

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. :ORDER AND OPINION
DTA No. 807122

for Revision of a Determination or for Refund :
of Sales and Use Taxes under Article 28 and 29 :
of the Tax Law for the Period March 1, 1979 :
through May 31, 1986. :

On March 13, 1992, the City of New York (O. Peter Sherwood, Corporation Counsel, Edward F. X. Hart, Stanley Buchsbaum, and Simon G. Salas, Esqs., of counsel) made a motion to this Tribunal for leave to file an amicus curiae brief.

ORDER

Upon reading the Notice of Motion, supporting affirmation, and proposed amicus curiae brief dated and submitted by the City of New York on March 10, 1992, and the declaration in opposition and response to the proposed amicus curiae brief dated and submitted by petitioner (James F. McMahon, David M. Wise, and Stephen Ianello, Esqs., of counsel) on April 1, 1992, and due deliberation having been had thereon,

NOW, upon the motion of Stanley Buchsbaum, attorney for the City of New York, it is,

ORDERED that said motion be and hereby is granted to the extent that pages one through nineteen of the proposed amicus brief are hereby accepted by the Tribunal, and that said motion be and hereby is denied to the extent that pages twenty through twenty-eight (i.e., Point III) of the proposed amicus brief are hereby stricken from the record before the Tribunal in this matter. Accordingly, pages nine through thirteen (i.e., Point III) of petitioner's response will also be disregarded by the Tribunal in its review of the record in this matter.

OPINION

The City of New York seeks permission to file a brief amicus curiae in this matter based on its interest in this particular case, its interest in the general issue involved, and on the assistance it can provide the Tribunal because of its unique knowledge of the history of the New York State sales tax as applied to this issue. Petitioner opposes the motion to file the amicus curiae brief because it believes the City of New York's interests are already being represented, and given the City's participation in the audit and hearing process, the amicus brief merely provides an extra opportunity for the City to present its arguments. Petitioner further objects to a new issue being brought up for the first time in the proposed amicus brief. The Division of Taxation did not submit any comments regarding the proposed amicus brief.

Initially, we note that there are no clear-cut procedural rules regarding appearances before the Tribunal involving taxes administered by the Division of Taxation that benefit a local government. However, it is clear that the Division of Taxation is the named party to these proceedings, not the City. Thus, while the City clearly has an interest in the outcome of the case, we do not deem it a party as asserted by petitioner.

In Matter of Standard Mfg. Co. (Tax Appeals Tribunal, July 11, 1991), this Tribunal determined that the rules concerning amicus curiae relief, contained in 22 NYCRR 500.11(e) regarding the filing of such briefs before the Court of Appeals, are the most specific and informative of any New York State court rules concerning this issue. The Tribunal will, therefore, look to such rules for guidance in determining whether to grant amicus curiae relief. Such rules provide as follows:

"(e) Amicus Curiae Relief. (For appeals selected for sua sponte examination of the merits see section 500.4 of this Part). A brief may be filed only by leave of court granted on motion, or upon the court's own request.

"Motions for amicus curiae relief, when appropriately made on notice to all of the parties and sufficiently in advance of the argument of the appeal to allow adequate court review of the motion and the

proposed brief, must include consideration of and satisfaction of the court of at least one of the following criteria:

"(1) a showing that the parties are not capable of a full and adequate presentation and that movants could remedy this deficiency;

"(2) that movants would invite the court's attention to law or arguments which might otherwise escape its consideration; or

"(3) that amicus curiae briefs would otherwise be of special assistance to the court."

The proposed amicus brief submitted meets the criteria set forth in Standard in that the unique historical perspective of the City of New York concerning the sales tax law and the complexity of the issues herein lead us to conclude that the brief will be of assistance to this Tribunal.

However, Point III of the proposed amicus curiae brief should not be made part of the record in this proceeding. This Tribunal has held that parties may raise an issue for the first time on exception and that in certain cases new issues could be raised for the first time in an amicus brief on exception (Matter of Standard Mfg. Co., *supra*; Matter of Small, Tax Appeals Tribunal, August 11, 1988.) This opinion is based upon the broad grant of authority to the Tribunal in the Tax Law and the implementing regulations adopted by this Tribunal which provide that "the Tribunal shall review the record and shall to the extent necessary or desirable, exercise all power which it could have exercised if it had made the determination" (Tax Law § 2006.7; 20 NYCRR 3000.11[e][1]). The record in this case reflects that both parties and the Administrative Law Judge proceeded under the assumption that this case involved primarily a legal issue and that the information submitted at the hearing level regarding the amount of the refund was sufficient. The factual issue of whether petitioner met its burden of proof as to the exact amount of the refunds was not mentioned in these proceedings until the proposed amicus brief was filed, and was never raised by the named parties. In this particular case, prejudice to the petitioner would result from the amicus raising for the first time on exception the issue of burden of proof concerning the amount of the refunds. Therefore, Tribunal review of this

factual issue on exception is neither necessary nor desirable, and the Tribunal will not allow this issue to be brought up on exception under these circumstances.

Accordingly, we grant the City of New York's motion for leave to file an amicus curiae brief on exception, to the extent that pages one through nineteen are hereby accepted and made part of the record. We deny such motion to the extent that pages twenty through twenty-eight (i.e., Point III) are hereby stricken from the record. Petitioner's response to Point III of the amicus brief is also hereby disregarded.

In that petitioner has already provided its response to the amicus brief and the Division of Taxation had no comment, no further time will be allowed for submission of written comments regarding the amicus brief. This case will proceed to oral argument.

DATED: Troy, New York
May 28, 1992

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner