NEW YORK CITY TAX APPEALS TRIBUNAL

In the Matter of	:	DECISION
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SKIDMORE, OWINGS & MERRILL, LLP	:	TAT (E) 17-21 (UB)
	:	
Petitioner	:	
	:	

Skidmore, Owings & Merrill, LLP (Petitioner) filed an exception to a Determination of an Administrative Law Judge (ALJ) dated July 30, 2021 (ALJ Determination) that sustained a Notice of Determination issued by the New York City Department of Finance (Department) dated December 21, 2015 (Notice), which asserted New York City Unincorporated Business Tax (UBT) deficiencies for the tax years ended September 30, 2011 and September 30, 2012 (Tax Years) as described below.[1]

The Commissioner of Finance of the City of New York (Respondent) was represented by Andrew G. Lipkin, Esq., Senior Counsel, New York City Law Department. Petitioner was represented by Richard A. Leavy, Esq., Sidley Austin, LLP. The parties submitted a Joint Stipulation of Facts, including exhibits (Stipulation) in which the parties stipulated to substantive and procedural facts and to the authenticity of accompanying exhibits. The parties consented to have this matter determined on submission without the need for appearance at a hearing, under Rules of Practice and

[1] Except as otherwise noted, the ALJ'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 ALJ Determination.

Procedure of the New York City Tax Appeals Tribunal (Tribunal Rules) 20 RCNY §1-09(f). Oral argument before the Tribunal was held on May 3, 2022.

Petitioner is an architectural, urban planning, and engineering firm that was originally formed in 1936 as an Illinois general partnership. During the Tax Years it was a New York limited liability partnership, organized as such by a filing with the Department of State on March 28, 1996.

Relationship between Petitioner and S-DISC

Skidmore, Owings, & Merrill DISC, Inc. (S-DISC) was formed as a Delaware corporation by filing a certificate of incorporation on June 28, 2004. On or about September 8, 2004, S-DISC filed with the Internal Revenue Service an "Election to be treated as an Interest Charge DISC" and also filed an "Election by a Small Business Corporation" under subchapter S of the Internal Revenue Code. As an entity subject to subchapter S of the Internal Revenue Code, S-DISC was generally not subject to federal corporate income tax. S-DISC was granted authority to do business as a commissioned sales agent by the State of Illinois on September 22, 2004.

During the Tax Years, Petitioner had 22 partners, of which 14 were active equity partners and 8 were retired partners receiving retirement payments from Petitioner. Hereinafter, we will refer only to the 14 active equity partners as "partners".[2] The partners owned Petitioner, and each received as compensation a share of Petitioner's

[2] Petitioner's 14 "active equity partners" were also the 14 shareholders of S-DISC. Stipulation ¶ 17. Petitioner's "retired partners," therefore, are of no relevance to this case.

profits (and shared in any losses) based on that partner's interest in the partnership.[3] During the 2011 and 2012 calendar years, Petitioner's partners were also the sole shareholders of S-DISC.[4]

Purposes for forming S-DISC.

As explained below, one purpose for forming S-DISC was to enable the partners, who were also the shareholders of S-DISC, to receive a portion of their compensation at a reduced federal tax rate, specifically as qualified dividends taxable at the lower rate for capital gains. Domestic International Sales Corporations (DISCs), authorized by Internal Revenue Code (IRC) §§ 991-997, provide certain tax benefits to domestic companies engaged in exporting goods and certain services, and to the owners of the export company who are also the shareholders of the DISC. The DISC limits these benefits to "qualified export receipts." As pertinent here, qualified export receipts include "gross receipts for engineering or architectural services for construction projects located (or proposed for location) outside the United States." IRC § 993(a)(1)(G).

As will be further explained, Petitioner paid commissions to S-DISC on a designated portion of its qualified export receipts from the performance of those services, and deducted the commissions on Petitioner's U.S. Return of Partnership Income Form

[3] Partnership Agreement, Article 6. Stipulation, Exh. D. The partnership is a professional practice formed "to engage in the practice of architecture, engineering, planning and related fields. . ." Partnership Agreement, Article 1. Stipulation Exh. D. Each partner's profits share is the exclusive source of compensation for that partner's professional services provided to Petitioner and its clients. Partnership Agreement, Article 3, Stipulation, Exh. D, p. iv: "Each Partner shall devote his/her full professional time and efforts to the affairs of [Petitioner] and shall pay over to [Petitioner] any and all compensation received by him/her from sources other than [Petitioner] which represents earnings in his/her professional capacity."

[4] Stipulation ¶ 17. S-DISC filed its federal income tax returns on a calendar year, which differed from Petitioner's Tax Years ending on September 30th.

1065, thus, reducing each partner's share of the profits in Petitioner and transferring those profits to S-DISC for distribution to the partners, as shareholders of S-DISC, taxable at the lower capital gains tax rates.

Another purpose for forming S-DISC was to change the profit-sharing ratios to compensate the partners with respect to the commissions Petitioner paid to S-DISC favoring certain partners, specifically Partners A, B and C. The profit-sharing ratios on those commission payments were changed from the partners' profit-sharing ratios in Petitioner, to their shareholder percentages in S-DISC.

Regardless of whether S-DISC's purpose was to tax the partner compensation paid to S-DISC, in the form of commissions, at a lower federal tax rate, or to also change the profit-sharing ratios with respect to the partner compensation paid to S-DISC, S-DISC was a vehicle to compensate the partners for their services to Petitioner and for Petitioner's use of their capital by means of Petitioner's commission payments to S-DISC. While the use of S-DISC to also change the profit-sharing ratios of the partners with respect to the commissions paid to S-DISC does not affect the outcome of this case, it does underscore that this was an arrangement to compensate the partners for their services and the use of their capital.

Payment of partner compensation to S-DISC for redistribution to partners.

We amend the ALJ's findings of fact to reflect that three of the partner-shareholders of S-DISC, identified in the Stipulation as Partner A, Partner B, and Partner

C, together, held 56.5% of the shares of stock in S-DISC,[5] but only a 21% profits interest in Petitioner.[6] The other partner-shareholders who, together, held only 43.5% of the shares of stock in S-DISC, held a 79% profits interest in Petitioner.[7] S-DISC had no employees.

Petitioner and S-DISC entered into a commission agreement (Commission Agreement) dated June 28, 2004,[8] which was the sole document governing the relationship between Petitioner and S-DISC.

Under ¶ 1 of the Commission Agreement (entitled "Grant of Agency"), Petitioner appointed S-DISC as its agent "with respect to certain architectural and engineering

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[5] See Exh. O, Form 4876-A, Number of Shares of S-DISC stock in which: Partner A held 900 + 800 + 700 + 700 = 3,100 shares of stock, representing 25.7% of the total shares of S-DISC; Partner B held 650 + 600 + 525 + 350 = 2,125 shares of stock, representing 17.6% of the total shares of S-DISC; Partner C held 875 + 715 = 1,590 share of stock, representing 13.2% of the total shares of S-DISC. Together, Partners A, B and C held 25.7% + 17.6% + 13.2% = 56.5% of the total shares of S-DISC, a majority.

S-DISC is incorporated under the Delaware General Corporation Law (GCL). Certificate of Incorporation, Stipulation Exhibit P, ¶ Seventh. GCL § 216 states that, unless the certificate of incorporation or by-laws otherwise provide, a majority vote of the shares controls all stockholder voting except the election of directors, which requires only a plurality vote. S-DISC's Certificate of Incorporation does not contain any contrary language regarding stockholder voting. Stipulation Exhibit P. Therefore, Partners A, B and C, together, control S-DISC. No by-laws for S-DISC have been placed into the Stipulated Record by Petitioner. We, therefore, refer to S-DISCs certificate of Incorporation to define the rights of S-DISC stockholders.

[6] See Schedule K-1's for each of the partners A, B and C, for each of the Tax Years. Exhibits G and J. The percentages reflect the ratio of each partner's share of "ordinary business income" reported on the K-1, in Part III, line 1, to Petitioner's total "ordinary business income" reported on line 22 of the first page of Petitioner's Form 1065 federal partnership return. The 21% figure is approximate, and totals 21.15% for the Tax Year ending in September 30, 2011, and 20.97% for the Tax Year ending in September 30, 2012. The respective interests of partners A, B and C in Petitioner's profits and losses can vary from year to year, if the number of each partner's Unit shares of participation increase or decrease at the beginning of any fiscal year. Section 7.15 of Petitioner's Partnership Operating Policies. Stipulation Exh. D, at p. 45. See *infra* n.7.

[7] Petitioner's partners share profits and losses and vote respecting [Petitioner's] matters based on the "Units" allocated among them, which determine their respective partnership shares of participation. Sections 1.05(a)(i) and 7.15 of Petitioner's Partnership Operating Policies. Stipulation Exh. D, at Pp. 4 & 45. Petitioner's partners' shares of profits and losses can be found in their Schedule K-1's, attached to Petitioner's Partnership federal income tax return – Form 1065. Exhs. G and J, *supra*, n.6. Partnerships do not pay federal income taxes, and each partner pays tax on that partner's share of the partnership's income and losses. The partner's share of the partnership's items of income, expenses, gains and losses is passed through to that partner and reported on that partner's Schedule K-1.

[8] Stipulation Exh. F.

services performed by [Petitioner] on those construction projects located (or proposed to be located) outside of the United States as are designated by [Petitioner] (**the "Designated Services")**, the commission income from which would qualify as 'qualified export receipts' as the term is defined in Section 993(a) of the Code." [Emphasis in original].

Paragraph 2 of the Commission Agreement states that: S-DISC "shall be entitled to receive a commission with respect to all Designated Services in such amount as will enable the DISC to derive taxable income attributable to such services equal to the maximum amount described in Section 994 of the Code. Payment of such commission shall be made, with respect to all Designated Services for the previous twelve month period, no later than September 30 of each year." [Petitioner's tax year end.]

Notably, the commissions payable to S-DISC did not include all of Petitioner's architectural and engineering services on construction projects performed outside of the United States, the commissions from which qualify as "qualified export receipts," but was further restricted only to Designated Services, "certain" projects designated by Petitioner.

Effect of Commission Agreement on Partner compensation.

The practical effect of Petitioner's commission payments to S-DISC was to reduce the amount of Petitioner's income and, therefore, each partner's share of that income payable by Petitioner for their services and for the use of their capital, and to redistribute that income to the same individuals in their capacity as S-DISC's shareholder-partners

but in a different profit-sharing ratio – based on each shareholder-partner's percentage interest in S-DISC. The partners, thus, received part of their compensation from Petitioner for their services to Petitioner and for Petitioner's use of their capital, in the form of their profit shares in Petitioner, and the remainder as distributions from S-DISC.

Pursuant to the Commission Agreement, Petitioner made payments to S-DISC in the form of commissions for agency services S-DISC was deemed to perform for federal income tax purposes. During the fiscal year ended September 30, 2011, Petitioner paid commissions to S-DISC of $23,749,999. During the fiscal year ended September 30, 2012, Petitioner paid commissions to S-DISC of $26,000,000. We amend the ALJ's findings of fact to clarify that Petitioner deducted, as Commission Expense, the $23,749,999 in commissions paid to S-DISC during the fiscal year ended September 30, 2011, and the $26,000,000 in commissions paid to S-DISC during the fiscal year ended September 30, 2012, on Petitioner's U.S. Return of Partnership Income Form 1065 filed for each of those years.[9]

We note that the deduction claimed by Petitioner for Commission Expense during the fiscal year ended September 30, 2011, reduced the "ordinary business income" Petitioner reported on its Federal Partnership Return by the amount of $23,749,999, to $26,722,065, thus, reducing the partners' distributive share of Petitioner's ordinary business income, as reflected on Schedule K of the federal partnership return.[10] Similarly, the Commission Expense deduction Petitioner claimed during the fiscal year

[9] Stipulation Exhs. G and J, Statement 1, Other deductions.
[10] Stipulation Exh. G, Schedule K.

ended September 30, 2012, reduced the partners' distributive share of Petitioner's ordinary business income reported on its Federal Partnership Return by the amount of $26,000,000, to $19,485,789.[11] Petitioner's deduction for Commission Expense, thus, reduced each partner's distributive share of Petitioner's income as reported on their individual Schedule K-1's, based on their share of the profits.[12] For example, Partner A's share of Petitioner's "ordinary business income" reported on Partner A's Schedule K-1 for fiscal year ended September 30, 2011 was $2,075,970, representing 7.768% of Petitioner's total "ordinary business income" of $26,722,065 reported on line 22 of Petitioner's Form 1065.[13] The $23,749,999 in commissions paid to S-DISC and deducted by Petitioner, reduced Partner A's distributive share of Petitioner's ordinary business income by $1,844,900 ($23,749,999 x 7.768%).

The amount of Partner A's compensation for services and for the use of Partner A's capital from Petitioner- Partner A's distributive share of Petitioner's ordinary business income - was reduced in the amount of $1,844,900, the amount of Partner A's share of the commission paid to S-DISC. Nevertheless, Partner A was entitled to a much larger share of that commission payment from S-DISC based on Partner A's 25.7% share of S-DISC's stock, $6,103,750 ($23,749,999 x 25.7%).

[11] Stipulation Exh. J, Schedule K.
[12] Stipulation Exhs. G and J, Schedule K-1's for each partner.
[13] Note slight error of $200, attributable to rounding profit percentage to three decimal places.

Increase in Partners A, B and C's share of Petitioner's profits with respect to certain income from Petitioner's foreign architectural and engineering services; provisions of the Commission Agreement which protect Petitioner and the other partners.

Based on our finding that the interests of each of S-DISC's 14 shareholder-partners differ significantly from their interests in Petitioner's profits and losses, and that S-DISC is entitled to receive commissions from Petitioner only with respect to Designated Services, and not on all "qualified export receipts" eligible for a federal income tax benefit, we find that S-DISC served a dual purpose – to obtain the DISC federal income tax benefits on the compensation paid to each partner with respect to the income from certain foreign business, and to change the profit-sharing ratios for the partners with respect to that compensation favoring Partners A, B and C. This change in profit-sharing ratios further confirms that this was an arrangement to compensate the partners for services and use of capital.

Petitioner is a service business, "provid[ing] services in the areas of architecture, building services engineering . . ." among other services.[14] Petitioner is a professional practice in which the partners participate in providing these services.[15] We, therefore, find that the commissions Petitioner paid to S-DISC as a percentage of the revenues from "Designated Services" compensated Petitioner's partners for their share of the revenues from these services; that the commission payments reduced Petitioner's profits, which otherwise would have been shared among the partners as compensation for their services

[14] Stipulation ¶ 19. It "generates gross receipts from transactions involving 'engineering and architectural services'" within the meaning of the relevant DISC provisions of the Internal Revenue Code. Stipulation ¶ 20.
[15] See n.3, *infra*.

and capital according to their partnership profit-sharing ratios; and that the portion of Petitioner's profits paid into S-DISC in the form of commissions, compensated the partners at a profit-sharing ratio for the Designated Services that was skewed heavily in favor of Partners A, B and C, which differed from their partnership profit shares applicable to Petitioner's other service revenues. This alone compels the finding that the commissions were payments to Petitioner's partners for their services.

However, as distinguished from paragraphs 1 through 4 of the Commission Agreement, which enable S-DISC to derive the applicable federal income tax benefits,[16] paragraphs 5 through 10 protect Petitioner and its partners. We, thus, amend the ALJ's findings of fact to identify terms in the Commission Agreement which protect Petitioner's business, and the interests of Petitioner's partners in that business.

Paragraph 5 of the Commission Agreement prevents S-DISC from binding Petitioner to any new business.[17] The partner-shareholders of S-DISC, therefore, cannot act as agent for Petitioner to bind Petitioner "to any contract or agreement" except as to the Designated Services provided in the Commission Agreement. One practical effect of this provision is to protect Petitioner's partners, other than A, B and C, who have a lesser interest in S-DISC's income.

[16] Although, as noted, ¶ 1 further restricts S-DISC's income to a potentially smaller amount than the maximum "qualified export receipts" permitted for federal income tax purposes. Also, ¶ 4, in which Petitioner guarantees the performance of the DISCs obligations, would be unnecessary if the same group of partners who, together, control Petitioner also controlled S-DISC.

[17] "**DISC's Authority**: Nothing in this agreement is intended to be construed as to grant authority to the **DISC** or its sub-agents, as agent or otherwise, to bind [Petitioner] to any contract or agreement, or to subject the [Petitioner] to any costs, liabilities or expenses except as specifically provided herein." (Emphasis in original.)

Similarly, ¶ 6 of the Commission Agreement, entitled "Covenant Not to Compete" states that: "The DISC shall not, without first obtaining the written approval of [Petitioner], represent or solicit business for other persons with respect to services which are or can be construed as competitive with the services of [Petitioner]." While ¶ 5 prohibits Partners A, B and C from generating new business on Petitioner's behalf, ¶ 6 prohibits certain of S-DISC's partner-shareholders from using S-DISC to generate new business on behalf of "other persons," placing S-DISC in competition with Petitioner for the business. Paragraph 6 prevents the partner-shareholders from using S-DISC to circumvent their fiduciary duty to the partnership, described in Article 3 of Petitioner's Partnership Agreement, to pay over to the partnership any compensation earned by the partner outside of the partnership.[18] Paragraph 6, thus, assures that S-DISC cannot compete with Petitioner for new business. One practical effect of ¶ 6 is that it also prevents Partners A, B, and C from inflating their share of partnership compensation, to the detriment of the other partners, by running new business through S-DISC.

Like ¶¶ 5 and 6, ¶¶ 7 through 10, governing termination, assignment, the application of New York law, and mandating arbitration for any disputes, all treat the Commission Agreement as an agreement between parties with differing interests. S-DISC was more than a tax-savings device, but a vehicle to change the profit-sharing ratios to

[18] Partnership Agreement, Article 3, requires that: "Each Partner shall devote his/her full professional time and efforts to the affairs of [Petitioner] and shall pay over to [Petitioner] any and all compensation received by him/her from sources other than [Petitioner] which represents earnings in his/her professional capacity. . . ." See also, New York Consolidated Laws, Partnership Law §43.

compensate the partners for their services with respect to a specified portion of Petitioner's foreign business, favoring Partners A, B and C.

These facts serve to further clarify that Petitioner's commission payments to S-DISC was compensation paid to the partners based on each partner's share of specified services performed by Petitioner. We emphasize here that the one essential fact critical to our decision in this case is that Petitioner deducted payments to S-DISC for the benefit of the partners for partner services, which S-DISC distributed to the partners at a reduced tax rate. The commission payments shifted the payment of that compensation from Petitioner to S-DISC. Although, for federal income tax purposes, the commissions were nominally paid by Petitioner to S-DISC for S-DISC's deemed services, they were payments for partner services. We note, therefore, that the character of the commission payments as compensation to the partners would have been the same if their respective interests in Petitioner and in S-DISC were identical.

On December 21, 2015, following an audit, Respondent issued the Notice asserting a deficiency in UBT for the Tax Years in the principal amount of $719,611.25, plus interest and penalty.[19] The explanation attached to the Notice stated: "Per NYC Administrative Code §11-507(3), No deduction shall be allowed (except as provided in section 11-509 of this chapter) for amounts paid or incurred to a proprietor or partner for services or for the use of capital. *Per the above code, commission expense paid to related*

[19] The Notice denied two UBT deductions, for commissions paid to S-DISC and for payments to retired partners. Petitioner only contests the denial of a UBT deduction for the commissions paid to S-DISC.

entity and payments made to retired partners are disallowed under NYC UBT." (Emphasis in original.)

The ALJ Determination sustained the Notice, concluding that Petitioner's commission payments to S-DISC were payments to Petitioner's partners for their services under Administrative Code §11-507(3) and, therefore, not deductible for UBT purposes.[20] The ALJ reached this same result under two alternative characterizations of the commission payments to S-DISC. First, accepting what the ALJ termed the "legal fiction" that the commission payments were made to S-DISC for its agency services, "the only way S-DISC's services could be rendered is through its shareholders, all of whom are active partners in petitioner."[21] The ALJ found that [n]o facts were submitted to indicate that anyone else within S-DISC could provide these services." Alternatively, the ALJ disregarded the "legal fiction," concluding that Petitioner's commission payments to S-DISC, which provided federal income tax benefits to the partner-shareholders when distributed to them, should be treated no differently than a payment by Petitioner on their behalf to a deferred compensation plan.[22]

Petitioner argues that the ALJ erroneously applied the economic substance doctrine, disregarding the form of Petitioner's commission payments to S-DISC for S-DISC's services and, instead, considered their economic substance as payments to the partner-shareholders for their services. Petitioner points out that DISCs were created

[20] ALJ Determination, at Pp. 9-10 & 13.
[21] ALJ Determination, at p. 9.
[22] *Id.*

under the Internal Revenue Code to confer a federal income tax benefit, and that the courts have recognized that DISCs do not need to have economic substance to confer that federal income tax benefit.

Petitioner also argues that, although 19 RCNY §28-06(d)(1)(i)(B) denies a deduction under Administrative Code §11-507(3) for payments to a non-partner third-party, where the payments are made for the provision of services or capital by a partner, the commission payments to S-DISC were for S-DISC's services, not the services of the partners.

Petitioner also relies on our decision in *Matter of Ark Restaurants Corp.*, TAT (E) 16-18 (GC), March 21, 2019, in which we held that a taxpayer is bound under the New York City General Corporation Tax (GCT) to its choice of claiming a federal income tax credit instead of a federal income tax deduction, unless there is a specific New York City modification under the GCT statute granting the deduction. Here, Petitioner repeats its argument that the specific UBT modification denying Petitioner a deduction for payments to partners for their services or for the use of their capital, under Administrative Code §11-507(3), does not apply to Petitioner's commission payments to S-DISC with respect to Petitioner's Designated Services.

Respondent, in turn, argues that it is immaterial that S-DISC is not a partner in Petitioner "because there was no economic substance to S-DISC and the payments ultimately ended up in the pockets of the partners in Petitioner."[23] The commission

[23] Respondent's Brief, at p. 8.

payments, therefore, while deductible for federal income tax purposes, were not deductible under the UBT as "payments to partners for services. . ." Administrative Code §11-507(3).[24]

Respondent argues that Petitioner's commission payments to S-DISC were compensation to Petitioner's partners for actual services performed by Petitioner's partners in furtherance of Petitioner's business. Respondent points out that "[c]learly, qualified export receipts are receipts from services rendered by Petitioner. If any doubt remains, according to the Commission Agreement (Exh. F, ¶ 1), Petitioner appointed S-DISC as its agent 'with respect to certain architectural and engineering services performed by [Petitioner]. . .' and barred S-DISC from representing any other person without Petitioner's consent."[25]

For the following reasons we affirm the ALJ Determination.

The UBT is imposed "on the unincorporated business taxable income of every unincorporated business wholly or partly carried on within the [C]ity." Administrative Code §11-503(a). An "unincorporated business" includes a partnership. Administrative Code §11-502(a). The unincorporated business taxable income of an unincorporated business is defined in Administrative Code §11-505 as the excess of its unincorporated business gross income over its unincorporated business deductions. Administrative Code §11-507 defines the "unincorporated business deductions" as "the items of loss and deductions directly connected with or incurred in the conduct of the business, which are

[24] Respondent's Brief, at Pp. 9-10.
[25] Respondent's Brief, at p. 15.

allowable for federal income tax purposes for the taxable year" subject to certain modifications.

The sole issue before us is the applicability of one of those modifications, Administrative Code §11-507(3), which provides that '[n]o deduction shall be allowed. . . for amounts paid or incurred to a proprietor or partner for services or for use of capital." Specifically, whether Petitioner's commission payments to S-DISC are compensation to the partners for their services to Petitioner and, therefore, not deductible under Administrative Code §11-507(3).

Relevance of Federal DISC Provisions to the Partners' compensation arrangement

DISCs, authorized by IRC §§ 991-997, provide certain tax benefits to domestic companies engaged in exporting goods and certain services, and to the owners of the export company who are also the shareholders of the DISC. A DISC must satisfy certain requirements of IRC § 992, including that 95% or more of its gross receipts consist of "qualified export receipts." As pertinent here, qualified export receipts include "gross receipts for engineering or architectural services for construction projects located (or proposed for location) outside the United States." IRC §993(a)(1)(G). A DISC receives commissions based on the amount of the export company's qualified export receipts.[26] Petitioner further restricts the qualified export receipts on which S-DISC's commissions can be based to the amount of Petitioner's Designated Services. A DISC satisfying the requirements of IRC § 992 is exempt from the federal income tax. IRC §991. S-DISC's

[26] Treas. Reg. §§ 1.194-1(b)(4) and (d)(2).

shareholders, here, Petitioner's 14 partners, receive actual distributions from S-DISC, which are treated as dividends.[27] As all of Petitioner's 14 partners were individuals, the dividends they received from S-DISC would have been taxed to each of S-DISC's shareholder-partners as "qualified dividends," taxable at reduced capital gains rates.[28] Thus, the commissions paid to S-DISC, and deducted by Petitioner, reduced each partner's distributive share of Petitioner's ordinary business income at the higher tax rates for ordinary income, but were included in their incomes as "qualified dividends" from S-DISC at the lower, capital gains tax rates.[29] Although S-DISC, an Interest Charge DISC (IC-DISC), can defer income to later tax years, the deferral is of limited value because S-DISC's shareholders must pay interest on the amount of that deferral.[30] S-DISC did not defer any income during the Tax Years, and distributed to its 14 shareholder-partners all the commissions S-DISC received from Petitioner.[31] Therefore, S-DISC was a mere conduit for the commission payments from Petitioner to compensate Petitioner's partners for their services.

In the present case, S-DISC provided tax benefits to Petitioner's partners, who were also the shareholders of S-DISC. But S-DISC also served an additional purpose in furtherance of this partner compensation arrangement– to change the partners' profit-

[27] IRC § 995.
[28] IRC § 1(h)(11)(A) & (B).
[29] IRC § 1(h)(11)(A) & (B).
[30] IRC § 995(f).
[31] See S-DISCs 1120 -IC DISC returns for calendar years 2011 and 2012. Stipulation Exhs. S & U. On page 1 of S-DISC's 1120-IC-DISC return for calendar year 2011 (Exh. S), S-DISC reported gross income of $21,950,000, which. Schedule B on page 2, shows that this entire amount consisted of the commissions. Schedule J (page 4) Part IV shows that entire amount as an "actual distribution" that year. The same applies to S-DISC's 1120-IC-DISC return for the calendar year 2012 (Exh. U). That year S-DISC received $35,370,000 in commissions and, on Sch. J, reported an "actual distribution" of $35,370,000.

sharing percentage, favoring Partners A, B and C, to allocate a higher percentage of Petitioner's partnership profits from Petitioner's overseas engineering and architectural business to those three partners than their partnership shares would have entitled them to.

The commissions Petitioner paid to S-DISC were tax-advantaged compensation to the partners for their services and the use of their capital.

Petitioner's partners share in Petitioner's profits and losses based on the "Units" allocated to them pursuant to the Partnership Agreement.[32] The partners' income sharing arrangement under the Partnership Agreement also determines each partner's share of Petitioner's income under the federal income tax.[33] For federal income tax purposes, each partner is taxed on that partner's "distributive share" of partnership income.[34] A partner's distributive share of partnership income is reported on that partner's Schedule K-1, attached to Petitioner's U.S. Return of Partnership Income for each of the Tax Years. See Stipulation Exhs. G & J.

A partner's distributive share of partnership income, therefore, is the basic compensation Petitioner pays to its partners for their services and for the use of their capital.[35] The commissions paid by Petitioner to S-DISC are deducted by Petitioner from the income Petitioner reports on its Partnership federal tax return, thus reducing the amount of income allocated to each of Petitioner's partners as distributive shares of Petitioner's income. The commissions paid to S-DISC, therefore, reduced the amount of

[32] Stipulation Exh. D, Partnership Agreement, Article 6; Partnership Operating Policies, at §§ 1.05, 1.06, 7.11 and 7.15.
[33] IRC §704(a).
[34] IRC §§701, 702, and 704.
[35] *Id.* Section 1.06 of the Partnership Operating Policies also entitles each of Petitioner's partners to receive a "guaranteed payment" in addition to their distributive share of the income allocated among the partners.

compensation Petitioner paid to each of its partners for their services and for the use of their capital. That compensation, however, was distributed to Petitioner's partners by S-DISC, in the form of tax-favored qualified dividends.

Simply stated, Petitioner's partners received part of their compensation for their services and the use of their capital, i.e., their distributive shares of partnership income, from Petitioner, and the remainder from S-DISC in the form of tax-favored qualified dividends. Petitioner's commission payments to S-DISC, therefore, were "amounts paid or incurred to a proprietor or partner for services or for the use of capital" within the meaning of Administrative Code 11-507(3), and not deductible under the UBT.

In reaching this conclusion, we modify the ALJ's statement that Petitioner's commission payments to S-DISC "are made for deemed services which are not actually performed."[36] While the services for which the commissions were paid "were not actually performed" *by S-DISC*, they were performed by the partners for Petitioner and its clients, in their capacity as partners of Petitioner, not as shareholders of S-DISC. S-DISC was merely a means to provide a tax benefit on payments to partners for services to Petitioner (and also to change the partner profit sharing ratio on the income from those services). All of Petitioner's income distributed to the partners compensated them for their services and for the use of their capital. Regardless of whether all that income was paid to the partners by Petitioner, or part of it was paid by Petitioner to S-DISC for distribution to

[36] ALJ Determination, at p. 7.

the partners, the entire amount of Petitioner's income was allocated among the partners as payment for their services.

Petitioner, however, argues "that the individual partners of the Petitioner that were shareholders of S-DISC performed no services for Petitioner for which S-DISC received payment. . . The Petitioner made payments to S-DISC for services S-DISC was deemed to have performed for the Petitioner pursuant to the terms of the Commission Agreement and not for services or for use of capital."[37]

The Commission Agreement, however, supports our conclusion that Petitioner's commission payments to S-DISC are for partner services. Paragraph 1 of the Commission Agreement appoints S-DISC "as its agent *with respect to certain architectural and engineering services* ***performed by [Petitioner]***. . . as are designated by [Petitioner] (the 'Designated Services')." (Emphasis added.) Petitioner, therefore, performed those services, for which Petitioner's partners were entitled to be compensated based on their allocated share of the income from the Designated Services. Notwithstanding Petitioner's partners entitlement to a share of that income as their compensation, ¶ 2 of the Commission Agreement stated that:

> "The DISC shall be entitled to receive a commission with respect to all Designated Services in such amount as will enable the DISC to derive taxable income *attributable to such services* equal to the maximum amount described in Section 994 of the Code."

Petitioner, thus, paid to S-DISC, and deducted from its federal taxable income as "commissions," a portion of the revenues it received from the Designated Services,

[37] Petitioner's Brief, at p. 9.

revenues which would otherwise have been shared among Petitioner's partners according to their profit-sharing percentages. The commissions Petitioner paid to S-DISC, which S-DISC distributed to the partners as dividends, represented a portion of the partners' compensation for their services [to Petitioner] and for the use of their capital [by Petitioner] within the meaning of Administrative Code §11-507(3), and were not deductible by Petitioner under the UBT.

Applicability of the Third-Party Payment Rule

Petitioner, nevertheless, argues that Administrative Code §11-507(3), which denies a deduction "for amounts paid or incurred to a . . . partner for services or for the use of capital" does not apply to the commissions paid to S-DISC, because S-DISC is not a partner in Petitioner.[38]

We conclude that this case is governed by our prior Decisions under the Third-Party Payment Rule, denying deductions to an unincorporated business for payments made to a third-party as consideration for the services or capital provided by a partner or sole proprietor. See *Matter of Horowitz*, TAT (E) 99-3 (UB) (2005), *aff'd*, 41 AD3d 101 (1st Dept 2007), *lv. denied*, 10 NY3d 710 (2008); *Matter of Proskauer Rose LLP*, TAT (E) 01-19 (UB) (2007), *aff'd,* 57 AD3d 287 (1st Dept 2008); *Matter of Murphy & O'Connell*, TAT (E) 06-18 (UB) (2011), *aff'd,* 93 AD3d 530 (1st Dept 2012), *lv denied* 19 NY3d 953 (2012); *Matter of Tocqueville Asset Management L.P.*, TAT (E) 10-37 (UB) (2015), *aff'd*, 141 AD3d 420 (1st Dept 2016).

[38] Petitioner's Brief, at 18.

The Third-Party Payment Rule, set out in 19 RCNY (UBT Rule) §28-06(d)(1)(i)(B), states that:

> "In addition to all other amounts otherwise included, amounts paid or incurred to a proprietor or partner for services or for use of capital *include any amount paid to any person if, and to the extent that, the payment was consideration for services or capital provided by the proprietor or partner."* (Emphasis added.)

Under the Third-Party Payment Rule, Petitioner's payment "to any person" [who is not a partner in Petitioner] satisfies the requirements of the Third-Party Payment Rule, so long as "the payment was consideration for services or capital provided by a partner." Thus, the Rule treats payments made by Petitioner to S-DISC to compensate the partners for their services as payments to the partners who earned the compensation, not S-DISC the payee.

As we previously explained, the commissions paid by Petitioner to S-DISC are based on Petitioner's export revenues from Designated Services, which Petitioner's partners are entitled to share for their services and use of capital. The commissions paid by Petitioner to S-DISC compensate Petitioner's partners for their share of Petitioner's export revenues from Designated Services for their services and the use of their capital. Petitioner's export revenues from Designated Services were generated by the services of Petitioner and Petitioner's partners, not S-DISC. The commissions, therefore, were solely attributable to the services of Petitioner's partners, not S-DISC, and were paid to S-DISC solely for the benefit of Petitioner's partners.

We conclude that the Third-Party Payment Rule is applicable to Petitioner's commission payments to S-DISC. Petitioner paid the commissions to S-DISC for the benefit of the partners; Petitioner received a tax deduction for the payment, and the partners received their share of the commissions from S-DISC at a reduced tax rate; and the commissions compensated the partners for their services to Petitioner in connection with the Designated services. All the requirements of UBT Rule 28-6(d)(1)(i)(B), therefore, were satisfied, and the third-party commission payments are not deductible.

We agree with the ALJ that Petitioner's payment of a portion of the partners' compensation into S-DISC to secure a tax benefit,[39] is no different from the deductions we have previously denied for contributions made by an unincorporated business on behalf of proprietors or partners to tax-favored defined benefit or health insurance plans.[40] In *Horowitz*, *supra*, we denied a UBT deduction for the federal income tax deductions claimed by a sole proprietor for 50% of social security taxes, for contributions to a self-employed health insurance plan and to a defined benefit plan. In *Horowitz* we found "that each of the three items is remuneration for services Petitioner, as proprietor, rendered to the unincorporated business" and properly disallowed under Administrative Code §11-507(3). We found irrelevant that the unincorporated business did not pay the amounts directly to the proprietor or partner, instead contributing the amounts on behalf of the proprietor to deferred compensation plans. In upholding the Third-Party Payment

[39] As well as to reallocate the lion's share of the commissions from Petitioner's designated foreign engineering and architectural services to Partners A, B and C.
[40] ALJ Determination, at 9-10.

Rule,[41] we relied on the First Department's decision in *Gutman Picture Frame Associates, et al. v. O'Cleirican*, 209 AD2d 340 (1st Dept. 1994):

> "Tax legislation should be implemented in a manner that gives effect to the economic substance of the transaction [] and the taxing authority may not be required to acquiesce in the taxpayer's election of a form for doing business but rather may look to the reality of the tax event and sustain or disregard the effect of the fiction in order to best serve the purposes of the tax statute."

Like the third-party payments in *Horowitz*, here "[t]he payments at issue while made to third parties [S-DISC] were made by [Petitioner] for the benefit of the [partners] and were remuneration for services rendered by [the partners] to [Petitioner]. Hence, the economic substance of these transactions requires disallowance of the deductions."[42]

Since *Guttman* and *Horowitz*, we have applied the Third-Party Payment rule to a partnership's tax-favored payments made to a retirement plan on behalf of its partners, *Proskauer Rose, supra*, and to a pension plan on behalf of the partners, *Murphy & O'Connell*, *supra*.

Petitioner does not challenge the Third-Party Payment Rule as a valid application of the "substance over form" doctrine where the payments are "consideration for services or capital provided by a proprietor or partner" [emphasis omitted] and the third-party payments are for the services of a partner.[43]

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[41] *UBT Rule 28-06(d)(1)(i)(B)*

[42] *Horowitz*, *supra*, at 7.

[43] Petitioner's Brief, at 18-19. [T]he identity of either the payee or the service provider as a partner of the taxpayer is an absolute prerequisite to the denial of the deduction for payments to partners." *Id.*, at 19. See also, Petitioner's Brief, at 23-24.

Petitioner, however, argues that the requirements of the Third-Party Payment Rule have not been met here, because the commission payments were for S-DISC's deemed services, not those of the partners. Petitioner's contention is without merit. The partners received part of their compensation for services and use of capital from Petitioner, in the form of their partner profits shares, and part of their compensation in the form of dividends from S-DISC. The dividends paid by S-DISC represented the partners' share of the commissions for services to Petitioner in connection with Petitioner's export revenues from the Designated Services. The commissions paid to S-DISC, therefore, are for partner services which, under the Third-Party Payment Rule, are not deductible under the UBT.[44]

Furthermore, it is immaterial that the shareholder-partners received their share of the commissions for their services to Petitioner in their capacity as S-DISC shareholders rather than as partners of Petitioner. In *Tocqueville*, *supra*, TAT (E) 10-37 (UB) (2015), at p. 12, we rejected the argument that compensation paid by a partnership to limited partners who were also employees of the partnership "is deductible because it was paid

[44] Petitioner concedes that the Third-Party Payment Rule applies when either the "payee" or the "service provider" is a partner, Petitioner's Brief, at 19: "[T]he identity of either the payee or the service provider as a partner of the taxpayer is an absolute prerequisite to the denial of the deduction for payments to partners." We, therefore, fail to understand Petitioner's characterization of our holding in *Matter of Tocqueville Asset Management, LP,* TAT (E) 10-37 (UB) (2015), *aff'd,* 33 NYS3d 891 (1st Dept 2016), that "*Tocqueville* was based simply on the fact that the payments were made to persons that were partners . . ." Petitioner's Brief, at 25. Petitioner's use of the plural "persons who were partners" is correct but misleading, because it references, both, the corporate general partner that received the payments and the individual partners who performed the services. The payments at issue in *Tocqueville* had been made to a corporate general partner for the services provided by that partner's employees who were also partners of the taxpayer. Our decision in *Tocqueville* turned on the fact that, both, the payee was the corporate general partner and the payment was for the services of the partner-employees of the payee. *Tocqueville*, at 6-12. We, thus, concluded that the Third-Party Payment Rule would have applied where the payee was not the corporate general partner in the taxpayer - because the payments were made to a corporation for the benefit of the partner-employees for services performed by the partner-employees. *Tocqueville,* at 15-18. Petitioner, therefore, misreads our decision in *Tocqueville.*

for the services of the Employee-Partners in their capacity as employees, not partners." Relying on our decision in *Matter of Miller Tabak Hirsch & Co.*, TAT (E) 94-173 (UB) (1999), we held:

> "[T]hat amounts paid to employees who were also partners in the taxpayer were not deductible, regardless of the capacity in which the payments were received."

Consistent with our decisions in *Tocqueville,* and *Miller Tabak,* the amounts paid to the shareholder-partners to compensate them for their services to Petitioner were not deductible, regardless of whether the shareholder-partners received those payments as S-DISC shareholders, or directly from Petitioner as partners.

Application of the economic substance doctrine

Petitioner contends that the ALJ erroneously disallowed Petitioner's payments to S-DISC, treating them as payments to S-DISC's shareholder-partners, on the grounds that S-DISC lacked economic substance and should be disregarded for tax purposes as a "sham."[45] Petitioner's contention is without merit, as the ALJ did not disregard S-DISC in denying Petitioner's deduction for commission payments to S-DISC as payments to partners for services.

The ALJ considered two alternative ways to view the case.[46] The ALJ reasoned, "one way to view this case is through the federal fiction of services rendered by S-DISC, which has no employees. Therefore, the only way S-DISC's services could be rendered is through its shareholders, all of whom are active partners in Petitioner. No facts were

[45] Petitioner's Brief, at 19-21 & 29-30.
[46] ALJ Determination, at 9-10.

submitted to indicate that anyone else within S-DISC could provide these services." The payments to S-DISC, therefore, are for the services of the partners and not deductible.

Alternatively, the ALJ concluded, as we did, that Petitioner's payments to S-DISC are no different than contributions made on behalf of partners or sole proprietors to defined benefit retirement plans and health plans, as in *Horowitz*, *Proskauer*, and *Murphy & O'Connell*. We concluded in those cases that the contributions to deferred compensation plans were for partner or proprietor services and not deductible under the Third-Party Payment Rule.

Moreover, while Petitioner agrees that "a federal DISC, . . . by its nature has no economic substance," [47] there is no need to disregard S-DISC to reach our result. The Third-Party Payment Rule treats payments to S-DISC for services performed by the partners as non-deductible payments to partners for services under Administrative Code § 11-507(3). [48]

Relevance of our decision in Ark Restaurants

Petitioner cites our decision in *Matter of Ark Restaurants Corp.*, TAT (E) 16-18 (GC) (2019), stating "*Ark Restaurants* held that the [Administrative] Code and the NYC Rule are not modified based on an economic substance analysis."[49] *Ark Restaurants*,

[47] Pet. Brief, p. 20.

[48] We reiterate that the Third-Party Payment Rule does not disregard the entity, here S-DISC, which received payments from Petitioner to compensate the partners for their services to Petitioner and its clients. Rather, the Rule treats payments to S-DISC to compensate the partners for their services as payments to the partners who earned the compensation, not S-DISC the payee.

[49] Petitioner's Brief, at 10.

however, did not concern "economic substance" and nowhere in the decision did we address that issue.

In *Arks Restaurants*, the taxpayer could elect either to claim a federal income tax credit under IRC §45B on its federal 1120 corporate income tax return for its payment of "excess" FICA taxes on employee tip income, or to deduct the amount on its tax return as an ordinary business expense under IRC §162. The taxpayer elected to claim the federal income tax credit. Nevertheless, on its NYC General Corporation Tax (GCT) return it claimed the deduction, even though it did not deduct the amount for federal income tax purposes.

The GCT, however, is based on the federal taxable income the taxpayer was required to report on its federal income tax return.[50] As the taxpayer did not deduct the excess FICA taxes for federal income tax purposes, it could not deduct them on its GCT return unless the statute allowed the deduction as a specific modification to federal taxable income.[51] The GCT provided no such modification. The taxpayer, nevertheless, argued that IRC §45B stated as the reason a federal deduction is denied if the taxpayer claims the §45B credit is to prevent the taxpayer from receiving a "double benefit."[52] Since the GCT, unlike the federal income tax, provides no credit, the taxpayer argued that it should be treated as if it had taken the deduction for federal income tax purposes, and its federal taxable income, accordingly, must be modified to allow the deduction under

[50] Administrative Code §11-602.8[i].
[51] Administrative Code §11-602.8[a] and [b].
[52] IRC §45B(b)(1)(c): "Denial of double benefit. No deduction shall be allowed under this chapter for any amount taken into account in determining the credit under this section."

the GCT, because any term used in the GCT "shall have the same meaning as when used in a *comparable context*" under the Internal Revenue Code.[53]

We rejected the taxpayer's "comparable context" argument to create a modification to federal taxable income where no such modification was provided under the GCT statute.[54] We also showed that the Legislature knew how to grant such a modification when it chose to, specifically allowing a deduction under the GCT for wages where the taxpayer had elected to claim a credit, instead of a deduction, under IRC §280C.[55]

Contrary to Petitioner's contention, our reasoning in *Ark Restaurants* supports our conclusion here. As distinguished from *Arks Restaurants*, the Legislature provided a specific statutory modification, Administrative Code §11-507(3), to deny a federal income tax deduction for amounts paid to partners for services or use of capital. The Third-Party Payment Rule, codified in UBT Rule §28-06(d)(1)(i)(B), applies that statutory modification to deny Petitioner's federal income tax deduction for commissions paid to S-DISC to compensate S-DISC's shareholder-partners for their services or use of capital in connection with Petitioner's export revenues from its Designated Services.

Assignment of Income Doctrine

After this case was argued by the parties on May 3, 2022, by letter dated June 24, 2022, Petitioner requested permission to submit an enclosed post-hearing brief "to

[53] *Ark Restaurants*, *supra*, at 7-10 & 13.
[54] Administrative Code §§11-602[8][a] and [b] contain no such modification.
[55] Administrative Code §11-602[8][a][7].

address the 'assignment of income' issues raised by the Tax Appeals Tribunal" during the argument of the case.

Petitioner argues that the Third-Party Payment Rule is the "assignment of income doctrine" and, once again, argues the inapplicability of that rule.[56] Petitioner identifies no other basis, besides the Third-Party Payment Rule, in support of its assertion that the Tribunal raised the assignment of income doctrine during oral argument of the case. The Third-Party Payment Rule has been thoroughly briefed by both parties and cannot serve as a valid basis for the post-hearing brief submitted by Petitioner. Nevertheless, for the sake of completeness, we accepted Petitioner's post-hearing brief and permitted Respondent to submit a responsive brief.

Petitioner seeks to restrict the applicability of the Third-Party Payment Rule to the federal "assignment of income doctrine." (Pet. Br., 4-8). We rejected the identical argument in *Tocqueville Asset Management, supra*, TAT (E) 10-37 (UB), at 19:

> "Moreover, contrary to Petitioner's assertion that the Third Party Payment Rule is limited to situations involving assignment of income, [] the case law makes it clear that the Third Party Payment Rule as codified in UBT Rule §28-06(d)(1)(i)(B) applies to any payment to a third party for services rendered by a partner."

There is nothing in the language of UBT Rule §28-06(d)(1)(i)(B) that references the assignment of income doctrine, let alone restricts its application to that doctrine. As in *Tocqueville*, we reject Petitioner's attempt to restrict the applicability of the Third-Party

[56] Pet. Post-hearing brief, at 4-8. See, e.g., *Id.,* at 4: ". . . this assignment of income analysis was the impetus for the enactment of what is referred to as the "Third-Party Payment Rule"; *Id.,* at 8: "The assignment of income doctrine, as incorporated into the Third-Party Payment rule, requires that the services be provided by the partners of the taxpayer."

Payment Rule.[57] We note that the assignment of income doctrine is a federal income tax doctrine, and Admin. Code §11-507(3) is a UBT modification to federal taxable income under the UBT statute, not under the Internal Revenue Code. Petitioner's contention that the assignment of income doctrine is inapplicable to DISCs under the federal income tax, therefore, is irrelevant to this case.[58]

Relevance of CAPA rulemaking authority to interpret statute.

Finally, we address Petitioner's contention that we have no authority to interpret the applicability Admin. Code §11-507(3) to the particular facts of this case, unless Respondent first promulgates a rule interpreting the statute on the specific issue.[59] We first note that Respondent has promulgated the Third-Party Payment Rule, UBT Rule §28-06(d)(1)(i)(B), which addresses the issue presented here. There is an abundance of decisions from the Tribunal, the First Department, and the Court of Appeals, holding that we have the authority to decide cases before us without such a rule. See, e.g., *Matter of Murphy and O'Connell v. Tax Appeals Tribunal*, 93 AD3d 530, 531 [1st Dept 2012] ["respondents were not required to promulgate a rule pursuant to the City Administrative Procedure Act [citation omitted]; they could instead, develop guidelines in the course of adjudicating individual cases"], citing *Matter of Roman Catholic Diocese of Albany v.*

[57] Nevertheless, even if we were to apply the principles of the assignment of income doctrine to the facts of this case, Petitioner's payment to a third party [S-DISC] for services rendered by its partners [in connection with Petitioner's overseas business] would be treated as compensation to the partners for their services. See *Lucas v. Earl*, 281 US 111 (1930). The attempt to treat the service income earned by the partners as the income of a third party [S-DISC] that didn't earn it would, as here, not be respected, whether in the form of a contractual anticipatory assignment or, as here, a deduction.

[58] Pet. Br., Pp. 9-12

[59] Pet. Br., Pp. 36-40.

NYS Dept of Health, 109 AD2d 140,148 [3rd Dept 1985] [Levine, J., dissenting in part] rev'd. 66 NY2d 948 [1985]; *GKK2 Herald LLC v. New York City Tax Appeals Tribunal*, 154 AD3d 213, 224 (1st Dept 2017), *appeal dismissed* 19 NY3d 953. The Court of Appeals has defined the limited circumstances where a rule is required: "that only a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers constitutes a rule or regulation required by the NY Constitution, article IV, §8". *Roman Catholic Diocese*, *supra*, 66 NY2d 948, 951.

These cases make clear that the Tribunal can hear and decide individual cases based on their facts without the necessity of a rule, and we reject Petitioner's contention to the contrary.

We conclude that Petitioner's commission payments to S-DISC were payments to the partners for their services, and properly disallowed under Admin. Code §11-507(3). [60]

[60] We have considered all the other arguments of the parties and find them unpersuasive.

Therefore, the ALJ Determination is affirmed and the Notice is sustained.

Dated: January 26, 2023
New York, NY

_____/s/_____
Frances J. Henn
President and Commissioner

_____/s/_____
Robert J. Firestone
Commissioner

_____/s/_____
Neil Schaier
Commissioner