NEW YORK CITY TAX APPEALS TRIBUNAL
ADMINISTRATIVE LAW JUDGE DIVISION

In the Matter of the Petition	:	DETERMINATION
	:	& ORDER
of	:	
	:	TAT (H)19-16(UB)
Cantor Fitzgerald Securities	:	
	:	

Hwang, A.L.J.:

This Determination and Order are issued upon (i) the motion by Petitioner, Cantor Fitzgerald Securities, for summary determination, dated September 12, 2024 (Petitioner's Motion), and (ii) the motion by Respondent, the Commissioner of the New York City Department of Finance (Department), for leave to file amended answer and for summary determination, dated January 16, 2025 (Respondent's Motion).

Procedural History

Petitioner filed a petition dated May 13, 2019 (Petition), with the New York City Tax Appeals Tribunal (Tribunal) for redetermination of a deficiency of the New York City (City) unincorporated business income tax (UBT) under Title 11, Chapter 5 of the City Administrative Code (Administrative Code) for the tax periods January 1, 2004, through December 31, 2006 (Disputed Tax Years).

The deficiency is asserted in a Notice of Determination, dated June 30, 2017 (Notice), issued by the Department at the end of an audit for the periods of January 1, 2004, through December 31, 2008. The deficiency is for the Disputed Tax Years only. The Notice does not assert tax adjustments for the periods January 1, 2007, through December 31, 2008, included in the

audit. Likewise, while the Petition is for tax years 2004 through 2008, it does not seek relief for 2007 and 2008.

Respondent filed an answer to the Petition with the Tribunal, dated July 17, 2019 (Answer).

A hearing was scheduled for October 8-9, 2024, but it was adjourned when Petitioner filed a notice of Petitioner's Motion, together with an affirmation and a brief in support of Petitioner's Motion, all dated September 12, 2024, seeking relief in the form of the cancellation of the Notice. On September 19, 2024, Petitioner submitted a copy of the Petition in support of Petitioner's Motion.

Respondent submitted a letter, dated September 18, 2024, objecting to delays to the hearing due to Petitioner's Motion. On September 25, 2024, the Administrative Law Judge previously assigned to this matter overruled Respondent's objection and ordered the hearing adjourned pending consideration of Petitioner's Motion.

Respondent filed Respondent's Motion, a brief in opposition to Petitioner's Motion and in support of Respondent's Motion (Respondent's Response Brief), and an affirmation in support of both, all dated January 16, 2025, to oppose Petitioner's Motion, dismiss the Petition, and seek leave to amend the Answer.

Petitioner filed a reply brief to Respondent's opposition to Petitioner's Motion, and response briefs in opposition to Respondent's Motion, all dated March 20, 2025.

Respondent filed a reply brief and an affirmation, both dated April 23, 2025, in further support of Respondent's Motion.

Petitioner was represented by Marc A. Simonetti, Esq., and Monica Barton, Esq., of State Tax Law LLC. Respondent was represented by Daniel Joy, Esq., Senior Counsel at the City Law Department.

ISSUES

1. Whether summary determination should be granted in favor of Petitioner because there is no material issue of fact to be tried and, as a matter of law, the facts mandate a determination in Petitioner's favor and cancellation of the Notice.

2. Whether summary determination should be granted in favor of Respondent because there is no material issue of fact to be tried and, as a matter of law, the facts mandate a determination in Respondent's favor, dismissal of the Petition.

3. Whether Respondent should be granted leave to amend the Answer if the Tribunal determined that the Partnership Allocation Rule (as defined below) was invalid.

FACTS

The material facts are as follows:

1. Petitioner is a New York partnership.

2. Petitioner was engaged in the conduct of a business as a broker-dealer in the City during the Disputed Tax Years.

3. Petitioner also owned interests in a number of entities that were classified as partnerships for federal income tax purposes during the Disputed Tax Years (Subsidiaries).

4. Petitioner was treated as a partner in the Subsidiaries for federal income tax purposes during the Disputed Tax Years.

5. Subsidiaries included Cantor Fitzgerald, LLC, CF Managed Assets, LLC, BGC RIE Holdings, LLC, BGC International Holdings, L.P., and CF & Co. Holdings, L.P. which, based on the evidence presented, did not engage in activities in the City (Non-City Subsidiaries). In this connection, the apportionment factors calculations for the Disputed Tax Years provided by Petitioner during the discovery in this matter show these Non-City subsidiaries did not have any property, receipts or payroll in the City.[1] Respondent's Response Brief, Exhibits 9-12.

6. Petitioner filed its federal tax return as a partnership for each of its tax years in the Disputed Tax Years (Federal Returns).

7. Petitioner reported on its Federal Returns its income, gain, loss and deduction which included its distributive shares of income, gain, loss and deduction of each Subsidiary, including each Non-City Subsidiary, for the Disputed Tax Years.

8. Petitioner filed a UBT return for each tax year in the Disputed Tax Years (UBT Return).

9. On the UBT Returns, Petitioner reported its UBT gross income (UBGI), calculated by including its distributive shares of income and gain of the Subsidiaries, including the Non-City Subsidiaries.

[1] In the Petitioner's Reply Brief, Petitioner asserts that the Non-City did engage in activities in the City. However, this unsworn statement in a brief is not evidence. Further, Petitioner has not presented any documentary or other evidence to show the Non-City subsidiaries engaged in activities in the City or filed UBT returns. Accordingly, Petioner's belated assertion in its reply brief must be rejected.

10. Petitioner reported its UBT deductions (UBDs) calculated by including its shares of loss and deduction of the Subsidiaries, including the Non-City Subsidiaries.

11. On the UBT Returns, Petitioner calculated its business income (UBI), the excess of UBGI over UBDs attributable to business activities, *i.e.*, non-investment activities, using the UBGI and UBDs calculated as described above.

12. On the UBT Returns, Petitioner allocated its UBI to the City using the business allocation percentage (BAP) based on the property, payroll and gross income as determined by aggregating Petitioner's shares of all the Non-City Subsidiaries property, payroll and gross income, with those of itself and its other Subsidiaries.

13. For BAP purposes, Petitioner did not treat any of its shares of property, payroll and gross income of the Non-City Subsidiaries as being connected with the conduct of an unincorporated business conducted wholly or partly in the City. Petitioner did not seek approval of the Commissioner under RCNY § 28-07(e)(4) or § 28-07(j)(B)-(C) to use the above-described method as an alternative method thereunder.

14. In 2008, the Department began an UBT audit of Petitioner for the Disputed Tax Years. The audit period was subsequently expanded to include tax years 2007 and 2008.

15. At the conclusion of the audit in 2017, the Department disallowed the inclusion of Petitioner's shares of the Non-City Subsidiaries' income and gain in calculating Petitioner's UBGI for the Disputed Tax Years.

16. The Department also disallowed the inclusion of Petitioner's shares of the Non-City Subsidiaries' losses and deductions in calculating Petitioner's UBDs for the Disputed Tax Years.

17. The Department further disallowed the inclusion of Petitioner's shares of the Non-City Subsidiaries' property, payroll and gross income in calculating Petitioner's BAP for the Disputed Tax Years.

18. The Department then recalculated Petitioner's UBI allocated to the City reflecting the disallowances above. The Department first calculated UBI for each Subsidiary separately and allocated it to the City based on the Subsidiary's own BAP.

19. The Department then calculated Petitioner's UBI separately from UBI of the Subsidiaries, then allocated Petitioner's UBI to the City using its own BAP.

20. The Department aggregated Petitioner's UBI allocated to the City with its shares of the Subsidiaries' UBI allocated to the City (in the same proportions as each such Subsidiary allocated its UBI to the City).

21. These adjustments had the effect of removing the Non-City Subsidiaries from Petitioner's UBT calculation and reporting, resulting in increased amounts of Petitioner's UBI being allocated to the City for the Disputed Tax Years.

22. As a result, the Department issued the Notice asserting additional UBT of $3,058,159.91, calculated in the manner provided in ¶¶18-20 above, together with $4,081,586.80, in interest and $625,476.07, in penalties, for a total due of $7,765,222.78.

23. The Department did not assert deficiency for tax years 2007 and 2008 on the ground that Petitioner reported losses for these years.

STATEMENT OF POSITIONS

Petitioner: Petitioner claims that the Department's assertion of deficiency is erroneous because the Department calculated and allocated Petitioner's UBI based on the "entity method" of Title 19 of the Rules of the City of New York (RCNY) § 28-7(j)(2)(i)(A) (Partnership Allocation Rule).[2] Petitioner asserts that the "entity method" contradicts Administrative Code § 11-502(a) because, under Administrative Code § 11-502(a), Petitioner is treated as directly conducting the activities of all its and the Subsidiaries' unincorporated businesses as one unincorporated business for UBT purposes. Petitioner refers to this approach as the "aggregate method."[3]

Petitioner claims that, under the "aggregate method," for purposes of determining UBI and BAP, a taxpayer must be able to aggregate all of its income, gain, loss and deduction from all sources including its shares of such items of other unincorporated entities in which it owns interests that, in the case of Petitioner, includes its Subsidiaries, including the Non-City Subsidiaries.

Petitioner claims that it should be able to allocate such items to the City based on BAP calculated at the Petitioner's level, by directly including the property, payroll and gross

[2] "Entity method" refers to the calculation method described in ¶¶ 18-20 under the "Findings of Fact," above.
[3] Neither the term "aggregate method nor "entity method" is defined in the Administrative Code or RCNY. Thus, while references to such terms are made herein to facilitate discussions, their usage is not intended to confer any particular legal significance to such terms.

income of Petitioner and its shares of such factors of all of its Subsidiaries, including the Non-City Subsidiaries, without being limited by the UBI and BAP determinations at the lower-tier unincorporated entities.

Petitioner also claims that the "aggregate method" is supported by the fact that the Administrative Code requires federal taxable income as the starting point for calculating its unincorporated business taxable income (UBTI) but does not require or permit removal of income, gain, loss or deduction from non-City businesses.

Petitioner further claims that the Partnership Allocation Rule is invalid because it contradicts Administrative Code § 11-508 and the Department lacks the authority to issue a rule that contradicts the statute in this case. Petitioner asserts that the Department issued the Partnership Allocation Rule as an "alternative" to the two statutorily prescribed allocation methods of Administrative Code § 11-508. Petitioner also asserts that this "alternative" does not result in a fair and equitable allocation of Petitioner's income to the City.

Respondent: Respondent claims that Petitioner's UBT Returns are erroneous as a matter of law because Petitioner's "aggregate method" is not the correct application of Administrative Code § 11-502(a). Respondent claims that the businesses of the Non-City Subsidiaries do not constitute unincorporated business and, therefore, their tax items should not be included in the UBT calculation and reporting for Petitioner.

Respondent asserts that the Partnership Allocation Rule is the default method under Administrative Code § 11-508, and the method employed by Petitioner is an alternative method allowed

at the discretion of the Commissioner under the Partnership Allocation Rule, which Petitioner did not seek. As such, Petitioner cannot include its shares of the Non-City Subsidiaries' tax items solely on account of its ownership interests for UBT purposes.

Respondent claims that the Department's audit adjustments are consistent with both the Administrative Code and the Partnership Allocation Rule, and that the Partnership Allocation Rule was properly issued and is valid.

Respondent also claims that, even if the Partnership Allocation Rule were invalid, the UBT liability asserted in the NOD is supported under any other allocation method, including one where payments made to Petitioner's partners are added back to UBGI as required by the Administrative Code § 11-507(3), where the UBT deficiency would exceed the amount asserted in the NOD.

Respondent claims that it should be allowed to assert additional UBT liability on Petitioner including by amending the Answer in accordance with Tribunal Rules §1-05 and Administrative Code § 11-529(e).

Respondent states that it identified a number of additional deduction items, primarily charitable deductions, of Petitioner during the discovery and the tax asserted in the NOD should be lowered to $2,412,230.24 (Updated Tax Amount) if it is determined that the Department's adjustment method was correct and the Partnership Allocation Rule is valid.

CONCLUSIONS OF LAW

Summary Determination Standard

Section 1-05(d)(1), the Tribunal's Rules of Practice and Procedure, 20 RCNY Ch. 1 (Tribunal Rules), provides that:

> "After issue has been joined, any party may move for summary determination .... 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 motion shall be denied if any party shows sufficient basis to require a hearing of any issue of fact ...."

In order to prevail, "[the proponent] of a summary [determination] motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues from the case" *Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985), citing *Zuckerman v City of New York*, 49 N.Y.2d 557, 562 (1980)).[4] Failure to make this showing requires that the motion be denied, regardless of the sufficiency of the opposing papers. *Winegrad*, 64 N.Y.2d at 853).

In this case, the key facts relevant to the questions of law before the Tribunal are not in significant dispute. In particular, facts are not in dispute regarding the method Petitioner used to calculate UBI and allocate it to the City and inclusion of the Non-City Subsidiaries' businesses and tax items

[4] Tribunal Rules § 1.05(d)(1) is based on the Civil Practice Law & Rules of New York (CPLR) § 3212(b), which governs summary judgment, the functional equivalent in New York courts of summary determination. Each of *Winegrad* and *Zuckerman* interprets CPLR § 3212(b).

for such purposes, and how the City adjusted Petitioner's method upon conclusion of the audit.

With these facts, the Tribunal has to answer the following questions of law: first, whether Petitioner's method for calculating UBI is correct, since UBI is the net business income subject to allocation to the City before Petitioner's entity-level adjustments to arrive at UBTI; second, whether Petitioner's method for allocating UBI to the City is correct; third, whether the Department's adjustments are valid; and, fourth, whether the Partnership Allocation Rule is valid, in each case, as a matter of law applying the standards of 20 RCNY § 1-05(d)(1).

In addition, if the Partnership Allocation Rule is not valid, the Tribunal needs to determine whether to grant Respondent's motion for leave to amend its Answer to include assertions to increase Petitioner's UBT liability on account of using an alternate allocation method or upon disallowance of certain payments to partners.

If, on the other hand, the Partnership Allocation Rule is valid, the Tribunal needs to address whether the NOD should be revised to reflect the Updated Tax Amount plus interest and penalties.

1. UBI Calculation Method

Administrative Code § 11-503(a) imposes UBT "on the [UBTI] of every unincorporated business wholly or partly carried on within the City."

UBTI is the excess of an unincorporated business's UBGI over its UBDs that is allocated to the City and adjusted for

non-allocable deductions and exemptions. Administrative Code § 11-505.

UBGI is the items of income and gain includible in calculating federal gross income of an unincorporated business. Administrative Code § 11-506(a)(1)

UBDs are deductions allowable for federal income tax purposes that are directly connected with, or incurred in the conduct of the unincorporated business, subject to modifications by the Administrative Code. Administrative Code §§ 11-507, 508.

The excess of an unincorporated business's UBGI over its UBDs, excluding investment income and related deductions, comprises UBI. Administrative Code § 11-501(g), (i), (j). Thus, UBI represents the net business income of an unincorporated business conducted wholly or partly in the City before allocation under Administrative Code § 11-508 and entity-level adjustments to arrive at UBTI under Administrative Code § 11-505.

Administrative Code § 11-502(a) provides that "[an] unincorporated business means any trade, business, profession or occupation conducted ... by ... an ... unincorporated entity, including a partnership ...." As such, an unincorporated business is defined as an activity, and not as a separate taxpayer. *See* RCNY §28-01(b)(taxpayer for UBT purposes is an individual or the entity conducting unincorporated business).

An unincorporated entity, such as a partnership, as the taxpayer conducting unincorporated business calculates and reports UBT with respect to the unincorporated business it conducts. An unincorporated entity makes a single UBT calculation and reporting for all unincorporated businesses it

conducts wholly or partly within the City on an aggregate basis. Administrative Code § 11-502(a) provides that:

> "If ... an unincorporated entity carries on wholly or partly in the city two or more unincorporated businesses, all such businesses shall be treated as one unincorporated business for the purposes of this chapter."

Petitioner claims that this language of Administrative Code § 11-502(a) authorizes it to calculate and report UBTI using the "aggregate method" by directly aggregating its and its shares of Subsidiaries' businesses and tax items together at the Petitioner's level. Petitioner claims that the "aggregate method" is the default method under the Administrative Code. In effect, Petitioner claims that it should be treated for UBT purposes in a manner similar to how an entity classified as a partnership is treated for federal income tax purposes.

Petitioner's claims, however, are fundamentally flawed and inconsistent with the Administrative Code. Whereas a partnership is subject to only information reporting requirements for federal income tax purposes, it is subject to income taxation under the UBT regime. Internal Revenue Code of 1986, as amended (IRC), §701; Administrative Code § 11-503(a). Thus, these two regimes' respective calculation and reporting methodologies are fundamentally different even though the UBT regime follows the federal partnership tax reporting in some respects, such as tax item characterization.

For federal income tax purposes, a partnership allocates its income, gain, loss and deduction among its partners who include their shares of the tax items in the calculation of their federal income tax liability. IRC §702. On the other hand, for UBT purposes, the Administrative Code requires taxable

income, *i.e.*, UBTI, calculation at the level of the taxpayer conducting an unincorporated business, with UBT payable at a single tax rate and without distinction between ordinary income and capital gain, as would be the case for federal income tax purposes. Administrative Code §11-503.

Thus, it makes sense for an unincorporated entity, as the taxpayer, to do a single UBT calculation and reporting at its level for all unincorporated businesses it conducts. If an unincorporated entity has an interest in another unincorporated entity, it also includes in its UBT calculation and reporting its shares of the tax items of such other unincorporated entity because:

> "... For purposes of this chapter, an unincorporated entity shall be treated as carrying on any trade, business, profession or occupation carried on *in whole or in part in the city* by any other unincorporated entity in which the first unincorporated entity owns an interest ...." [Emphasis added.] Administrative Code § 11-502(a).

In such case, a UBT paid tax credit is provided with respect to tax payable on account of tax items of the lower-tier entity allocated to the upper-tier unincorporated entity in the ownership chain. Administrative Code § 11-503(j); RCNY §28-03(d). This UBT paid credit mitigates the risk of multiple-taxation of the same stream of income as it is distributed or allocated through the ownership chain, in a manner typical of income tax regime.

Petitioner claims that this tax credit rule does not support income tax nature of the UBT because excess UBT can be carried forward under Administrative Code § 11-503(j). Tax credit carry forward, however, is typical of an income tax

regime and simply reinforces UBT's character as such, since tax carry forward is intended to ensure effective tax rate remains constant over multiple tax periods despite multi-tiered ownership of the same stream of income. *Compare with* Administrative Code §11-604(18)(General Corporation Tax); New York Consolidated Laws, Ch. 60, Art. 9-A, § 210-B (New York Corporation Franchise Tax); IRC §904(c) (Federal foreign tax credit).

Petitioner then points to Administrative Code § 11-506(a)(2) as support for its "aggregate method." Administrative Code § 11-506(a)(2) provides that "[t]he character of a partner's distributive share of gross income, gains, losses and deductions of an unincorporated entity shall be determined as if such gross income, gains, losses and deductions were realized directly by such partner." Petitioner claims that this statute requires flow-through of tax attributes for UBT purposes.

Administrative Code § 11-506(a)(2), however, also provides later in the same paragraph that ". . . [t]his paragraph shall not affect the determination of whether gross income, gains, losses or deductions of an unincorporated entity are subject to the tax imposed by this chapter as realized from an unincorporated business[,]" which is determined pursuant to the UBT provisions of the Administrative Code.

In other words, UBT applicability to a business attributed through an ownership interest in an unincorporated entity directly carrying on such business is determined separate and apart from the attribution of the tax attributes of such business. Tax items from an attributed business are taken into account in UBT calculation *only after* it is determined that UBT applies to such business. [Emphasis added.] In this case, if UBT

does not apply to any business of any Subsidiary, then the tax items of such business are not taken into account in calculating Petitioner's UBT liability.

Petitioner also asserts that Administrative Code § 11-506(a)(1) requires the federal taxable income of a partnership as the starting point for UBTI calculation and that there is no mechanism to remove non-City tax items from the UBT calculation. To the contrary, however, the Administrative Code does not require federal taxable income of a partnership as the starting point for UBTI calculation, and Petitioner's approach is impractical to implement.

As stated above, a partnership is not subject to an entity-level federal income tax. Instead, it calculates its tax items, including income, gain, loss and deductions, as an entity and allocates them to its partners. For this purpose, a partnership calculates its taxable income (*i.e.*, ordinary business income) as if it were an individual, and by excluding certain separately stated items, such as capital gain or loss, charitable deductions, and non-allowed items. Code §§ 702, 703.

The resulting partnership's ordinary business income and the separately stated items are allocated among the partnership's partners for inclusion in the partners' own calculation and reporting for federal income tax purposes. A partnership may even allocate its tax items among the partners in different proportions to reflect the economic arrangements among the partners, subject to limitations imposed by Subchapter K of the IRC. *See* IRC § 704(b)-(d). As such, while a partnership's individual items of income, gain, loss and deduction, as a group, form the starting point for calculating UBTI, a partnership does not have a single "taxable income" to

speak of, which can serve as the starting point for UBTI calculation. Again, this is because UBT is an income tax while federal partnership tax regime is not.

In addition, a partnership's federal income tax items are calculated without separation between UBT tax items and non-UBT tax items as is required under Administrative Code UBT provisions. Petitioner's method likewise does not provide for a mechanism for component-specific calculation methodologies for UBI and investment income.

In contrast, for UBT purposes, the Administrative Code mandates UBTI calculation using only income, gain, loss and deduction of the unincorporated business from the get-go. *See* Administrative Code § 11-506(a)(UBGI means the sum of income and gain from an unincorporated business); § 11-506(a)(UBDs mean "loss and deduction directly connected with or incurred in the conduct of the business"). Since the starting point for calculating UBTI is the unincorporated business's income, gain, loss and deduction, there is no need to provide for removal of income, gain, loss or deductions of non-UBT businesses from the UBTI calculation.

What Petitioner's method accomplishes here is the inclusion of the businesses and tax items of the Non-City Subsidiaries in its UBT calculation and reporting which the "entity method" would not allow. Petitioner's inclusion of the Non-City Subsidiaries, however, is not supported by law. Petitioner overlooks the obvious limitation on its attempt to include the Non-City Subsidiaries in the UBT calculation and reporting: a business that an unincorporated entity conducts entirely outside of the City is not treated as an unincorporated business in the

first place and is not attributed to an upper-tier unincorporated entity.

Administrative Code § 11-502(a), subsequent to the language of the same statute which Petitioner relies for the "aggregate method" provides that:

> "... [T]he ownership by an unincorporated entity of an interest in another unincorporated entity that is not carrying on any trade, business, profession, or occupation in whole or in part in the city shall not be deemed the conduct of an unincorporated business by the first unincorporated entity."

To put it differently:

> "... If an unincorporated entity owns an interest in another unincorporated entity that is not carrying on any trade, business, profession or occupation in whole or in part in the City, the first unincorporated entity will not be considered engaged in an unincorporated business based solely on such ownership." RCNY § 28-02(a)(7)(ii)."

As a business conducted entirely outside of the City does not constitute an unincorporated business, RCNY § 28-02(a)(4)(ii) under Administrative Code § 11-502(a) provides that:

> "... The businesses carried on entirely outside the City are not taxable and, therefore, items of income, gain, loss or deduction from such businesses are not included in computing the unincorporated business taxable income of the City business."

Thus, as previously stated, UBGI and UBDs, forming the basis for UBTI, only take into account income, gain, loss and deduction that are connected to an unincorporated business. Administrative Code §§ 11-507, 508.

In this case, the Non-City Subsidiaries did not conduct any unincorporated business wholly or partly in the City during the Disputed Tax Years as evidenced by the fact that none of the Non-City Subsidiaries showed any property, receipts or payroll in the City in the Disputed Tax Years, based on The apportionment factors calculations for the Disputed Tax Years provided by Petitioner during the discovery in this matter. Respondent's Response Brief, Exhibits 9-12.

Petitioner asserts that the Non-City Subsidiaries, Petitioner and its other Subsidiaries engaged in a "unitary business" in and outside of the City during the Disputed Tax Years, a concept which does not exist for UBT purposes, but such assertion, even if such concept existed, is not borne by its own Tax Returns, as they show zero City business activities and income ascribed to the Non-City Subsidiaries during the Disputed Tax Years.

Further, the unitary business concept is used in corporate taxes in connection with combined tax returns and combined tax reporting – procedures that do not exist under the UBT because each unincorporated business subject to the UBT must file its own entity-specific return. Hence, Petitioner's reliance on the unitary business concept appears misplaced.

As such, for UBT purposes, businesses conducted by the Non-City Subsidiaries did not constitute unincorporated businesses attributable to Petitioner solely because Petitioner owned interests in the Non-City Subsidiaries. Petitioner cannot get around these Administrative Code and RCNY provisions by directly including its shares of the Non-City Subsidiaries' income, gain, loss and deduction with Petitioner's, as this method is not in accordance with the Administrative Code. In fact, as discussed

above, this method is contrary to, and distorts, UBT provisions of the Administrative Code discussed above.

2. Petitioner's UBI Allocation Method.

Administrative Code § 11-508(a) provides that a fair and equitable portion of UBI of an unincorporated business carried on both within and without the city shall be allocated to the City, in the manner provided in Administrative Code § 11-508(b), (c) or (d).

Administrative Code § 11-508(b) provides for BAP based on the taxpayer's books, but it does not apply to Petitioner for the Disputed Tax Years.

Administrative Code § 11-508(c) provides for BAP by formula based on three factors: property, payroll and gross income. This formula-based allocation is determined at the level of the unincorporated entity conducting the unincorporated business.

Petitioner claims that it used the formula-based BAP of Administrative Code 11-508(c) in allocating its UBI to the City for the Disputed Tax Years. Petitioner claims that its method of aggregating its own allocation factors and its shares of the Subsidiaries' allocation factors is the "default" method under Administrative Code 11-508(c). For this purpose, Petitioner treated its shares of the Non-City Subsidiaries' factors as not being connected with unincorporated businesses.

The formula-based BAP of Administrative Code 11-508(c) and its implementing Rule, RCNY § 28-07(d) alone, however, do not address allocation factors attributed from another unincorporated entity, such as a Subsidiary, since there is no guidance for ascribing property or payroll at the level of the

first unincorporated entity with the UBI of the second entity, and there is no guidance for determining UBI portion of the first unincorporated entity's share of the income and gain of the second entity.

In addition, neither Administrative Code 11-508(c) nor RCNY § 28-07(d) allows attribution of allocation factors of an unincorporated entity that does not conduct an unincorporated business wholly or partly in the City, as Petitioner did with the allocation factors of the Non-City Subsidiaries. Furthermore, Petitioner did not seek approval of the Commissioner under RCNY § 28-07(e)(4) or § 28-07(j)(B)-(C) to use the method it did as an alternative method either.

Even if the Commissioner had approved Petitioner's use of its "aggregate method," it still could not have included the Non-City Subsidiaries as long as they did not conduct any unincorporated business during the Disputed Tax Years. As such, Petitioner's method was inconsistent with the Administrative Code and RCNY and, thus, was not valid.

3. Respondent's Adjustments.

With respect to attributed allocation factors, the Partnership Allocation Rule provides that, unless the Commissioner approves another method:

> ". . . a partner *must* allocate to the City the same percentage of its distributive share of each item of a particular partnership's business income, gain, loss and deduction as the partnership allocated to the City for purposes of determining its own [UBI] allocated to the City for the partnership's taxable year ending with or within the partner's taxable year." [Emphasis added]

The Department adjusted Petitioner's Tax Returns by disallowing the aggregation of Petitioner's property, payroll and gross income with its shares of the allocation factors of its Subsidiaries including the Non-City Subsidiaries. The Department then determined Petitioner's BAP by calculating the allocation factors for each Subsidiary then aggregating them with the allocation factors calculated at the Petitioner's level.

The Department's adjustments were consistent with the Partnership Allocation Rule. The adjustments also had the effect of removing the Non-City Subsidiaries' allocation factors from inclusion in the calculation of Petitioner's BAP.

4. Validity of the Partnership Allocation Rule.

Petitioner claims that the Partnership Allocation Rule is invalid because it was not issued with appropriate statutory authority, and it contradicts Administrative Code § 11-508(c), which it claims is the default method applicable to Petitioner's case. Petitioner also claims that the Partnership Allocation Rule functions as an alternative to the statutory method and "demotes" the statutory method, Administrative Code § 11-508(c), to an alternate method.

Petitioner's claims are without merit. As stated previously, Administrative Code § 11-508 does not provide an allocation method for a partner's share of a partnership's income, gain, loss and deduction. Administrative Code § 11-508(d) provides for use of alternate methods in RCNY if the income from the City is not fairly and equitably reflected under the provisions of Administrative Code § 11-508(b) and (c). Besides, Administrative Code § 11-537(a) authorizes the

Commissioner to make such rules and regulations as the Commissioner may deem necessary to enforce the UBT provisions of the Administrative Code.

The Commissioner exercised its authorities under Administrative Code §§ 11-508(d) and 11-537(a) to issue rules in furtherance of UBT provisions, and its issuance of the Partnership Allocation Rule complemented and "plugged the gap" in the statutory allocation method line-up under Administrative Code §§ 11-508, as intended by section 11-537(a). It is the default method for allocating UBI attributed from another unincorporated entity as its language suggests. Thus, unlike Petitioner's claims, the Partnership Allocation Rule does not contradict the Administrative Code. For the same reason, the Partnership Allocation Rule also neither is an alternative to any statutory method nor "demotes" the statutory method, Administrative Code § 11-508(c), to an alternate method.

Petitioner alleges that the Partnership Allocation Rule violated the City's Administrative Procedures Act (CAPA), New York City Charter, Chapter 45, because it was issued without the proper statutory authority. That is not correct. CAPA provides procedural requirements for New York City agencies to issue rules (such as notice and hearing) pursuant to other enabling statutes and the Department complied with the procedural requirements of CAPA when it issued the Partnership Rule under the Administrative Code 23 years ago. Respondent's Response Brief, Exhibits 18-19.

Petitioner also alleges that the U.S. Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), limits judicial deference to an executive branch agency's authority to issue regulations interpreting a statute

to those that are expressly delegated by the relevant legislation. Even if statutory authority is expressly granted to an agency, Petitioner claims, the reviewing court must confirm the basis for the regulatory action, check if the regulation properly conforms to the legislative authority, and determine whether it properly interprets the law.

Petitioner's allegations regarding *Loper Bright Enterprises* are misplaced. *Loper Bright Enterprises* does not apply to judicial review of local municipal rulemaking in New York State because it is limited to federal agency rulemaking pursuant to the Administrative Procedures Act, 5 U.S.C. §§ 551-559. RCNY is governed by the New York State Administrative Procedures Act, Consolidated Laws of New York, Ch. 82, and CAPA.

Even if *Loper Bright Enterprises* were to apply to this case, the Department had the express authority to issue Partnership Allocation Rule under Administrative Code § 11-537(a), and to use it in conjunction with Administrative Code § 11-508, and the Partnership Allocation Rule was proper since its content aligned with and complemented the statutory allocation methods of Administrative Code § 11-508. *Boreali v. Axelrod*, 71 N.Y.2d 1, 11 (1987); *Matter of NY Statewide Coalition of Hispanic Chambers of Commerce v. NY City Department of Health & Mental Hygiene*, 23 N.Y.3d 681, 698 (2014).

This conclusion is further supported by the deference a rule issuing agency receives in New York due to its technical expertise and understanding which, in this case, is the nature of UBT as an entity-level tax imposed by the Administrative Code, where the Department's knowledge and understanding of the underlying operations and inferences are critical for proper implementation of the applicable tax regime. *See Kurcsics v.*

Merchants Mt. Ins. Co., 49 N.Y.2d 451 (1980); *Joy Builders, Inc. v. Town of Clarkstown*, 165 A.D.3d 1084(2018).

Petitioner also claims, without elaborating, that the Partnership Allocation Rule does not result in a "fair and equitable" allocation of Petitioner's income to the City. Contrary to Petitioner's claim, the Partnership Allocation Rule is a "fair and equitable" method for allocating UBI allocated from a partnership.

Neither the Administrative Code nor RCNY defines the term "fair and equitable." Where a statute uses a term that it does not define, the starting point must always be the language itself. *Walt Disney Company v. Tax Appeals Tribunal*, 42 N.Y.3d 538, 549 (2024). "[T]he court should construe it so as to give effect to the plain meaning of the words used" *Id.* at 160-161.

In this case, the words "fair" and "equitable," taken separately, are ordinarily understood to mean "unbiased," "reasonable" and "within established law." *See, e.g.*, Merriam-Webster's Dictionary of Law (definitions of "fair" and "equitable"), https://www.merriam-webster.com/dictionary/fair#legalDictionary (accessed 11/28/2025).

When looked through the prism of these commonly used words, the Partnership Allocation Rule is fair and equitable because it does not prefer a particular, or arbitrary, outcome over any other (either for or against UBI allocation to the City) since the Partnership Allocation Rule simply tracks the allocations made by the unincorporated entity conducting the unincorporated business which should be in the best position to make such

allocations, generating internal consistency between allocations of the same stream of tax item through an ownership chain.

5. Leave to Amend Answer.

Respondent seeks to amend the Answer to assert greater UBT liability against Petitioner than the deficiency asserted in the NOD if the Tribunal determined that the Department's adjustment method and the Partnership Allocation Rule (as defined below) were invalid.[5] Such action is permitted under the Tribunal Rules § 1-04 and Administrative Code § 11-529(d)(1) if the claim therefor is asserted at or before the hearing.[6]

Notwithstanding the foregoing, however, it's unnecessary to rule on this motion for leave to amend the Answer in light of the determination here, since it is only an alternative argument in the event that the Tribunal determined in Petitioner's favor and granted Petitioner's Motion. *See* Respondent's Response Brief, p. 8. Should there be an opportunity to revisit this matter on another occasion, *e.g.*, on remand of this matter, this Tribunal may consider the merits of granting Respondent's motion to amend the Answer as Respondent's alternative arguments go to the questions of interpretation of Administrative Code § 11-502(a) and validity of the Partnership Allocation Rule.

[5] Respondent alleges that even if the Partnership Allocation Rule were found invalid, applying Administrative Code § 11-502(a) to Petitioner's Disputed Tax Years would result in $2,997,591.61, in a tax deficiency, plus interest and penalties. Alternatively, again assuming that the Partnership Allocation Rule were invalid, adding back payments made by Petitioner to its partners in calculating its UBTI for the Disputed Tax Years under Administrative Code § 11-507(3), would result in a tax deficiency of at least $11,236,094.40, plus interest and penalties. Respondent's assertion regarding partner payment add-back has been part of the discovery in this matter.

[6] While Respondent's time to amend the Answer of its own motion passed under the Tribunal Rules § 1-04(b)(1), this Tribunal may still grant the leave since the hearing was scheduled but was adjourned when Petitioner filed Petitioner's Motion.

6. Updated Tax Amount.

Respondent states that, during the discovery of this matter, it found a number of adjustments primarily relating to charitable deduction that warrant reducing Respondent's UBT liability to $2,412,230.24, plus interest and penalties, under the assumption that the Partnership Allocation Rule is valid. Respondent's Response Brief, p. 30, Exhibit 20. Petitioner has not raised objections to the proposed adjustments.

Based on the foregoing, IT IS DETERMINED THAT:

1. Petitioner's UBT returns for the Disputed Tax Years are erroneous as a matter of law;

2. The Partnership Allocation Rule is valid and the Department has the proper authority to issue the Partnership Allocation Rule;

3. The Department's adjustments as set forth in the NOD are the correct application of the Administrative Code and the Partnership Allocation Rule, but the tax deficiency needs to be reduced to the Updated Tax Amount, plus interest and penalties thereon, on account of additional adjustments identified by Respondent during the discovery and voluntarily disclosed in the Respondent's Response Brief; and

4. The Department's application for leave to amend its Answer, as an alternative assertion, is rendered moot by the determinations above.

The Parties remaining arguments have been considered and found unpersuasive.

ACCORDINGLY, a. Petitioner's motion for summary determination is denied; b. Respondent's motion for summary determination is granted; c. Petition is dismissed; d. Respondent's motion for leave to amend the Answer is denied as moot; and e. the NOD is sustained but the deficiency asserted therein is reduced to the Updated Tax Amount plus the interest and penalties thereon.

IT IS SO ORDERED.

DATED: December 16, 2025
New York, New York

/s/
SUNG H. HWANG
Administrative Law Judge