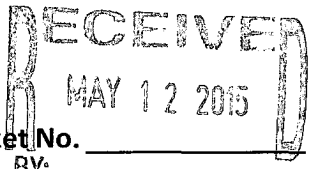
STATE OF ILLINOIS
ILLINOIS INDEPENDENT TAX TRIBUNAL
CHICAGO, ILLINOIS

GMODELO CORP, INC.,	)	
(EIN 20-59886687)	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	**Docket No.** _____
	)	**BY:** _____
ILLINOIS DEPARTMENT OF REVENUE	)	15 TT 97

PETITION
(INCOME TAX REFUND)

Introduction

Petitioner, GModelo Corp., Inc., is engaged in importing beer from Mexico. Petitioner amended its income tax return for the 2012 tax year, claiming a refund on grounds that it was "taxable" in the Mexican jurisdictions where the beer was brewed. Because the Department of Revenue never acted on the claim, it is deemed denied as a matter of law, and Petitioner hereby protests.

Statement of Jurisdiction

1. Petitioner filed a refund claim for the year at issue on June 5, 2014. The amount of the claim exceeds $15,000, exclusive of interest.
2. Section 909(e) of the Illinois Income Tax Act provides that if the Department has failed to approve or deny a claim within 6 months from when the claim was filed, the taxpayer may treat the claim as denied and protest accordingly. 35 ILCS 5/909(e).
3. This section provides in addition that after July 1, 2013, protests concerning matters that are subject to the jurisdiction of this Tribunal shall be filed not with the Department of Revenue

(Department) but with this Tribunal. *Id.*

4. As of the date of this filing, the Department has failed to approve or deny Petitioner's claim (with the result that there is no statutory notice to attach to this petition).

5. This Tribunal therefore has jurisdiction over this matter pursuant to sections 909(e) and 910(a) of the Illinois Income Tax Act, and section 1-45(a) of the Illinois Independent Tax Tribunal Act. *Id.;* 35 ILCS 5/910(a); 35 ILCS 1010/1-45(a).

Background Facts

6. Petitioner is a subsidiary of Diblo S.A. de C.V., which is itself a subsidiary of Grupo Modelo, S.A. de C.V. Grupo Modelo is a leading producer, distributor and marketer of beer. During the year at issue, Grupo Modelo operated multiple breweries in Mexico.

7. The laws in several (U.S.) states prohibit the importation of alcoholic beverages, except through a special regulatory apparatus where foreign sellers may distribute beer only through licensed wholesalers, who in turn may sell only to other wholesalers and licensed retailers.

8. In 2007, Petitioner and Constellation Beers, Ltd., an unrelated third party, thus formed Crown Imports LLC (Crown), a fifty-fifty joint venture partnership, to facilitate the importation of Grupo Modelo brands into the United States:

9. To this end, in 2007, Crown entered into a special importer agreement with a GModelo affiliate. Pursuant to this agreement, the affiliate purchases beer from the Grupo Modelo breweries in Mexico and supplies it to Crown, who resells it to wholesalers throughout the United States.

10. During the year at issue, Crown maintained a substantial inventory of shipping supplies *(e.g.,* airbags, seals, dividers) at the Grupo Modelo breweries in Mexico.

11. Crown's supply chain personnel also made regular and systematic visits to the breweries during this year.

12. Crown maintained an inventory of Grupo Modelo imports at warehouses in several states, including Illinois. Most orders for the imported beer were filled from these Crown inventories.

13. In certain cases, however, the Crown customer, *i.e.,* the domestic distributor, would instead request that Crown ship the beer from the Grupo Modelo brewery in Mexico directly to the distributor's facility in the United States.

14. In some of these instances, the beer was imported from the Grupo Modelo brewery to customer distribution centers in states where Crown did not file income tax returns or pay income taxes. This petition concerns gross receipts from beer sales fitting this description (the "sales at issue").

15. Petitioner amended its income and replacement tax return for the year at issue, claiming a refund in the amount of $1,250,509.

16. On its amended return, Petitioner recomputed its liability by undoing the effects of the so-called "double-throwback" rule employed on its original return; specifically, Petitioner reversed the effects of this rule by excluding from the apportionment fraction numerator the gross receipts from the sales at issue.

The Double-Throwback Rule

17. Where, as here, a person has income from sources inside and outside Illinois, the portion of the person's net income that is taxable in Illinois is figured using a special statutory apportionment formula.

18. Using this formula, the person multiplies its net income by an apportionment fraction, with the product of this computation yielding the percentage of the person's income that is subject to tax

in this state. 35 ILCS 5/304(a).

19. This statutory fraction is the ratio of the person's total sales in Illinois over the person's total sales everywhere. 35 ILCS 5/304(a)(3), (g).

20. The general rule is that sales of goods are counted as "in Illinois" if the property is delivered or shipped to a purchaser in this state. 35 ILCS 5/304(a)(3)(B)(i)l 86 Ill. Admin. Code § 100.3370(c)(1)(A).

21. There are two exceptions–under the one relevant here, the double-throwback rule, sales of goods shipped to another state are "throw back" and counted as sales "in Illinois" if the seller is taxable in Illinois, but is taxable in neither the state *to, nor from* which the goods are shipped. 86 Ill. Admin. Code § 100.3380(c)(1).

COUNT I - There Is No Throwback For the Sales At Issue Because Petitioner Was "Taxable" In Mexico

22. Petitioner realleges paragraphs 1 through 21 as if set forth fully herein.

23. A person is "taxable" in another state (and there is therefore no throwback) if the state has jurisdiction to subject the person to a net income tax, regardless of whether the state does or does not subject the person to such a levy. 35 ILCS 5/303(f)(2); 86 Ill. Admin. Code § 100.3200(a)(l)(B).

24. If Crown, Petitioner's fifty-percent owned joint venture partnership, is taxable in Mexico, then as partner in the venture, Petitioner is derivatively taxable there too. *Borden Chemicals & Plastics, L.P. v. Zehnder,* 312 Ill.App.3d 35 (1st Dist. 2000).

25. Petitioner was "taxable" in Mexico in that, as the result of Crown's local activities, the republic had jurisdiction to subject it to a net income tax.

26. Whether a foreign nation has jurisdiction to subject a person to a net income tax is governed by the standards of P.L. 86-272{15 U.S.C. §§ 381-384). 86 Ill. Admin. Code § 100.9720(c)(8)(B).

27. In general, this federal law provides that a nonresident is immune from income tax in a given state if the person's activities in the state are limited to solicitation for orders for sales of goods. 15 U.S.C. §§ 381-384; *Wisconsin Dep't of Revenue v. Wm. Wrigley, Jr. Co.,* 505 U.S. 214 (1992).

28. Crown, and derivatively, Petitioner, would not be immune from income tax in Mexico under the standards of P.L. 86-272 because Crown maintained an inventory of shipping supplies at the Grupo Modelo breweries and because Crown's supply chain personnel made regular and systematic quality control visits to these facilities–manifestly non- solicitation activities.

29. Mexico thus had jurisdiction to subject Crown, and derivatively, Petitioner, to an income tax, with the result that (i) Petitioner was "taxable" in Mexico within the meaning of 35 ILCS 5/303(f)(2) and 86 Ill. Admin. Code § 100.3200(a)(1)(B); and (ii) that the double-throwback rule does not apply to the sales at issue.

WHEREFORE, Petitioner respectfully requests this Tribunal enter an order finding that:

(a) Petitioner was "taxable" in Mexico as the result of Crown's activities in the country;

(b) The double-throwback rule does not apply to the sales at issue; and that

(c) Petitioner is entitled to the refunds claimed accordingly.

COUNT II -The "Treaty" Amendment Impermissibly Narrows The Scope Of 35 ILCS 5/303(f)

30. Petitioner realleges paragraphs 1 through 21 as if set forth fully herein.

31. There is a tax treaty between the United States and Mexico which provides that U.S. companies are exempt from Mexican income taxes under certain circumstances.

32. In August 2010, a new Department rule went into effect, providing that for purposes of throwback, where a person is not subject to income tax in a foreign country as the result of a treaty, the person is not "taxable" in that jurisdiction as a matter of law-even though the person's activities in the country would otherwise subject it to tax. 86 Ill. Admin. Code § 100.3200(a)(2)(C). (This amendment is hereafter referred to as the "treaty amendment").

33. An administrative rule may not limit the scope of the statute it purports to interpret. *Du-Mont Ventilating Co. v. Dep't of Revenue*, 73 111.2d 243, 247-48 (1978).

34. The treaty amendment violates this prohibition because it results in a more restrictive definition of "taxable" than provided by 35 ILCS 5/303(f)(2).

35. The statute holds, without qualification, that a person is taxable in another state if that state has jurisdiction to subject the person to a net income *tax,* regardless of whether the state in fact exercises such authority.

36. The treaty amendment impermissibly narrows the scope of the statute because a foreign nation that enters a tax treaty has no less jurisdiction to subject a person to tax than does a (domestic) state which, in the same exercise of its sovereign authority, elects to have no income tax at all.

37. Crown, and derivatively, Petitioner was taxable in Mexico, notwithstanding the income tax treaty between Mexico and the United States.

38. The double-throwback rule does not apply to the sales at issue.

WHEREFORE, Petitioner respectfully requests this Tribunal enter an order finding that:

(a) The treaty amendment is invalid and unenforceable because it impermissibly narrows the scope of 35 ILCS 5/303(f)(2);

(b) That Petitioner was "taxable" in Mexico, notwithstanding the treaty amendment;

(c) The double-throwback rule does not apply to the sales at issue;

(d) Petitioner is entitled to the refunds claimed accordingly; and that

(e) Petitioner is entitled to attorney's fees under 5 ILCS 100/10-55(c).

COUNT III -The Treaty Amendment Is Not A Reasonable Interpretation Of 35 ILCS 5/303(f)(2)

39. Petitioner realleges paragraphs 1 through 21 as if set forth fully herein.

40. An agency regulation will be upheld only if it is a reasonable interpretation of Illinois law. *Matthews v. Will County Dep't of Labor*, 152 Ill.App.3d 176, 180 (1st Dist. 1984); 35 ILCS 5/1401(a).

41. The operative language in section 303 is virtually identical to the language in section 3 of the Uniform Division of Income for Tax Purposes Act (UDITPA).

42. The UDITPA is a model act containing guidelines for apportioning the income of multistate taxpayers. *Hartmarx Corp. v. Zehnder,* 309 Ill.App.3d 959, 964 (1st Dist. 1999).

43. The UDITPA was incorporated into Article IV of the Multistate Tax Compact, which became effective in Illinois in 1967. *Id.* at 964-65.

44. The Compact establishes the Multistate Tax Commission as its administrative agency. In 1973, the Commission promulgated a series of model regulations interpreting the UDITPA's apportionment provisions.

45. The model rule governing when a person is "taxable" in a foreign country provides that if jurisdiction is otherwise present, the country *is not* considered without jurisdiction to tax by reason of a tax treaty between that country and the United States.

46. Illinois repealed the Compact in 1975, but the official commentary for the Illinois Income Tax Act states that section 303 (among others) still embodies "the principles underlying" the UDITPA. *Caterpillar Tractor Co. v. Lenckos,* 84 Ill.2d 102, 121(Ill. 1981).

47. But among the Compact states codifying the model regulations either in whole or in part, except Illinois, *all of them* adopt the rule that, as a matter of law, a person may be "taxable" in a foreign country, notwithstanding that the person is not required to pay income tax there because of a treaty between that country and the United States.

48. The treaty amendment is out of step with the principles of the UDITPA and is unenforceable as an unreasonable interpretation of 35 ILCS 5/303(f)(2).

WHEREFORE, Petitioner respectfully requests this Tribunal enter an order finding that:

(a) The treaty amendment is invalid and unenforceable because it is not a reasonable interpretation of 35 ILCS 5/303(f)(2);

(b) Petitioner was "taxable" in Mexico, notwithstanding the treaty amendment;

(c) The double-throwback rule does not apply to the sales at issue;

(d) Petitioner is entitled to the refunds claimed accordingly; and that

(e) Petitioner is entitled to attorney's fees under 5 ILCS 100/10-55(c).

COUNT IV - Petitioner Is "Taxable" In The Individual Mexican States From Which The Beer Is Shipped

53. Petitioner realleges paragraphs 1 through 21 as if set forth fully herein.

54. A person is "taxable" in another state (and throwback does not apply) if the state has jurisdiction to subject the person to a net income tax, regardless of whether the state does or does not subject the person to such a levy. 35 ILCS 5/303(f)(2); 86 Ill. Admin. Code § 100.3200(a)(1).

55. The political subdivisions of a foreign nation, like the individual Mexican states where the beer at issue is brewed, are considered "states" for purposes of the foregoing rule. 35 ILCS 5/1501(22).

56. The determination of whether the political subdivision of another country has jurisdiction to subject a person to a net income tax is made as if the political subdivision were a state of the United States. 86 Ill. Admin. Code § 100.3200(a)(2)(C).

57. A state has jurisdiction to subject a person to a net income tax if in that state, the person owns or maintains a stock of goods, or if its activities there otherwise go beyond the mere solicitation of orders for sales of goods. *Wm. Wrigley, Jr. Co.,* 505 U.S. at 216; 86 Ill. Admin. Code § 100.9720(c)(4)(O)(vi).

58. The individual Mexican states where the beer is brewed (and from which the beer is shipped) had jurisdiction to subject Crown, and derivatively, Petitioner, to a net income tax because Crown maintained an inventory of shipping supplies at the Grupo Modelo breweries, and because Crown personnel regularly visited these facilities.

59. A person is "taxable" in a state, in this case, an individual Mexican state, if the state *could* subject it to a net income tax, even if the state does not in fact impose one.

60. The Mexican Constitution grants each of the Mexican states the power to impose taxes on corporate profits.

61. As part of the country's National Tax Coordination System, however, each of the states has entered into a separate agreement with the federal government where, in exchange for increased participation in federal revenues, the states have agreed to forgo imposition of their own corporate income taxes.

62. However, there is nothing in Mexican constitutional or statutory law that limits the ultimate

authority of the state to impose taxes on corporate income, and each state has the independent power to withdraw from the agreement at any time and in its sole discretion, with the approval of its State Congress.

63. Thus the individual Mexican states are in this respect no different than certain U.S. states which can, but in their sovereign discretion do not, impose general taxes on corporate income.

64. The individual Mexican states where Crown maintained inventories of shipping supplies, and where Crown employees made regular visits *(i.e.,* the states where Grupo Modelo operated breweries) *could* subject Crown, and derivatively, Petitioner, to a net income tax, notwithstanding that they did not in fact impose such levies.

65. Crown, and therefore Petitioner, was "taxable" in these Mexican states within the meaning of 35 ILCS 5/303(f)(2) and 86 Ill. Admin. Code § 100.3200(a)(1)(B).

66. The double-throwback rule does not apply to the sales at issue.

WHEREFORE, Petitioner respectfully requests this Tribunal enter an order finding that:

(a) Petitioner was "taxable" in the individual Mexican states where the beer was brewed;

(b) The double-throwback rule does not apply to the sales at issue; and that

(c) Petitioner is entitled to the refunds claimed accordingly.

Dated: May 11, 2015.

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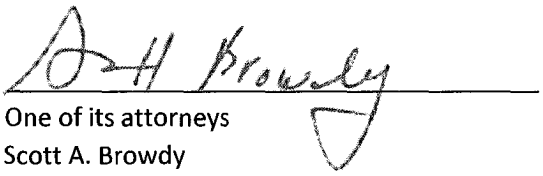
(312) 564-7310 (Phone)

By: 

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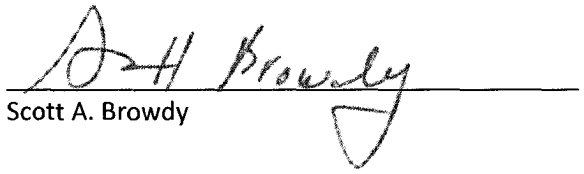
CERTIFICATE OF SERVICE

I, Scott A. Browdy, hereby certify that on May 11, 2015, a copy of the foregoing Petition was sent to the Independent Tax Tribunal and Department of Revenue by overnight delivery via Federal Express:

Illinois Independent Tax Tribunal
160 N. LaSalle Street, Room N506
Chicago, Illinois 60601

And

Illinois Department of Revenue
Office of Legal Services
100 W. Randolph St., Level 7-900 (7th Floor Thompson Center)
Chicago, Illinois 60601



Scott A. Browdy