NEW YORK CITY TAX APPEALS TRIBUNAL

In the Matter of	:	DECISION
GOLDMAN SACHS PETERSHILL FUND OFFSHORE HOLDINGS (DELAWARE) CORP.	:	TAT (E) 16-9 (GC)
Petitioner	:	

Goldman Sachs Petershill Fund (Petitioner) filed an exception to a Determination of an Administrative Law Judge (ALJ) dated January 3, 2019 (ALJ Determination) that sustained a Notice of Determination issued by the New York City Department of Finance (Department) dated July 30, 2014 (Notice), which asserted a City General Corporation Tax (GCT) deficiency for the tax year ended December 31, 2010 (Tax Year) 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 Alysse McLoughlin, Esq., and Kathleen Quinn, Esq., of McDermott Will & Emery LLP. The parties submitted a Joint Stipulation of Facts and Exhibits (Stipulation) in which the parties stipulated to substantive and procedural facts, and to the authenticity of the accompanying exhibits. The parties consented to have this matter determined on submission without the need for appearance at a hearing, under the Rules of Practice and Procedure of the New York City Tax Appeals Tribunal (Tribunal Rules) 20 RCNY §1-09(f). Oral argument before the Tribunal was held on July 22, 2020.

[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.

Petitioner, a Delaware corporation, is owned by two limited partnerships: Petershill Offshore LP (Offshore LP) owns 96.42% of Petitioner's stock and Petershill PMD QP Offshore LP (QP Offshore LP) owns the remaining 3.58% of Petitioner's stock. Petitioner's two owners will be collectively referred to as the "Petershill Offshore Entities". We amend the ALJ's Findings of Fact to reflect that Goldman Sachs Group, Inc. is the general partner of both Petershill Offshore Entities, through its ownership of the disregarded entity Goldman Sachs PH Offshore Advisors, Inc. (f/k/a Goldman Sachs Petershill Fund Offshore Advisor's, Inc.).[2]

The Petershill Offshore Entities have no employees or offices. Goldman Sachs Asset Management International, which is wholly owned, directly and indirectly, by Goldman Sachs Group, Inc., was the investment manager for the Petershill Offshore Entities (Investment Manager). The Investment Manager is incorporated in England and in Wales.

The Petershill Offshore Entities' investment strategy[3] is to buy equity interests in alternative investment management companies that provide investment management services to hedge funds and other alternative investment vehicles. The Petershill Offshore Entities formed Petitioner, and Petitioner formed Petershill U.S. IM Master Fund, L.P. (Master Fund), a limited partnership, for the purpose of enabling the Petershill Offshore Entities to make their alternative investment management company investments. The Investment Manager designated a group of employees to manage

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[2] Goldman Sachs PH Offshore Advisors, Inc. (f/k/a Goldman Sachs Petershill Offshore Advisor's, Inc.), a disregarded entity owned by Goldman Sachs Group, Inc., is the general partner of both Petershill Offshore Entities, and is also the general partner of Master Fund. Joint Stipulation of Facts and Exhibits (Stipulation) ¶¶ 4 & 7. The general partner's name is spelled differently twice in the Stipulation, beginning with "Goldman Sachs" in ¶4 and beginning with "GS" in ¶7. These are the same entity, correctly referred to as Goldman Sachs Group, Inc. *See* Exhibits to Joint Stipulation of Facts (Exhibits), Amended and Restated Agreement of Exempted Limited Partnership, Goldman Sachs Petershill U.S. IM Master Fund, L.P.

[3] We note that, as per the Stipulation, the Petershill Offshore Entities have no employees or offices and their investment strategy, therefore, was effectively dictated by their Investment Manager, which is wholly owned, directly and indirectly, by Goldman Sachs Group, Inc., their general partner. .

Masterfund's investments (Fund Investment Team). The Fund Investment Team identified and evaluated alternative investment companies in which Masterfund could invest and managed those investments on an ongoing basis by conducting portfolio evaluations, developing investment strategies, and monitoring the investments' performance. The Fund Investment Team performed all the aforesaid activities in London.

Petitioner owns 88.91% of the equity of Master Fund, solely as a limited partner. Petershill PMD QP Fund, LP (a Goldman Sachs employee investment fund) owns 1.43% of the equity of Master Fund, solely as a limited partner. Goldman Sachs Group, Inc. owns the remaining 9.66% of the equity of Master Fund both as a general partner, through its ownership of the disregarded entity Goldman Sachs Petershill Fund Offshore Advisors, Inc., and as limited partner, through the disregarded entity Petershill Fund, L.P.

In 2008, Master Fund purchased a 9.9% limited liability interest ("LLC Interest") in Claren Road Asset Management, LLC ("Claren"), an investment management company specializing in credit, event-driven, and capital structure arbitrage transactions. Claren was established by former employees of Citigroup's credit trading department, who manage the day-to-day operations of Claren and make all of Claren's investment decisions. The remaining interests in Claren were owned by investors unrelated to Master Fund. Master Fund was never a managing member of Claren, and neither Petitioner nor Master Fund at any time engaged in any transactions with Claren other than ownership of the LLC Interest, a minority interest. The entire process leading to the decision for Master Fund to invest in Claren, and the ongoing monitoring and management of Master Fund's investment in Claren, were performed by the Fund Investment Team in London.

We modify the ALJ's factual findings to clarify that both Claren and Master Fund were treated as partnerships under the federal income tax and the GCT, and both were conduits for tax purposes, not taxable entities. Claren, therefore, did not file a GCT

return, and did not pay GCT on its income and activities derived from New York City ("City"). During the time that Master Fund held its interest in Claren, Petitioner reported and paid GCT on its share of Claren's income, deductions, gains and losses.[4] Master Fund was a conduit for the income it received from Claren, and Master Fund's share of Claren's income flowed through from Master Fund to Petitioner, and was reported by Petitioner on its GCT returns filed for each of the years 2008, 2009 and the Tax Year. [5]

During the years 2008, 2009 and the Tax Year, Claren was engaged in business activities within the City. We modify the ALJ's Findings of Fact to reflect that Petitioner's GCT returns, submitted as Exhibits to the Stipulation, reported a business allocation to the City for the years 2008 and 2009 of 100%. Aside from Master Funds' investment in Claren, neither Petitioner nor Master Fund conducted any business activities in New York during the Tax Year, Master Fund did not own any investments during the Tax Year other than an interest in Claren and Petitioner did not own any interests during the Tax Year other than an interest in Master Fund. Petitioner's 100% City business allocation percentage, which Petitioner reported on its GCT returns filed for each of the years 2008 and 2009, was solely attributable to Claren's business activities in New York City. The income from those activities flowed through to Petitioner from its interests in Claren and Master Fund, both of which were taxed as partnerships and were treated for tax purposes as conduits, not as taxable entities.

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[4] Stipulation, ¶ 40.

[5] See Stipulation, ¶ 41, explaining how Master Fund's sale of its interest in Claren resulted in capital gain "flowing through from Master Fund to Petitioner" and that Master Fund's capital gain on the sale was included by Petitioner "in computing its federal income tax liability for the 2010 tax year." See also, Stipulation Exh. C, Statement 3 attachment to Petitioner's GCT return filed for the Tax Year:

> "[Petitioner] is a limited partner in a limited partnership that received [City] source income from partnerships doing business in the [City] . . . {Petitioner] is subject to tax in [the City] solely as a result of such ownership. . . . [T]he amount reported on schedule B line 1 is the [Petitioner's] federal taxable income taking into account only its distributive share of income, capital, gain loss or deduction related to this partnership interest."

The parties have also stipulated that: "None of Petitioner, the Petershill Offshore Entities, Offshore Advisors, the Master Fund or Claren are a publicly traded limited partnership as defined in section 7704 of the Internal Revenue Code . . . [or] a portfolio investment partnership within the meaning of 19 RCNY §11-06."[6]

During the Tax Year, the Fund Investment Team determined that Master Fund should sell its investment in Claren to The Carlyle Group, which is not related to the Petershill Offshore Entities or to Petitioner. The sale took place during the Tax Year.[7] The Fund Investment Team conducted all negotiations from London for the sale of Master Fund's interest in Claren to the Carlyle Group.

Petitioner reported on its federal income tax return, filed for the Tax Year, a capital gain on its sale of Claren in the amount of $54,673,566 (Capital Gain). However, Petitioner excluded the amount of the Capital Gain in determining its entire net income on its GCT return filed for the Tax Year. Claren continued to conduct 100% of its business activities in the City through its date of sale during the Tax Year and, except for the Capital Gain, Petitioner allocated 100% of its share of Claren's income to the City on its GCT return.[8]

During the Tax Year, neither Petitioner nor Master Fund had any real or tangible personal property nor any employees in New York. Aside from Master Fund's investment in Claren, neither Petitioner nor Master Fund conducted any business activities in New York during the Tax Year. Neither Claren and Master Fund nor Claren and Petitioner are part of a unitary business.[9] The parties have stipulated that if Petitioner

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[6] Stipulation, ¶¶ 43-44.

[7] The record does not specify the date Claren was sold.

[8] Petitioner reported on its GCT returns filed for the years 2008, 2009 and the Tax Year Petitioner's share of Claren's entire net income, 100% of which was apportioned to the City, as follows: $3,193,367 in 2008; $8,020,346 in 2009; and $13,463,069 in the Tax Year. Petitioner excluded the amount of the Capital Gain from its GCT return for the Tax Year.

[9] Stipulation ¶¶ 37-38. The "unitary business" principle is a requirement under the due process and commerce clauses of the Constitution that limits the power of a State to apportion the income of a multi-state business. A State

was subject to the GCT in the Tax Year, it was solely due to Claren's activities in the City. During the time that Master Fund held its interest in Claren, Petitioner reported and paid GCT on its share of Claren's income, deductions, gains and losses.

As Petitioner and Claren were not engaged in a unitary business, on its GCT return Petitioner apportioned the income derived from its limited partnership interest in Claren on a separate accounting basis under the Department's Statement of Audit Procedure, GCT-2008-01 (3/14/08). Consistent with principles of separate accounting, Petitioner treated Claren as a separate business on Petitioner's GCT return and separately apportioned its partnership share of Claren's income, 100% of which was attributable to Claren's business activities conducted within the City. Petitioner had no other income during the Tax Year besides the Capital Gain from the sale of that Partnership interest, which Petitioner treated differently from its partnership share of Claren's income, excluding the Capital Gain from entire net income.

On July 30, 2014, following an audit, Respondent issued the Notice asserting a deficiency of GCT in the principal amount of $4,029,688, plus interest. The GCT deficiency was entirely attributable to Petitioner's exclusion of the Capital Gain from Petitioner's entire net income reported on its GCT return for the Tax Year.

The ALJ Determination sustained the Notice, concluding that Petitioner erroneously excluded the Capital Gain from entire net income. The ALJ reasoned that the Capital Gain had nexus to the City because it was derived from the sale of a business that conducted its business activities within the City and was treated as a conduit, not as a

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cannot apportion the income from the activities of a taxpayer conducted outside of the State unless the activities are part of a unitary business conducted by the taxpayer within the State. Where a taxpayer's instate activities do not form a unitary business with its out-of-state activities, only the income derived from the taxpayer's instate activities can be apportioned to the taxing jurisdiction under principles of "separate accounting." *See infra,* n. 54, for a more complete explanation of the unitary business principle.

separate taxable entity, for tax purposes. The ALJ concluded, therefore, that Petitioner had nexus to the City by reason of its partnership interest in a City business on which Petitioner had paid GCT on its share of the partnership's income for each of the years it owned Claren. The ALJ determined that the necessary connections between the income sought to be taxed, the taxpayer and the City were established, satisfying Constitutional requirements under the Due Process and Commerce Clauses to subject Petitioner to GCT on the Capital Gain.

Petitioner argues that it lacks sufficient nexus to the City to subject it to GCT on the Capital Gain. Petitioner analogizes its investment in Claren, taxed as a partnership interest under the federal income tax and the GCT, to corporate stock, because Petitioner owns "a minority, non-managing interest in a limited liability company." Based on Petitioner's premise that a partnership interest and a share of corporate stock are identical in all relevant respects, Petitioner relies on case law delineating the separation between corporations and shareholders and argues that a corporation's connections and contacts with a state cannot be imputed to its shareholders. It is Petitioner's position that, unless it has managerial control over a City business in which it holds an interest, it cannot be deemed to have "purposely availed" itself of the privilege of conducting business within the City.

Petitioner does not deny that, as a partnership for tax purposes, Claren's partnership income flowed through to, and was taxable directly to, Petitioner, a corporation, not Claren, which, as a partnership, was not subject to the federal income tax or the GCT. Petitioner argues, however, that, although Petitioner was required to pay the federal income tax as a corporation on its share of Claren's partnership income, Petitioner did not have sufficient nexus to the City to be subject to the GCT. Petitioner's position that it lacks nexus to the City is entirely inconsistent with its payment of GCT on its share of Claren's income for each of the three years it owned its partnership interest in Claren,

inclusive of the Tax Year, and its disclosure on its GCT return for the Tax Year that it was subject to the GCT on Claren's income.[10]

As an alternative position, Petitioner argues that even if its interest in Claren created sufficient nexus to subject it to the GCT, the Capital Gain cannot properly be allocated to the City. In support of that position, Petitioner refers to the Stipulation ¶¶ 37-38, in which the parties stipulated that neither Claren and Master Fund nor Claren and Petitioner were part of a "unitary business."[11] Petitioner argues that its "gain from the sale of its interest in Claren is not unitary with the flow-through income earned by Claren" and, therefore, that the income Petitioner derived from its interest in Claren must be allocated separately from the gain Petitioner derived from the sale of that interest in Claren. Petitioner, thus, distinguishes between two sources of income from its interest in Claren, the flow-through income from its interest in Claren's business and the Capital Gain on the sale of that interest, arguing that one is related to Claren's business and the other is not. Petitioner argues that Petitioner's management of its investment in Claren is a business distinct from Claren's and, therefore, not related to Claren's business. Petitioner, thus, argues that the Capital Gain from the sale of its interest in Claren's business must be treated as service income, derived from Petitioner's investment activities in London rather than from the appreciated value of Claren's City business.

Respondent argues that the City's taxation of the Capital Gain "is justified by the protection, opportunities and benefits the City confers upon Claren" and, therefore, that application of the GCT to the Capital Gain comports with the Due Process Clause of the

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[10] Petitioner has not requested a refund on the GCT it paid on its share of Claren's income. Petitioner and Respondent have stipulated to the following two specific alternative resolutions of this matter: Should we decide that the Capital gain was not subject to the GCT, "the Notice will be cancelled for the 2010 Tax Year." Alternatively, should wedecide that Petitioner was subject to the GCT on the Capital Gain, "the amount of additional tax will be the amount set forth in the Notice – namely: $4,029,688 plus interest." Stipulation, p. 5, at III (a) & (b). By expressly stipulating to specific alternative resolutions, the parties ruled out any other possible resolutions.

[11] For an explanation of the unitary business principle, see notes 9 and 54.

Constitution.[12] Respondent argues that *Allied-Signal Inc. v. Director*, 504 US 768, 778 (1992) and *Wisconsin v. J.C. Penney Co.*, 311 US 435, 444 (1940) both hold that the Capital Gain is allocable to the City, where the value of Claren's business was generated.

For the following reasons we affirm the ALJ Determination.

Petitioner's Nexus to the City

The GCT is imposed on corporations "doing business in the City". 19 RCNY ("Rules") §11-03(a)(1)(i); City Administrative Code (Administrative Code) §11-603.1. Pursuant to Rules §11-603(5): "If a partnership is doing business . . . in [the City], then all of its corporate partners are subject to [GCT]." Where a corporation owns an interest in a limited partnership doing business in the City, Rules §11-06(a) provide that: "Subject to the provisions of paragraph (b) and (c) of this section, a corporation shall be deemed to be doing business in the City *if it owns a limited partnership interest in a partnership that is doing business . . . in the City.*" (Emphasis added.) The only exceptions to this rule, specified in paragraphs (b) and (c), for limited partnerships that are either "publicly traded limited partnerships" or "portfolio investment partnerships" do not apply to Petitioner's ownership of its interest in Claren.[13]

Claren is a limited liability Company ("LLC") with several managing members in addition to Petitioner.[14] An LLC with at least two members is classified as a partnership for federal income tax purposes, unless it affirmatively elects out of that classification.[15] As Claren had more than two members, and nowhere asserts that it elected out of that classification, Claren was classified as a partnership for federal income tax purposes.

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[12] Resp. Br., P. 5.
[13] Petitioner Stipulated that Claren was neither. Stipulation ¶¶ 43-44.
[14] See Limited Liability Company Agreement of Claren Road Asset Management, LLC, Stipulation Exh. K, at p.1 and Sch. I-1, Sch. I.
[15] Treas. Regs. §301.7701-3(b)(1)(i) (Effective January 1, 1997); IRS Publication 3402 (Revised March 2020), at p. 3.

Petitioner does not dispute that Claren was classified as a partnership for federal income tax purposes and that Petitioner treated Claren as a partnership when filing its federal income tax return for the Tax Year and for each of the years Petitioner owned an interest in Claren. On Petitioner's GCT return filed for the Tax Year Petitioner disclosed that it "is a limited partner in a limited partnership that received New York City source income from partnerships doing business in New York City" and acknowledged that "[t]he taxpayer is subject to tax in NYC solely as a result of such ownership" and that Petitioner took "into account . . . its distributive share of income, capital, gain loss or deduction related to this partnership interest."[16]

Petitioner, thus, admits by its disclosure on its GCT return filed for the Tax Year, and by reporting its share of Claren's income on the GCT returns filed for each of the years 2008, 2009 and the Tax Year, that it has nexus to the City as a result of its ownership of a partnership interest in Claren. Petitioner also acknowledges by its disclosure that it was "deemed to be doing business in the City" within the meaning of GCT Rules §11-06(a) and filed a GCT return for the Tax Year in compliance with that rule.

Petitioner asserts that the ALJ erred in finding that Petitioner "stipulated that Claren's NYC activities subjected Petitioner to GCT in 2010."[17] We agree that Petitioner did not specifically stipulate to having nexus to the City. Nevertheless, Petitioner's disclosure on its GCT return filed for the Tax Year that it "is a limited partner in a limited partnership that received New York City source income from partnerships [i.e., Claren] doing business in New York City", taken together with Petitioner's stipulation that it paid GCT on its share of Claren's partnership income, is an admission of all of the relevant facts necessary to establish that Petitioner had nexus to the City.

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[16] Stipulation, Exh. C, Statement 3.
[17] Pet. Br., at p. 20.

Claren, classified as a partnership for federal income tax purposes, did not pay federal income tax on the income it derived from its City business activities: "A partnership is not a separate taxpaying entity. Instead, partnership income is taxed directly to the partners."[18] Under the federal income tax, a partnership is treated as an "entity" separate from the partners, only for the limited purpose of computing taxable income from the partnership's business.[19] The partnership's income, however, flows through to the partners,[20] in accordance with their respective partnership interests,[21] as a "conduit,"[22] and each partner takes "into account his distributive share of the partnership's" income, gains, losses and deductions.[23]

In the present case, Master Fund was a partner in Claren, and Master Fund's share of Claren's income flowed through to Master Fund. But Master Fund, like Claren, was also a partnership for federal income tax purposes and did not pay tax on its share of Claren's income. Claren's income, therefore, flowed through to Master Fund, and from Master Fund to Petitioner, in accordance with its 88.91% partnership interest in Master Fund. Petitioner, a corporation, paid the federal income tax on its share of Claren's income. Petitioner, therefore, was the "taxpayer" for Federal income tax purposes.

We conclude that Petitioner was also the "taxpayer" under the GCT. As a limited partner in a limited partnership doing business in the City, Petitioner was "deemed to be doing business in the City" and was subject to the GCT on Claren's business activities within the City. Rules §11-06(a). Therefore, Petitioner was required to include the amount it reported for Federal income tax purposes in computing its entire net income under the GCT. Administrative Code §11-602.8(i).

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[18] McKee, Nelson, Whitmire, *Federal Taxation of Partnerships and Partners* (March 2021), at ¶ 1.01[1]; Internal Revenue Code ("IRC") §701.
[19] IRC §703
[20] IRC §701
[21] IRC §704(b)
[22] McKee, Nelson, Whitmire, *supra*, at 1.01[1].
[23] IRC §702.

Partnership interest distinguished from corporate stock for purposes of due process

Petitioner, however, argues that its LLC interest in Claren "is virtually indistinguishable from ownership of stock in a corporation". [24] Based upon Petitioner's characterization of its interest in Claren as an interest in a corporation, not a partnership, Petitioner relies on *Shaffer v. Heitner*, 433 US 186 (1977), which holds that the Due Process Clause prohibits a state from exercising jurisdiction over the shareholders of a corporation whose only connection to the state is the ownership of shares of stock in a corporation doing business or domiciled in the state.[25] Quoting *Shaffer*, Petitioner argues "[t]hus, a corporation's 'purposefully avail[ing] [itself] of the privilege of conducting activities within the forum state' cannot be attributed to the shareholders."[26]

We reject Petitioner's contention that its interest in Claren should be treated as an interest in a corporation for the purpose of determining whether Petitioner was taxable on its share of Claren's income under the GCT. It is undisputed that Claren was properly characterized as a partnership for both federal income tax and GCT purposes, and that Petitioner reported its interest in Claren as a partnership interest on both its federal income tax and GCT returns.

A corporation, as distinguished from a partnership, is an entity separate from its shareholders for tax purposes.[27] Thus, if Claren had made an election to be taxed as a corporation, which it did not do here, it would have been treated as an association taxable

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[24] Pet. Br., at 11.
[25] Pet. Br., at 12-14.
[26] Pet. Br., at 13.
[27] Bittker and Eustice, *Federal Income Taxation of Corporations and Shareholders* (November 2020), at ¶ 1.05[1][a]. "In general, the [Internal Revenue Code] treats every C corporation as an independent taxpaying entity . . . [t]his treatment is the root of the double taxation of corporate income . . ."

as a corporation, and subject to both the federal income tax and the GCT.[28] In that case Claren, not Petitioner, would have been the corporate taxpayer for both Federal income tax and GCT purposes. However, Claren, a partnership for tax purposes, was a mere conduit for the income derived from its City activities, all of which flowed to the partners. A portion of that income flowed to, and was taxable to, Petitioner, a corporation.

For federal income tax purposes, a partner is treated as "carrying on the business of the partnership"[29] and, for the purpose of determining the character of the partner's share of the partnership's income, is treated "as if such income were realized *directly from the source from which realized by the partnership* . . ." (Emphasis added). Petitioner, by virtue of its partnership interest, was treated as carrying on its share of Claren's business, all of which was conducted within the City and, for purposes of determining whether the income was capital gain or ordinary income, as having realized Claren's income directly from its source – whether directly from Claren's customers or from Claren's capital asset transactions.

Petitioner, however, contends that, as a partner, Petitioner is "not treated as owning [Claren's] property" and had no right to participate in "the management, control, or business affairs of Claren." The absence of Petitioner's legal rights in Claren's property, or of Petitioner's inability to participate in the management of Claren, however, are irrelevant to the issue at hand – whether Petitioner is taxable on Claren's income. For Federal income tax and GCT purposes, Petitioner, not Claren, is taxable on Claren's income, and Petitioner, together with the other partners in Claren are treated as "[p]ersons carrying on business as partners"[30] each partner separately taxable on that partner's share

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[28] *See* Treas. Regs. §§301.7701-3(a) & (b). A corporation can elect to be taxed as an "S Corporation" and be treated as a conduit entity in a similar manner to a partnership for federal income tax purposes. IRC §§1361-1363. The GCT, however, does not recognize an S Corporation election. Administrative Code §11-602.8(ii).
[29] IRC §701
[30] IRC §701

of Claren's income.[31] As a partner in Claren, Petitioner was treated for tax purposes as having been engaged, jointly with the other Claren partners, in Claren's business activities which took place wholly within the City.[32] Here, we are interested in Petitioner's legal relationship to Claren's business and income only under the relevant tax law, not under the property law or under any other area of law. Regardless of whether Petitioner had any interest in Claren's property or management under other, non-tax, statutory or contractual provisions, under both the IRC and GCT Petitioner was taxable on its share of Claren's business operations. Reference to the IRC and the GCT answers the only relevant question before us: Who was the taxpayer?

Claren is not a corporation for tax purposes and is not subject to the federal income tax or the GCT. Petitioner is a corporation, taxable on the income Claren derives from its City business activities. If Petitioner is not the taxpayer, no one is, and Claren's income derived from its business activities within the City permanently escape taxation.

Petitioner, however, contends that it was not engaged in "purposeful activities" within the City and, therefore, that the City is barred by the Due Process Clause from imposing GCT on its share of Claren's income.[33] Petitioner's contention is without merit. The relevant question under due process is whether Petitioner had fair notice that it would be subject to the GCT on its share of Claren's income derived from its City business. "Due process centrally concerns the fundamental fairness of governmental activity . . . We have, therefore, often identified 'notice' or 'fair warning' as the analytic touchstone of due process nexus analysis."[34] Claren is not a taxable entity under the federal income tax and the GCT. As a corporate partner in Claren, Petitioner is deemed to be engaged in Claren's City business activities, and Petitioner's share of Claren's income, entirely

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[31] Regulations promulgated under IRC §701 treat the partnership as "joint business activities" conducted separately by each partner. *See* Treas Regs. 1.701-2(a) "Subchapter K is intended to permit taxpayers to conduct joint business (including investment) activities through a flexible economic arrangement without incurring an entity-level tax."
[32] *See supra,* Treas Regs. 1.701-2(a).
[33] Pet. Br., 13-15
[34] *Quill v. North Dakota,* 504 US 298, 312 (1992).

derived from the City, flows through to, and is reported as taxable income on, Petitioner's corporate federal income tax and GCT returns. When Petitioner filed its GCT returns it was aware that it was subject to GCT, reporting its share of Claren's federal gross income and deductions on its GCT returns for each of the years it owned Claren, and paying the GCT on that income.

Petitioner, thus, was aware that as a partner in Claren it was deemed to be engaged in Claren's City business activities, and that it was taxable on its share of Claren's income. Petitioner's awareness that, as a partnership, Claren was merely a conduit for its income derived from its City business and that Petitioner, not Claren, was the taxpayer responsible for paying federal corporate income tax and GCT on Claren's income, provided ample notice to Petitioner to satisfy due process. Given Petitioner's consistent reporting position on its GCT returns during the years it held Claren, and its disclosure on its GCT return for the Tax Year that it is taxable on the partnership income it receives from City sources, there can be little doubt that Petitioner had "fair notice" that it was taxable on its share of Claren's income.[35]

Petitioner therefore had "fair warning that its activity [the ownership of an interest in a City business treated as a conduit for tax purposes] may subject it to the jurisdiction of [the City]."[36]

Relevance of non-precedential decisions from other jurisdictions

Petitioner also references non-precedential decisions by other taxing jurisdictions, holding that limited partners who lack managerial control over an instate partnership business are not subject to tax in those states. Putting aside that we are not bound by

[35] Thus, Petitioner's attorney agreed during oral argument of this case that Petitioner was certainly aware, when Petitioner acquired its interest in Claren, that it was required to file GCT returns.
[36] *Quill, supra,* 504 US, at 308.

those non-precedential decisions,[37] each of them are distinguishable from the present case, and we also disagree with the reasoning in each of those cases.

In *Swart v. FTB,* 7 Cal. App. 5th 497 (5th District 2017) the California Court of Appeal held that "passively holding a 0.2 percent ownership interest in a manager-managed California limited liability company (LLC)" did not constitute "doing business" within the meaning of a California statute which defined "doing business" as "actively engaging in any transaction . . ." within California. Although *Swart* discussed the federal income tax treatment of partnerships, it appears to have given short shrift to the most critical aspect of the taxation of partnerships applicable here – their "conduit" nature. Taxed as a conduit, rather than a separate entity, a partnership's income is taxable only to its corporate or individual partners. *Swart* appeared to give much weight to the de minimis nature of a 0.2% interest. By comparison, Master Fund's 10% (9.99%) interest in Claren cannot be deemed to be de minimis.[38] Moreover, "doing business" under the GCT is defined more broadly than the narrow definition under California's statute.[39] The GCT definition was modified in 1990 to expressly include, within the scope of the term "doing business" a limited partner in a partnership doing business within the City.[40]

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[37] The Tribunal is not bound by the decisions of the courts of other states. City Charter §170.d:

> "The tribunal shall follow as precedent the prior precedential decisions of the tribunal (but not of its small claims presiding officers), the New York State Tax Appeals Tribunal or of any federal or New York state court or the U.S. Supreme Court insofar as those decisions pertain to any substantive legal issues currently before the tribunal."

[38] We note that, although the parties have stipulated that Master Fund had a 9.99% interest in Claren, Stipulation, at ¶ 16, a schedule contained in the Stipulated Exhibits shows Master Fund to have 19.99 percent of the "Participation Units," and a "Capital Balance at Closing" of $50,440,000, representing 19.99 percent of the total $252,326,263.08 Capital Balance for all Members. Stipulation Exh. K, Sch. I-1. Whether this discrepancy represents a typographical error, or there is additional information concerning Master Fund's interest in Claren that is not included in the Stipulated documents, we cannot say. Because the distinction is not material to the issues before us, we do not amend the ALJ's factual findings on this point and continue to rely on the Stipulation.

[39] Rules §11-03(b): "The term 'doing business' is used in a comprehensive sense and includes all activities that occupy the time or labor of people for profit. Regardless of the nature of its activities, every corporation organized for profit and carrying out the purposes of its organization is deemed to be doing business for the purposes of the tax."

[40] Rules §11-06. In *Matter of Varrington Corp. v. City of New York Department of Finance*, 85 NY2d (1995), the Court of Appeals retroactively applied the regulation in recognition of the City's long-standing policy in its treatment, as taxpayers, of limited partners in partnerships doing business in the City.

We also disagree with *Swart's* focus on the non-tax definition of "partnership," which emphasizes legal relations having nothing to do with how a partnership's activities and income is taxed. But again, perhaps California does not have a statute comparable to the City's, requiring the application of the federal income tax definition of "partnership" unless the context clearly requires otherwise. [41] We conclude, therefore, that *Swart* is distinguishable from the present case, that its reasoning on the issue of "doing business" supports our decision here, and that the GCT requires us to look to the federal income tax definition of "partnership" here, not to bodies of law extraneous to the issue of taxation.

We have considered the other state court decisions cited by Petitioner and find each of them to be inapposite to the issue here.[42] In each of those cases the courts appear not to have even considered the federal income tax treatment of partnerships, let alone the conduit nature of how they are taxed. In each of those cases the courts, therefore, focused on non-tax legal aspects of partnerships which, again, do not control here, and those decisions were premised on taxation schemes that appear to differ, in a relevant way, from the GCT. We reiterate, however, that we are not bound by the decisions of the courts of other States. City Charter §170.d.

Apportionability of the Capital Gain to the City

Petitioner further contends that even if Petitioner had nexus to the City when it sold its partnership interest in Claren, the Capital Gain is not apportionable to the City.[43] Under the GCT, the amount of a taxpayer's entire net income (ENI) apportionable to the

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[41] Administrative Code §11-601.14:
"Unless a different meaning is clearly required, any term used in this chapter shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes . . ."

[42] See *Lanzi v. Alabama Dept. of Rev.*, 968 So.2d 18 (Ala. Civ. App. 2006); *BIS LP, Inc. v. Division of Taxation*, 25 N.J. Tax 88 (N.J. Tax Ct. 2009), *affd*, 26 N.J. Tax 489 (N.J. App. Div. 2011); *UTELCOM, Inc. v. Bridges*, 77 So.3d 39 (La. Ct. App. 2011).

[43] Pet. Br., 24-31.

City, and subject to tax, is determined by first, computing the taxpayer's ENI,[44] then, dividing the taxpayer's ENI into the amounts of the taxpayer's business income and investment income.[45] It is undisputed that all of Petitioner's ENI, including the Capital Gain, is business income.[46] The amount of Petitioner's business income would then be multiplied by Petitioner's business allocation percentage to ascertain the amount of the taxpayer's business income subject to the GCT.[47] The business allocation percentage takes into account a weighted average of the taxpayer's total property, receipts and payroll that is within the City.[48] Petitioner has stipulated that "[d]uring the time that Master Fund held its interest in Claren, Petitioner reported and paid GCT on its share of Claren's income, deductions, gains and losses."[49] Petitioner's GCT returns for each of the years 2008, 2009 and the Tax Year, show that Petitioner apportioned its share of Claren's income derived from its business operations to the City using a 100% business allocation percentage.[50] Petitioner similarly reported 100% of its share of Claren's income during the Tax Year, but excluded the Capital Gain.[51] Petitioner has stipulated that it did not have any of its own property, sales or payroll and that its business allocation percentage was based on Claren's business activities. Petitioner's business allocation percentage, therefore, was determined by reference to Claren's property, receipts and payroll, all of which was located within the City as Petitioner allocated its share of Claren's income 100% to the City. In other words, Petitioner's only property, receipts and payroll reportable on its GCT return for the Tax Year were Claren's property, receipts and payroll, all of which were allocable 100% to the City.

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[44] As defined in Administrative Code §11-602.8.
[45] As defined in Administrative Code §§11-602.5 & 11-602.7.
[46] Petitioner reported all its ENI as business income on its GCT return filed for the Tax Year. See Stipulation Exh. C, NYC 3L Schedule B, lines 19 and 24. Petitioner, however, excluded the Capital Gain and paid tax only on its share of Claren's income totaling $13,463,069, 100% of which was allocated to the City. Compare line 24 to lines 26 and 27. It is evident from the arithmetic that the allocated business income of $13,463,069 includes, at a minimum, 100% of Petitioner's share of Claren's partnership income.
[47] Administrative Code §11-604.3(a).
[48] *Id.*
[49] Stipulation, ¶ 40.
[50] Stipulation Exhs., A, B & C.
[51] See, *supra,* n. 46

We, thus, reject Petitioner's contention that it had no property, receipts or payroll within the City.[52] Petitioner was doing business in the City as a result of its limited partnership interest in Claren,[53] and paid the GCT on its share of Claren's income, deductions, gains and losses, which Petitioner allocated 100% to the City. The remaining question is whether the Capital Gain, on Petitioner's sale of its interest in Claren should be properly allocated outside of the City, as Petitioner contends, when all of its value is attributable to Claren's business activities within the City.

The crux of Petitioner's argument here derives from the parties' stipulation that neither Petitioner and Claren nor Master Fund and Claren were engaged in a unitary business".[54] Under the unitary business principle, income earned outside of the taxing jurisdiction is not apportionable to the taxing jurisdiction unless the out-of-state business activity giving rise to the income is part of a unitary business, at least a portion of which business is conducted within the taxing jurisdiction.[55] Thus, "the lynchpin of apportionability in the field of state income taxation is the unitary business principle."[56] All of Claren's income, however, was generated from its business activities within the

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[52] Pet. Br., 28-29.

[53] Administrative Code §11-603.5: "If a partnership is doing business . . . in [the City], then all of its corporate partners are subject to [GCT]; Rules 11-06(a) provides that, with certain exceptions not applicable here: "a corporation shall be deemed to be doing business in the City if it owns a limited partnership interest in a partnership doing business . . . in the City."

[54] Stipulation ¶¶ 37-38. The "unitary business" principle limits a State's authority to apportion income to a taxing jurisdiction; income that arises outside of the State, and is not earned as part of a unitary business, a portion of which is conducted within the State, is not apportionable to the State. *F.W. Woolworth v. Revenue Department*, 458 US 354 (1982). Only income earned as part of a "unitary business" satisfies the due process requirement that the income is "rationally" related to instate values and, therefore, apportionable to the taxing jurisdiction. *Container Corp. v. Franchise Tax Board, 463 US 159, 166 (1983)*, at 166. Fundamentally, the unitary business requirement is satisfied where (1) at least some portion of the business is conducted within the taxing jurisdiction, (2) there is "some bond of ownership or control uniting the purported "unitary business", and (3) "the out-of-state activities of the unitary business must be related in some concrete way to the in-state activities. The functional meaning of this requirement is that there must be some sharing or exchange of value not capable of precise identification or measurement," which means that the various functional segments of the unitary business work together to achieve a common business objective and it is not practicable to accurately measure the value of the various intracompany services being transferred within the unitary business and the flows of value resulting from economies of scale within the unitary business. *Id.*

[55] *Container Corp., supra,* 463 US 159, at 165-166. *Compare F.W. Woolworth v. Revenue Department,* 458 US 354 (1982) (holding that Woolworth's foreign subsidiaries were not engaged in a unitary business with its United States business and the dividends from those subsidiaries, therefore, was not apportionable to New Mexico.

[56] *Mobil oil Corp. v. Commissioner of Taxes of Vermont*, 445 US 439 (1980).

City. We, therefore, must consider whether there is something special and distinct about the Capital Gain from the sale of Claren's business that would require it to be allocated separately from the income from Claren's operations, which Petitioner treated as business income apportionable to the City. Petitioner, in effect, asks that we bifurcate the income from its partnership interest in Claren into: (1) the flow-through income from Petitioner's share of Claren's operations, which Petitioner treated as apportionable, and (2) the Capital Gain from the sale of that interest, which Petitioner treated as not apportionable, arguing that the gain from the sale of Claren is unrelated to Claren's business.

Even before we address Petitioner's arguments, the bifurcation issue that Petitioner raises does not appear to proceed logically from the Stipulation. Petitioner concedes that if it has nexus, which we conclude it does, then Petitioner's share of Claren's income is apportionable to the City but argues that the Capital Gain is not. We have not found any controlling precedent on the unitary business issue in which the income from an investment, generally dividends, is treated as unitary and apportionable, but not the gain on the sale of that investment. The United States Supreme Court in *Allied Signal v. Director Div. Taxation,* 504 US 768, 780 (1992) stated the contrary concerning the application of the unitary business principle: "we have held that for constitutional purposes capital gains should be treated as no different from dividends." Even where no unitary business was found to exist, courts have treated dividends and capital gains the same. *See Allied Signal Inc. v. Commissioner of Finance,* 79 NY2d 73, 75-76 (1991) ("In this appeal we are called upon to determine whether New York City may constitutionally tax *any* portion of the dividend and capital gain income that a nondomiciliary corporation receives by reason of its investment in another corporation conducting business within the City in the absence of a unitary relationship between the two corporations.") In *Allied Signal*, the Court of Appeals held that the City could tax the dividends and capital gains, where the corporation in which the investment was held conducted business within the City. *Id.* As we can see no meaningful distinction for this purpose between a partner's distributive share of income from a partnership interest, and

a distribution of income to shareholders of a corporation by means of a dividend, where both were derived from business activities within the City, we conclude that any effort to bifurcate Petitioner's distributive share of Claren's income, on which Petitioner paid GCT, and its Capital Gain from the sale of its interest in Claren must, on its face, fail.

Petitioner, however, contends that it was engaged in a separate "investment business" in managing the investment of its interest in Claren.[57] Petitioner argues that the value of its Capital Gain on which the City seeks to collect tax arose out of Petitioner's investment management business, rather than Claren's business operations and, therefore, the value of the Capital Gain is not apportionable by the City under the unitary business principle.[58] A contention similar to Petitioner's, that the activities in managing an investment should be treated separately from the investment's underlying business operations when applying the unitary business principle, was considered and rejected in *Mobil, supra,* 445 US, at 440: "Mobil has attempted to characterize its ownership and management of subsidiaries and affiliates as a business distinct from its sale of petroleum products in this country. . . [to which the Mobil Court responded] Nor do we find particularly persuasive Mobil's attempt to identify a separate business in its holding company function. So long as dividends from subsidiaries and affiliates reflect profits from a functionally integrated enterprise, those dividends are income to the parent earned in a unitary business. One must look principally at the underlying activity, not the form of investment, to determine the propriety of apportionability."

The parties stipulated that Petitioner and Claren were not engaged in a unitary business, but not that Claren, itself, was not a unitary business. We do not interpret the Stipulation to require us to treat the income Petitioner derived from Claren's business differently from the Capital Gain Petitioner derived from the sale of that business. Both Petitioner's distributive share of Claren's income and the Capital Gain, must be treated as

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[57] Pet. Br., 26.
[58] Pet. Br., 26-27.

part of Claren's unitary business, and both are apportionable to the City under the unitary business principle.[59] We read the Stipulation to mean that if Petitioner's investment business produced income from investments other than Claren (and assuming the underlying businesses in which Petitioner held investments did not engage in business within the City[60]), that the income from those other investments would not be apportionable by the City, because it would not be unitary with Claren's business. Under that hypothetical, Petitioner's other investment income would be outside of the City's reach without considering the nexus of Claren's business to the City. The unitary business principle, therefore, does not support Petitioner's position, because under it both Petitioner's distributive share in Claren and the Capital Gain are unitary to Claren's business.

Petitioner, however, argues that, in accord with the Stipulation, its "activities in connection with its investment in Claren were performed in London, including the investigation concerning whether the investment should be made and the negotiations with Claren concerning the making of the investment, the periodic monitoring of the investment, the ultimate determination to sell, and the activities involved in selling, the interest in Claren."[61] Based on these stipulated facts, Petitioner contends that the Capital Gain was earned outside the City.[62]

Petitioner's investment acumen might have influenced Petitioner's *timing* of the sale of its interest in Claren. We conclude, however, that the Capital Gain was wholly attributable to Claren's value on the date it was sold which, in turn, was wholly attributable to the value of Claren's business, all of which was the result of Claren's

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[59] We see no distinction, in substance, between Petitioner's share of the gain Claren would have recognized on the sale of its business, which Petitioner does not deny is includible in Petitioner's ENI and taxable under the GCT, and the Capital Gain Petitioner recognized on the sale of its share in that same business. The only possible distinction that Petitioner identifies, the federal character of the gain, is irrelevant for purposes of the GCT.
[60] *See, supra, Allied Signal, Inc.*, 79 NY2d 73, discussed *infra.*
[61] Pet. Br., 30.
[62] *Id.*

business activities within the City, and which Petitioner allocated 100% to the City during the Tax Year, and in each of the years Petitioner held Claren. Put another way, but for the value of Claren's business on the date of sale there would be no gain and possibly a loss, wholly independent of any efforts by Petitioner's staff in London.

We, therefore, reject Petitioner's contention that the Capital Gain was attributable to services Petitioner performed in London when managing its investment in Claren, rather than the value of Claren's City business on the date it was sold. The City's imposition of GCT on the Capital Gain satisfies the Due Process Clause if there is "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax . . . and the income attributed to the State for tax purposes must be rationally related to the taxing State." (Internal quotes omitted.)[63] Both of these requirements are satisfied here. Petitioner has nexus to the City by reason of its partnership interest in Claren. And the value of the Capital Gain on Petitioner's sale of its interest in Claren's business is "rationally related" to Claren's business activities, all of which were conducted in the City. Indeed, we can see no other sources of value for the gain. Even if Petitioner's investment management and negotiating skills secured the highest possible sales price for its interest in Claren, nevertheless, those skills added nothing to the value of Claren's business, the subject of the sale.[64]

Allocating the Capital Gain outside of the City would, in our view, be incompatible with due process, where all of Claren's earnings were derived from business activities conducted within the City. A tax is compatible with due process if "the taxing power of the state bears fiscal relation to the protection, opportunities and benefits given by the state." *Wisconsin v. J.C Penney Co.,* 311 US 435, 444 (1940).

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[63] *Quill, supra,* 504 US 298, at 306; *Container Corp., supra,* a, at 165-166.

[64] Even if it could be established, objectively, that a specific portion of the sales price could be attributed to Petitioner's efforts, which was not done here, it would not change the fact that the entire amount of the sales price is "rationally" related to the value of Claren's business. Going one step further, the entire amount of the sales price is the value of Claren's business represented by Petitioner's interest in Claren.

Here there is no doubt that all of Claren's earnings, derived from business activities within the City, were the result of the "protection, opportunities and benefits given by the City." Simply stated, there was nowhere else where Claren performed its business activities and nowhere else where its income was apportionable.[65] Here Petitioner proposes that the gain would not be subject to tax in any jurisdiction.

Similarly, Petitioner's reliance on the negotiations for the sale having taken place in London is misplaced, where the entire value of Claren's business derived from its business activities within the City. "The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction." *J.C. Penney,* at 445.

Following *J.C. Penney* and *International Harvester*, the New York Court of Appeals has held that the GCT could be imposed on the dividends and capital gains received by a nondomiciliary corporation "by reason of its investment in another corporation [ASARCO] conducting business within the City in the absence of a unitary relationship between the two corporations." *Matter of Allied Signal, supra,* 79 NY2d 73. In *Allied Signal*, as here, the nondomiciliary corporation had nexus to the City. As here, the nondomiciliary taxpayer argued that, because it was not engaged in a unitary business with the corporation in which it held an investment, the City was precluded from taxing its income, the dividends and capital gain, derived from that investment. In upholding the tax, the Court of Appeals reasoned that in *Harvester, supra,* "the Supreme Court expressly rejected the notion that the taxing power exerted by a State had to be premised on the taxpayer's own activities within the State." *Allied Signal,* at 83. The court rejected the contention of Bendix, the nondomiciliary shareholder of ASARCO, that the imposition of tax on Bendix's gain from the sale of ASARCO did not comport with due process (*Id.,* at 82):

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[65] See also, *International Harvester Co. v. Department of Taxation,*322 US 435 (1944).

> "Here, it is undisputed that New York City afforded privileges and opportunities to ASARCO. That these privileges and opportunities have contributed to ASARCO's *capital appreciation* and thus also inured to the benefit of its shareholders, including Bendix, is beyond question. Thus, we agree with the City that it has given Bendix something "for which it can ask return," and that consequently a sufficient nexus existed to support the City's tax." (Emphasis added.)

Under *Allied Signal,* Petitioner's Capital Gain, attributable to the "capital appreciation" of Claren's City business from the "privileges and opportunities" afforded to Claren by the City, has nexus to the City and is subject to the GCT.

Petitioner also argues that the Capital Gain is in the category of "other business receipts" under Administrative Code §11-604(a)(2)(D) and apportioned to where those receipts are "earned." Petitioner notes that under Rules §11-65(e)(2), "[r]eceipts from the sales of capital assets (property not held by the taxpayer for sale to customers in the regular course of business) are not business receipts." Notwithstanding this rule, Petitioner argues that because the Capital "Gain is from the taxpayer's one and only business", it should be treated as an allocable business receipt.[66]

Petitioner, however, would allocate this business receipt, the Capital Gain from the sale of Petitioner's partnership interest in Claren, wholly outside of the City. Petitioner bases its position, in part, on the federal income tax treatment of capital gains arising from the sale of a partnership interest.[67] Petitioner agrees that the income that flows through from Claren's operations to Master Fund, then to Petitioner, is treated under IRC

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[66] Pet. Br., 29. We reject Petitioner's contention that Rules §11-65(e)(2) requires the Capital Gain to be excluded from ENI. It does not. The Rule, when applicable, only requires a Capital Gain to be excluded from the "receipts factor" when computing the "business allocation percentage." When the Rule applies, the Capital Gain is not excluded from ENI, but only from the business allocation percentage – to avoid distorting the percentage.
[67] Pet. Br., 25-26.

§702(b) as having been realized directly from the same sources as realized by Claren.[68] The flow through income, therefore, would be properly allocable to the City, where Claren earned the income. Petitioner, referencing IRC §741, argues that the Capital Gain is treated differently than the flow through income, not as income from Claren's City activities, but as income earned by Master Fund from the sale or exchange of a capital asset.[69] But as we explained, *supra* n. 60, for purposes of the GCT we see no meaningful distinction between Petitioner's share of the gain Claren would have recognized on the sale of its business, which Petitioner does not dispute flows through to Petitioner and is taxable under the GCT, and Petitioner's Capital Gain on the sale of its share in that same business. The only distinction Petitioner raises, the "character" of the gain as capital or ordinary under the federal income tax, has no counterpart under the GCT and is not relevant here.

We also reiterate here that the Capital Gain was derived from the sale of Petitioner's interest in Claren's business, not from Petitioner's services. Here, Petitioner did not earn service revenues derived from Petitioner's investment activities in London but sold its own investment and realized gain. Petitioner, however, argues that the Capital Gain is in the category of "other business receipts," and is allocable to the City only if it was "earned" within the City. Administrative Code §11-604.3(a)(2)(D). Petitioner relies on *Siemens Corporation v. NYS Tax Appeals Tribunal,* 657 NY2d 1020 (1997) in support of its position that "such receipts are 'earned' where 'the work done to establish and maintain' the revenue generating asset is performed.[70] Petitioner emphasizes that *Siemens* specifically looked to where the work was performed to generate the income, in *Siemens*, the income from lending, through soliciting the loans, maintaining the loans and other work in connection with making the loans. *Siemens* looked to the lender's activities in making the loan, rather than the location of the

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[68] Pet. Br., 25.
[69] Pet. Br., 26.
[70] Pet. Br., 29-30.

borrowers or "source" of the interest income. On the basis of *Siemens,* Petitioner contends that the Capital Gain should, similarly, be allocated to London, where the investment was managed and from where the sale was negotiated.

Siemens, however, is distinguishable from the present case. In *Siemens*, the taxpayer's lending activities generated the interest income, not the borrowers who paid their obligations under the loans. Thus, in *Siemens* the place where those lending activities were performed, rather than the "source" of the payments from the borrowers, determined where those "other business receipts" were "earned". In the present case, the entire value of the "other business receipts," the Capital Gain, is generated by the appreciation of the value of Claren's business, based on the activities of Claren's business conducted within the City. *Allied Signal, supra, at 82.* The Capital Gain, in that regard, is distinguishable from the interest income earned in connection with the lending activity in *Siemens*, which is earned as the result of efforts conducted from where the lender, not the borrower, is located. Applying *Siemens* to these facts would produce an entirely different result, one in accord with the treatment of the gain on the sale of the investment in ASARCO at issue in the Court of Appeals decision in *Allied Signal, supra,* rather than with the services performed in *Siemens*. We therefore reject Petitioner's contention that apportioning the Capital Gain as if it was the interest income in *Siemens* is warranted here.[71]

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

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

Commissioner Neil Schaier did not participate in this Decision.

Dated: March 12, 2021
New York, NY

Frances J. Henn
President and Commissioner

Robert J. Firestone
Commissioner