidentified

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(cont'd) concluded that "'allowed' as used with respect to the employment incentive credit means only as granted by the terms of the statute - the correct investment tax credit."

records of unrelated taxpayers, Freedom of Information Law (FOIL) requests[13], and statements and/or testimony of witnesses.

Petitioner did not support its position by submitting either documentary evidence in admissible form or other offers of proof. Its statements remain unsubstantiated allegations. (*Matter of Alvord & Swift.*)[14]

With respect to the allegation that other City taxpayers were permitted the deduction, it is noted that it is equally plausible that the referenced unidentified taxpayers were allowed to deduct the Excess FICA tax payments from ENI because in computing FTI they neither applied the amounts as an IRC § 45B federal income tax credit nor as an IRC §162 business expense deduction. These unsubstantiated allegations do not constitute issues of fact. (*Matter of Alvord & Swift.*)

Petitioner also refers to "mixed fact and law" rulings which it alleges support denial of the motion. No proffer of those rulings was made and no cite was referenced. This particular claim cannot be evaluated.

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[13] Petitioner's representative averred at oral argument that a FOIL request was filed "about a month" before the hearing "along these lines." Tr. 43. This statement was not supported by proof in admissible form.

[14] *See e.g.*, the recent NYS Division of Tax Appeals ALJ Order in Matter of Moody's Corporation & Subsidiaries (NY St Div of Tax Appeals, DTA No. 827396, November 16, 2017.) This Order is referenced only to illustrate one example of the substantiation of assertions that similarly situated unidentified taxpayers have been permitted a deduction which is the same as that requested by a litigant.

Petitioner elected to adjust its federal corporate income tax for the period in issue by application of an IRC §45B credit for Excess FICA. Petitioner did not elect to apply these amounts as a business expense deduction against FTI. Since Petitioner chose to use the amounts as a tax credit, once the credit was taken the deduction was no longer "allowable." (IRC § 45B [c]). The GCT base of FTI could not include the deduction for such amount as the deduction was not "allowable." No contrary inferences may be drawn reasonably from the undisputed facts presented. (*Gerard v Inglese,* 11 AD2d 381, 383 [2d Dept 1960].)

Petitioner's allegations are contradicted by the documentary evidence. *Berardino v Ochlan,* (2 AD3d 556 [2d Dept 2003].) No other facts have been offered. The determination of the Motion depends upon the facts presented to which facts both parties agree.

Petitioner did not tender evidentiary proof in admissible form in opposition to the Motion. (*Friends of Animals.*) Petitioner presented only unsubstantiated allegations which are "insufficient to raise an issue of fact." (CPLR 3212 [b]; *Matter of Alvord & Swift.*) In this matter Petitioner has not raised any triable issues of fact. Accordingly, Movant has tendered sufficient evidence to "eliminate any material issue of fact from the case." (*Winegrad.*) Summary determination in

movant's favor may be made based on the pleadings and papers submitted. (*In re Estate of Peters*, 132 AD3d 1250 [4th Dept 2015].)

ACCORDINGLY, the motion for summary determination is granted. The Notice of Determination dated May 26, 2016, as adjusted according to Movant's letter of March 13, 2017, is sustained.

DATED: March 6, 2018
New York, New York

_____/s/_____
Anne W. Murphy
Chief Administrative Law Judge