STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
ELECTCHESTER FIRST HOUSING COMPANY **ELECTCHESTER SECOND HOUSING COMPANY** **ELECTCHESTER THIRD HOUSING COMPANY** **ELECTCHESTER FOURTH HOUSING COMPANY** **ELECTCHESTER FIFTH HOUSING COMPANY** **KNICKERBOCKER VILLAGE HOUSING COMPANY**	:	DECISION DTA NOS. 816912, 816913, 816914, 816915, 816916 AND 816917
for Revision of Determinations or for Refunds of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period April 5, 1995 through May 5, 1998.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on December 2, 1999 with respect to the petitions of Electchester First Housing Company, 161-04 Jewel Avenue, Flushing, New York 11365, Electchester Second Housing Company, 161-29 Harry Van Arsdale Avenue, Flushing, New York 11365, Electchester Third Housing Company, 65-52 160th Street, Flushing, New York 11365, Electchester Fourth Housing Company, 65-94 162nd Street, Flushing, New York 11365, Electchester Fifth Housing Company, 65-83 160th Street, Flushing, New York 11365 and Knickerbocker Village Housing Company, 10 Monroe Street, New York, New York 10002. Petitioners appeared by Stephen P. Kramer, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Cynthia E. McDonough, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception and petitioners filed a brief in opposition. The Division of Taxation filed a reply brief. Oral argument, at the Division of Taxation's request, was heard on August 10, 2000 in Troy, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether Private Housing Finance Law § 93(1) exempts petitioners, limited dividend housing companies under Article IV of the Private Housing Finance Law, from tax imposed pursuant to Tax Law § 1107.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioners, Electchester First Housing Company, Electchester Second Housing Company, Electchester Third Housing Company, Electchester Fourth Housing Company, Electchester Fifth Housing Company and Knickerbocker Village Housing Company, filed claims for refunds of tax paid on purchases of utilities pursuant to Tax Law § 1107 as follows:

Petitioner	***Date of Claim(s)***	***Period of Claim(s)***	***Amount of Claim(s)***
Electchester First Housing Co.	6/8/98	4/5/95-5/5/98	$45,471.39
Electchester Second Housing Co.	5/12/98	8/31/95-5/5/98	$63,456.65 1,602.01 1,319.68 37.66
Electchester Third Housing Co.	5/12/98	5/3/95-4/6/98 6/2/95-4/6/98	$82,418.60 1,525.81

Electchester Fourth Housing Co.	6/8/98	4/5/95-5/5/98	$38,623.17
Electchester Fifth Housing Co.	5/12/98	10/31/95-5/5/98 6/2/95-5/5/98	$20,021.78 18,667.26
Knickerbocker Village Housing Co.	5/13/98	5/8/95-4/8/98	$105,931.31

By letters dated October 13, 1998, the Division of Taxation ("Division") denied petitioners' claims in full. The letters provided that "although the Private Housing Finance Law allows an exemption to limited dividend housing companies to [sic] sales and use taxes imposed by New York State, the tax you are requesting to be refunded is a local tax and cannot be refunded on this basis."

Petitioners are located in New York City and are limited dividend housing corporations within the meaning of Article IV of the Private Housing Finance Law. The tax at issue is a four percent sales tax added to petitioners' residential energy bills by their utility company. Petitioners paid the tax at issue and such tax was remitted to the State of New York. There is no dispute regarding the computation of petitioners' refund claims.

By letter dated October 1, 1998, the Division's former counsel responded to petitioners' letter to the Division's Sales Tax Instructions and Interpretations Unit asking whether limited dividend housing companies are exempt from paying taxes imposed by Tax Law § 1107. This letter stated that such companies were not so exempt.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge concluded that petitioners are limited dividend housing companies as defined in Article IV of the Private Housing Finance Law (hereinafter "PHFL") and are, therefore, exempt from any and all franchise, organization,

income, mortgage recording and other taxes to the state and all fees to the state or its officers pursuant to PHFL § 93(1).

The Administrative Law Judge discussed the history of Tax Law § 1107, noting that simultaneous with its enactment, New York City's authority to impose local sales tax pursuant to Tax Law § 1210 was suspended. The Administrative Law Judge observed that the section 1107 tax is imposed solely within the territorial limits of New York City and tax paid pursuant to Tax Law § 1107 is collected by the Division and deposited into a municipal assistance tax fund. Such funds are, in turn, disbursed by the State Comptroller to the Municipal Assistance Corporation for the City of New York (hereinafter "MAC") in order that MAC may meet its financial obligations. If a balance remains in the municipal assistance tax fund after payment to MAC, it is appropriated to New York City.

The Administrative Law Judge concluded that the plain meaning of Tax Law § 1107 compels a finding that petitioners' payment of section 1107 tax constituted the payment of taxes to the State within the meaning of PHFL § 93(1) and, therefore, petitioners were properly exempt from the payment of such tax.

The Administrative Law Judge rejected the Division's argument that the tax imposed pursuant to section 1107 is local in nature and does not benefit the State. The Administrative Law Judge held that the tax imposed by section 1107 is imposed, collected, and appropriated pursuant to State statutes. Conversely, the City of New York did not enact section 1107; does not collect or administer the tax; and does not control the appropriation of the revenue raised by the tax. Furthermore, the Administrative Law Judge concluded that the State Legislature explicitly stated in Chapter 187 of the Laws of 1975 that section 1107 is a State tax.

Additionally, the Governor's Memorandum of Approval for Chapter 187 specifically refers to the tax imposed by Tax Law § 1107 as a "sales tax imposed by the State" and "a State sales and use tax."

The Administrative Law Judge found that the issue of whether the section 1107 taxes "benefit" the State is irrelevant to a determination of whether these taxes fall within the PHFL § 93(1) exemption. The Administrative Law Judge determined that even if the statute in question limited exemptions to those taxes which "benefit" the State, Tax Law § 1107 would qualify, because MAC, the entity which ultimately receives the revenue generated by section 1107, is a public benefit corporation. Also, the Administrative Law Judge noted that the Legislature has stated that the funding of MAC to enable MAC to meet its obligations is in the interests of the State of New York. The Legislature has thus determined that the funding of MAC through revenues generated by Tax Law § 1107 benefits the State.

The Administrative Law Judge found that where a tax is imposed, and its proceeds spent, is not determinative of whether the tax is properly deemed a local tax. The Administrative Law Judge distinguished the tax at issue from taxes authorized pursuant to Articles 29 and 30 of the Tax Law. Article 29 authorizes certain localities to pass a local law and to impose a sales tax and Article 30 authorizes certain localities to pass a local law and to impose an income tax. Thus, taxes under these articles are imposed by localities. In contrast, the Administrative Law Judge noted that taxes imposed under Article 28, including Tax Law § 1107, are mandated directly by the State. In addition, the Administrative Law Judge found that the Governor's Memorandum of Approval evinces an intent by the drafters of the legislation that the tax in question be considered a State tax. The Administrative Law Judge stated that even more significantly, Chapter 187 of

the Laws of 1975 expressly states that, except for Federal revenue sharing purposes, "but not otherwise," Tax Law § 1107 is a State tax.

The Administrative Law Judge rejected the Division's argument that ***People v. Brooklyn Garden Apts.*** (283 NY 373) supported its position. The Administrative Law Judge noted that the issue in that case was whether a particular *charge* imposed by the State constituted a tax or a fee within the meaning of the exemption provision. The court contrasted a *tax* from the *charge* at issue, which was "payable to [the State] for a specific purpose" (***People v. Brooklyn Garden Apts.***, ***supra***, at 380). Based on ***Brooklyn Garden Apartments***, the Division asserted that this particular tax was a local and not a State tax because section 1107 tax revenue was not deposited into the State's General Fund. The Administrative Law Judge concluded that ***Brooklyn Garden Apartments*** does not address the difference between a State tax and a local tax nor does it address the issue of whether a state tax loses its character as such where, as in the instant matter, the State Finance Law requires the deposit of such tax in a fund other than the General Fund. The Administrative Law Judge noted that the State Finance Law provides for numerous special funds into which the revenues from specific taxes are deposited. The Administrative Law Judge concluded that such taxes do not cease to be State taxes simply because of the method of accounting for such funds.

ARGUMENTS ON EXCEPTION

On exception, the Division argues that the Administrative Law Judge erroneously concluded that the tax at issue constituted a State tax because it was enacted by the State, administered and collected by the State. The Division maintains that these facts are not dispositive of the nature of the tax because pursuant to the State Constitution, all taxes require

legislative authorization as a prerequisite. Additionally, the Division claims that taxes imposed under Articles 29 and 30 of the Tax Law can also be imposed directly by the State Legislature without additional action by municipalities.

The Division believes that the Administrative Law Judge should have examined the substance and effect of the tax in order to determine its true nature. The Division argues that in ***Bethlehem Steel Corp. v. Board of Education*** (61 AD2d 147, 402 NYS2d 655, ***affd*** 44 NY2d 831, 406 NYS2d 752, ***appeal dismissed sub nom. City of Rochester v. Waldert*** (439 US 922, 58 L Ed 2d 315), two statutes which were designed to raise money for localities while avoiding the constitutional limits on local real property taxation were struck down as unconstitutional. There, the Court examined the transaction in its entirety and followed the money to identify the ultimate beneficiary of the funds in determining the true nature of the tax. Thus, posits the Division, Tax Law § 1107 is not, in substance, a State tax. The substitution of sales taxes by the State was necessary as a financing mechanism to insure that MAC could sell its bonds in the private market. The Division argues that the end result of the sales tax imposed remained the same as it had under Tax Law § 1210. Just because section 1107 is included in Article 28 does not mean that it is a State tax. Rather, it replaces revenue in an identical manner as was collected under Article 29.

The Division maintains that this is a case of statutory interpretation. Since PHFL § 93 was initially enacted in 1926, the line between what constitutes "payment to the state and its officials" of taxes has become blurred. Until 1965, the State was the payee of tax revenue that inured to the benefit of the State. The Division states that, through revenue sharing and state aid, tax revenues initially paid to the State are being turned over to localities at a rate not anticipated in 1926. PHFL § 93 does not exempt taxes imposed by the State but taxes paid to the State. Since 1965,

all sales taxes are paid to the State in the first instance. The Division claims that this hybridization of what constituted "payment to the state" increased with the enactment of the package of bills designed to assist the financial bailout of New York City, including section 1107.

Statutes granting an exemption from taxation are to be construed strictly against the taxpayer. Where the language of a statute is ambiguous, the courts may resort to other aids, such as legislative history, to arrive at the statute's true meaning. Here, the Division asserts, it makes little sense for the Legislature to have intended an additional tax exemption for limited dividend housing companies as well as other housing companies organized under PHFL, and located in New York City, when other measures enacted simultaneously were designed to preserve and enhance the City's income stream and prevent its bankruptcy. The Division claims that the legislative history does not indicate an intent to provide a tax exemption for private housing companies located in New York City that is not available to upstate private housing companies nor is there an intent that tax revenue would go to any State purpose other than MAC.

In opposition, petitioners argue that the statutory scheme of section 1107 is neither subtle nor complex. Taxes imposed under section 1107 are imposed by the State, paid to the State and spent by the State. The Legislature's enactment of section 1107 does not end the inquiry of whether or not that tax is a State tax. Rather, the legislature declared that this tax was identical to the State sales and use tax imposed pursuant to sections 1105 and 1110 of the Tax Law. Petitioners assert that this is simply a new State tax payable to the State.

Petitioners believe that there is no ambiguity that must be resolved here. They argue that the Division fails to explain how a tax which is decreed identical to the State sales and use tax, from which petitioners are exempt, and which is paid to the State of New York, could apply to

companies such as petitioner that are exempt from the payment of taxes to the State. The Division, they claim, also ignores the provisions of Chapter 187 which declares that except for purposes of Federal revenue sharing, the tax is construed for all purposes as a tax imposed by the State. Similarly, the Governor's memorandum states that MAC will be funded by a sales tax imposed by the State.

Petitioners agree with the Administrative Law Judge's rejection of the Division's argument that because the Legislature has decided to use the proceeds of the section 1107 tax to benefit the City of New York, petitioners should be viewed as paying the tax to the City and not to the State. Petitioners maintain that the exemption at issue does not depend on the expenditure of the tax money. If so, petitioners would be subject to a portion of many other taxes from which they are now exempt, since the State remits a significant portion of these taxes to the City through local revenue sharing. Petitioners claim that no support for this limitation on the exemption is found in the statute or in case law nor do the cases relied on by the Division stand for the proposition that a tax levied and collected by the State which is ultimately paid over to a State public benefit corporation is deemed a tax paid to a locality. Similarly, petitioners view as specious the Division's argument that because all local sales taxes are paid to the State, the section 1107 tax (which replaced a pre-existing local tax) is a local tax as well.

For the sake of argument, petitioners suggest that if locally imposed sales taxes were outside the scope of the PHFL exemption (an issue not presented herein), it does not follow that section 1107 taxes are outside that scope. They are not paid to the State as an agent for the locality - they are paid to the State because the Legislature has directed that they be so paid and collected. Exemptions from local taxes pursuant to PHFL § 93 are subject to local option. New

York City has no control over section 1107 taxes nor can petitioner ask the City for exemption from these taxes under the authorizing provisions of PHFL § 93(3) or (4).

In its reply brief, the Division argues that State action, by itself, is not sufficient to make a tax a State tax. The key question is what indicia characterize a tax a State tax. The language used in section 1107 concerning its identity with sections 1105 and 1110 is similar to language in section 1210. The reasons for the creation of section 1107 are analogous to the rationale for the creation of the tax statutes to aid localities addressed in ***Gandolfi v. City of Yonkers*** (101 AD2d 188, 475 NYS2d 429, ***appeal dismissed*** 62 NY2d 604, 478 NYS2d 1023, ***affd*** 62 NY2d 995, 479 NYS2d 517) and ***Bethlehem Steel Corp. v. Board of Education*** (***supra***). There, the courts decided that the nominal substitution of a state tax for a local tax was not enough to make a tax a state tax for purposes of the constitutional limitation on local real property taxes. Further, the Division claims, no other purported State tax is attributed to local taxing efforts for Federal revenue sharing purposes as is section 1107. The Division maintains that although section 1107 revenues go to support a public benefit corporation, the purpose of such a corporation is not necessarily to implement state initiatives. The Division argues that the nature of a tax must be determined by its operation rather than by the descriptive language applied to it. As the Tax Appeals Tribunal has stated in ***Matter of Baker*** (Tax Appeals Tribunal, October 11, 1990) the label of the tax is not conclusive but the nature and practical effect is determinative. The standard of substance over form should be applied to examining the tax at issue. The Division believes that the present sales tax scheme could not have been envisioned in 1926 when PHFL was first enacted. Therefore, its terms must be interpreted in light of the current system whereby all Article 28 and 29 taxes are paid to the State. The Division maintains that there was no legislative intent

in enacting section 1107 to grant petitioners a new exemption from sales tax which they had not enjoyed previously.

The Division maintains that in order to prevail over the Division's interpretation of section 1107, petitioners bear the burden to show that their interpretation of the statute is the only reasonable one. The Division argues that petitioners have not met their burden. If petitioners are correct, urges the Division, their interpretation would open the door to exemptions from Article 29 taxes paid to the State that would negatively impact New York City's revenues. This would be inconsistent with the extraordinary measures instituted by the State Legislature to overcome New York City's fiscal crisis.

OPINION

Tax Law § 1107(a) provides as follows:

> On the first day of the first month following the month in which a municipal assistance corporation is created under article ten of the public authorities law for a city of one million or more, in addition to the taxes imposed by sections eleven hundred five and eleven hundred ten, there is hereby imposed on such date, within the territorial limits of such city, and there shall be paid, additional taxes, at the rate of four percent, which except as provided in subdivisions (b) and (d) of this section, shall be identical to the taxes imposed by sections eleven hundred five and eleven hundred ten. Such sections and the other sections of this article, including the definition and exemption provisions, shall apply for purposes of the taxes imposed by this section in the same manner and with the same force and effect as if the language of those sections had been incorporated in full into this section and had expressly referred to the taxes imposed by this section.

PHFL § 93(1) provides that "[a]ny housing company shall be exempt from the payment of any and all franchise, organization, income, mortgage recording and other taxes to the state and all fees to the state or its officers."

The City of New York, as are other cities and counties in New York State, was authorized to impose a local sales tax pursuant to Tax Law § 1210. However, the City's authority to do so was suspended pursuant to section 1210(f) until such time as the notes and bonds of MAC for the City of New York have been fully paid and discharged.

On exception, the Division continues to argue that because the tax enacted by Tax Law § 1107 is like the local tax imposed pursuant to Tax Law § 1210, it remains a local tax and thus not subject to the PHFL § 93 exemption. There is no support for this argument. It was the Legislature which provided the authority, pursuant to Tax Law § 1210, for cities and counties to enact local sales and use tax legislation in the first instance. Pursuant to section 1210(f), the Legislature specifically suspended the authorization of the City of New York to impose a sales and use tax by local law. The State then imposed its own additional tax pursuant to section 1107, intended to be nearly identical to the existing State sales and use tax.

What indicia, we must ask, does this additional tax bear that would classify it as a local tax? As the Administrative Law Judge has pointed out, it was imposed by the State and not by the City of New York; it was collected by the State and not by the City of New York; and the revenue it generated was administered by the State and not by the City of New York. While excess funds collected pursuant to section 1107 are remitted to New York City by the State, we do not find this sufficient to transform the additional tax into a local tax. The fact that the tax at issue is not imposed pursuant to section 1210 but section 1107 in itself indicates that it cannot be considered as identical to other section 1210 taxes. Our conclusion that this tax is a State tax is strengthened by the specific language of Chapter 187 of the Laws of 1975 and of the Governor's Memorandum in Support which define the tax imposed pursuant to section 1107 as a State tax.

Moreover, whether or not Tax Law § 1107 is a State tax is not the ultimate question. PHFL § 93(1) provides that limited dividend housing companies as defined in Article IV of the PHFL are "exempt from the payment of any and all franchise, organization, income, mortgage recording and other taxes to the state and all fees to the state or its officers." The sales tax imposed by section 1107 is undeniably a tax. It is also undeniably paid to the State. As petitioners point out, we are not called upon to review the Division's position that taxpayers such as petitioner are only exempt from that portion of the sales and use tax enacted pursuant to Article 28 (and not Article 29).

The Division argues that we should follow the money. Indeed, that is what PHFL § 93 requires the taxpayer to do. If the money is to be paid to the State as a tax, then petitioners are exempt from having to pay it. There is no requirement that petitioners first pay the money to the State and then follow it as it passes through the State's coffers into the hands of its ultimate recipient in order to determine if they were required to have paid it in the first instance.

We find that the Administrative Law Judge fully addressed the issues raised herein in his determination and see no reason to disturb his conclusions. Therefore, we affirm his determination.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of the Division of Taxation is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petitions of Electchester First Housing Company, Electchester Second Housing Company, Electchester Third Housing Company, Electchester Fourth Housing Company,

Electchester Fifth Housing Company and Knickerbocker Village Housing Company are granted; and

4. The Division of Taxation is directed to refund the tax in accordance with conclusion of law "H" of the Administrative Law Judge's determination.

DATED: Troy, New York
February 8, 2001

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner