STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CUNA MUTUAL INSURANCE SOCIETY	:	DETERMINATION DTA NO. 813881
for Redetermination of a Deficiency or for Refund of Franchise Taxes on Insurance Corporations under Article 33 of the Tax Law for the Years 1990 and 1991.	:	

Petitioner, CUNA Mutual Insurance Society, 5910 Mineral Point Road, Madison, Wisconsin 53705-4498, filed a petition for redetermination of a deficiency or for refund of franchise taxes on insurance corporations under Article 33 of the Tax Law for the years 1990 and 1991.

On February 12, 1996 and February 22, 1996, respectively, petitioner, appearing by Hugh T. McCormick, Esq., and the Division of Taxation, appearing by Steven U. Teitelbaum Esq. (Andrew J. Zalewski, Esq., of counsel) consented to have the controversy determined on submission without hearing. On April 1, 1996 the Division of Taxation submitted documentary evidence. On May 3, 1996 petitioner submitted documents and a brief. On June 13, 1996 the Division of Taxation submitted a brief. On July 12, 1996 petitioner submitted a reply brief. Accordingly, the six-month period for the issuance of this determination began on July 12, 1996. After due consideration of the record, Timothy J. Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner is properly subject to the additional franchise tax on insurance corporations at the rates provided for in Tax Law § 1510(a), which imposes such tax on insurance corporations "except life insurancecorporations", or Tax Law § 1510(b), which imposes such tax on "life insurance corporations".

FINDINGS OF FACT

1. Petitioner, CUNA Mutual Insurance Society, is a mutual life insurance company organized under the laws of the State of Wisconsin. During the years at issue, petitioner held a valid license issued by the New York State Insurance Department allowing petitioner to engage in the business of "life, annuities, and accident and health insurance".

2. During the years at issue, petitioner did business in New York pursuant to its license.

3. On its Franchise Tax Return for Insurance Corporations (Form CT-33) for the year 1990 petitioner reported life insurance premiums of $17,051,810.00 (line 73), accident and health insurance premiums of $20,229,712.00 (line 72) and total life insurance company premiums of $37,281,522.00 (line 6).

4. On its 1991 CT-33 petitioner reported life insurance premiums of $17,551,604.00 (line 92), accident and health insurance premiums of $20,617,468.00 (line 93) and total life insurance company premiums of $38,169,072.00 (line 6).

5. On both its 1990 and 1991 CT-33's petitioner calculated the premiums portion of its franchise tax liability as a life insurance company, as opposed to a nonlife insurance company.

6. Petitioner filed its Federal income tax returns for the years at issue on Form 1120-PC ("U.S. Property and Casualty Insurance Company Income Tax Return").

7. Following an audit of petitioner's 1990 return, the Division of Taxation ("Division") issued to petitioner a Notice of Deficiency dated June 6, 1994 which asserted $144,522.00 in additional franchise tax due, plus interest, for 1990. The Division made several adjustments to petitioner's return in its calculation of petitioner's 1990 franchise tax deficiency. Petitioner conceded the adjustments made to its allocation percentage and its entire net income. At issue herein is the Division's recomputation of the premiums portion of petitioner's franchise tax liability. Specifically, the Division determined that petitioner had improperly calculated its tax on premiums at the rates applicable to life insurance companies. The Division took the position that the premiums portion of petitioner's franchise tax liability was properly calculated at the higher rates applicable to nonlife insurance companies.

8. Petitioner subsequently paid the amount asserted due in the June 6, 1994 Notice of Deficiency and filed a Claim for Refund dated January 1995 seeking refund of $124,967.00. Petitioner's refund claim was premised on the assertion that the Division had improperly calculated the premiums component of petitioner's franchise tax liability by classifying petitioner as a nonlife insurance company. Petitioner took the position that it should be subject to the tax on premiums at the rates prescribed for life insurance companies. In the calculation of its refund claim, petitioner used the allocation percentage and entire net income amounts as adjusted by the Division on audit. The calculation of the refund claim was not at issue in this matter.

9. By letter dated February 2, 1995, the Division denied petitioner's claim in full.

10. On February 28, 1995 the Division issued to petitioner a Notice of Deficiency asserting $122,384.00 in additional corporation franchise tax due, plus interest, for the year 1991. This deficiency resulted from audit adjustments made to petitioner's allocation percentage and also from a recomputation of the premiums tax component of petitioner's franchise tax liability by computing the tax on premiums at the rates applicable to nonlife insurance companies. The Division also made a downward adjustment to petitioner's reported premiums. Specifically, the Division determined that petitioner had $20,465,975.00 in accident and health premiums, and $17,013,612.00 in life insurance premiums for total premiums of $37,479,587.00, a lower amount than reported (see, Finding of Fact "4"). Petitioner accepted the adjustments to its allocation percentage and total premiums reported, but petitioned the recomputation of the tax on premiums at nonlife insurance company rates. Petitioner also asserted in the petition that, even accepting the audit adjustments to its allocation percentage, it had overpaid its franchise tax liability for 1991 by $2,950.00. This overpayment resulted from the downward adjustment in petitioner's total premiums reported. Petitioner claimed a refund in the amount of this overpayment. The Division did not raise any issue regarding petitioner's computation of this claimed refund.

11. For the years 1993 and 1994 petitioner reported and paid the franchise tax on premiums as a nonlife insurance company.

CONCLUSIONS OF LAW

A. As a foreign insurance company doing business in New York, petitioner is subject to the franchise tax imposed under Article 33 of the Tax Law. Article 33 imposes two different types of franchise taxes on insurance corporations. Specifically, similar to the tax imposed on general corporations under Article 9-A, Tax Law § 1501 imposes an income-based tax measured by the greatest of four alternative bases. Tax Law § 1510 imposes an additional franchise tax on insurance corporations based on the amount of "gross direct premiums" received by the corporation. It is this additional franchise tax which is at issue in the instant matter.

B. Tax Law § 1510 draws a distinction between life insurance corporations and all other insurance corporations by imposing the tax on premiums at a lower rate for life insurance corporations than for all other insurance corporations. During the period at issue, insurance corporations taxable under Tax Law § 1510(a) ("insurance corporations except life insurance corporations") paid the tax on premiums at the rate of 1.0% for accident and health premiums and 1.2% for all other premiums. Those insurance corporations taxable under Tax Law § 1510(b) ("life insurance corporations") paid the tax on premiums at the rate of .8%. The statutory language distinguishes between insurance corporations subject to the tax on premiums under section 1510 (former[a]) and those subject to tax under section 1510(b), in relevant part, as follows:

> "(a) Domestic, foreign and alien insurance corporations except life insurance corporations. Except as hereinafter provided, every domestic insurance corporation, and every foreign or alien insurance corporation authorized to transact business in this state under a certificate of authority from the superintendent of insurance other than such corporations transacting the business of life insurance, shall . . . pay a tax on all gross direct premiums . . . .
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> "(b) Domestic, foreign and alien life insurance corporations. (1) Except as hereinafter provided, every domestic life insurance corporation, and every foreign and alien life insurance corporation authorized to transact business in this state under a certificate of authority from the superintendent of insurance, shall . . . pay a tax on all gross direct premiums . . . ." (Tax Law § 1510.)

C. The issue in this case is whether petitioner falls within the class of insurance corporations taxable under section 1510(a) or whether petitioner is taxable under section 1510(b). Resolution of this controversy is a matter of statutory construction.

The fundamental rule of statutory construction is to effectuate the intent of the Legislature (Matter of 1605 Book Center, Inc. v. Tax Appeals Tribunal, 83 NY2d 240, 244, 609 NYS2d 144, 146, cert denied ___ US ___, 130 L Ed 2d 19). Where the statutory language is clear and unambiguous it should be construed so as to give effect to the plain meaning of the words used (Patrolmen's Benevolent Assn. v. City of New York, 41 NY2d 205, 208, 391 NYS2d 544, 546). Regarding tax statutes in particular, it is axiomatic that ambiguity therein must be "construed in favor of the taxpayer and against the taxing authority, and the burdens they impose are not to be extended by implication" (Matter of American Cyanamid & Chem. Corp. v. Joseph, 308 NY 259, 263). On the other hand, tax statutes should be construed to insure the collection of all designated taxes where a supportable theory can be found (see, County of Nassau v. Lincer, 254 App Div 760, 4 NYS2d 77, 78, affd 280 NY 662; see also, McKinney's Cons Laws of NY, Book 1, Statutes § 313).

D. In this case, the plain language of the relevant statute makes clear that petitioner is not subject to the tax on premiums at the rates set forth in Tax Law § 1510(a) and is subject to such tax at the rates specified in Tax Law § 1510(b).

Section 1510(a) specifically excludes "insurance corporation[s] transacting the business of life insurance" from the premiums tax at the rates specified therein. "Insurance corporation" is defined for purposes of Article 33 as "a corporation . . . doing an insurance business" (Tax Law § 1500[a]). Although this circuitous definition provides little illumination, there is no dispute (and no doubt [see, Findings of Fact "1"-"4"]) in the instant case that petitioner was an "insurance corporation" for purposes of Article 33. The verb "transact" means "to carry on a business" (see, Webster's Ninth New Collegiate Dictionary 1252 [1989]). As petitioner correctly notes at page 9 of its reply brief "the term 'transacting' has no particular quantitative sense." It is clear from the record, however, that the quantity of petitioner's life insurance

business was substantial. Specifically, petitioner had in excess of $17,000,000.00 in life insurance premiums for each of the years at issue. Approximately 45% of petitioner's total premiums for New York franchise tax purposes were life insurance premiums. Petitioner was thus obviously "transacting the business of life insurance" and was therefore among the class of insurance corporations specifically excluded from the tax on premiums at the rates prescribed in Tax Law § 1510(a).

To the extent that there may be any doubt that the plain language of Tax Law § 1510(a) excludes petitioner from tax at the rates specified therein, it is appropriate to turn to the Insurance Law for guidance in determining the meaning of the term "insurance corporation". The Court of Appeals has held that the predecessor to the current premiums tax provisions (i.e., Tax Law former § 187) was in pari materia with the Insurance Law, and that, accordingly, these provisions "must be read together and applied harmoniously and consistently" (Guardian Life Insurance Co. of America v. Chapman, 302 NY 226). Turning then to the Insurance Law, it is observed that Insurance Law § 107(a)(1), (10), (28), and (36) defines various types of insurance companies as entities "having power" to do or write various kinds of insurance. The Insurance Law thus defines insurance companies as entities which are licensed or authorized to engage in various kinds of insurance business. Since petitioner was licensed to engage in the business of "life, annuities, and accident and health insurance" it was an insurance company under the Insurance Law, and was, therefore, pursuant to the court's holding in Guardian Life, an insurance corporation for purposes of Tax Law § 1510(a). It is noted that the Division itself has looked to whether a company must be licensed by the Superintendent of Insurance to determine if the company is "doing an insurance business" and is therefore an "insurance corporation" under Tax Law § 1500(a) (see, Matter of Stuhlmaker, Kohn & Richardson, LLP, Advisory Opinion, September 12, 1996 [TSB-A-96(22)C]; Matter of KPMG Peat Marwick, Advisory Opinion, January 12, 1993 [TSB-A-93(4)C]).

Tax Law § 1510(b) imposes the tax on premiums at the rate specified therein on "every domestic life insurance corporation" and "every foreign . . . life insurance corporation

authorized to transact business in [New York] under a certificate of authority from the superintendent of insurance." Since petitioner, a foreign corporation, was licensed by the New York State Insurance Department to engage in the business of life insurance, the only question is whether petitioner was a "life insurance corporation" for purposes of Tax Law § 1015(b). The term "life insurance corporation" is not defined in Article 33 of the Tax Law. However, as discussed previously, the premiums tax portion of the Tax Law and the Insurance Law are in pari materia. Accordingly, it is appropriate to refer to the Insurance Law to determine the meaning of this term.

Section 107(a)(28) of the Insurance Law defines "life insurance company" as "any corporation having power to do either one or both of the kinds of insurance business specified in [Insurance Law § 1113(a)(1),(2)]." Section 1113(a)(1) and (2) list "life insurance" and "annuities", respectively, among the kinds of insurance which may be authorized in New York. Thus, under the Insurance Law, a life insurance company is a company having power to do life insurance and/or annuity business in New York. The Insurance Law's definition does not require that a company actually engage in a certain level of life insurance business or that life insurance comprise a certain percentage of the company's business; it merely imposes a licensing requirement.

Petitioner is a mutual life insurance company organized under the laws of Wisconsin. During the years at issue, petitioner held a license issued by the New York State Insurance Department to engage in the business of life insurance. Petitioner was therefore a "life insurance company" as defined by Insurance Law § 107(a)(28).

Since petitioner was a life insurance company under the Insurance Law, it is concluded that petitioner was a life insurance corporation for purposes of Tax Law § 1510(b) and was therefore subject to the tax on premiums at the rate prescribed by that section (see, Guardian Life Insurance Co. of America v. Chapman, supra).

E. The Division of Taxation contends that merely being licensed to engage in the business of life insurance is insufficient to qualify as a life insurance corporation for purposes of

Tax Law § 1510. Rather, the Division asserts that the activities of the corporation must be analyzed. The Division specifically contends that "where an insurance company is licensed to sell life insurance in the State of New York, but derives less than 50% of its premiums from that business, it is improper to conclude that such corporation is engaged in 'transacting the business of life insurance' pursuant to Tax Law § 1510." The Division cites Matter of McAllister Bros., Inc. v. Bates (272 App Div 511, 72 NYS2d 532), as supportive of this contention. The Division also asserts that Internal Revenue Code § 816 is appropriately applied to determine whether petitioner is subject to tax under subdivision (a) or (b) of Tax Law § 1510.

Matter of McAllister v. Bates (supra), does not support the Division's position. In McAllister the former State Tax Commission reclassified the petitioner therein from a transportation corporation taxable under Article 9 to a business corporation taxable under Article 9-A. In confirming the former State Tax Commission's action, the Court rejected the petitioner's claim that its classification for franchise tax purposes should be governed by its Articles of Incorporation. Instead, the Court held that "classification for franchise tax purposes is to be determined by the nature of its business and that the purposes for which the Corporation was organized are immaterial." (Id., 72 NYS2d at 536.) The Division cites the above-quoted language in support of its contention that petitioner's business activities, and not simply its licenses, are determinative of the issue presented herein. McAllister is distinguishable from the instant matter, however, because the Article 9 statute in question, Tax Law former § 184 imposed franchise tax on corporations "formed for or principally engaged in the conduct of a transportation or transmission business" (emphasis added). The language of former section 184 thus supports the Court's holding that it is a quantitative analysis of the corporation's business and not merely the Articles of Incorporation which controls for purposes of classification under Article 9 or 9-A. Unlike Tax Law former § 184, there is simply no language in Tax Law § 1510 which could be interpreted to require an insurance corporation to be "principally engaged" in the business of life insurance in order to qualify as a life insurance corporation under Article 33. As petitioner correctly notes in its reply brief, the Division's interpretation would require modifying

Tax Law § 1510 by adding the words "principally" or "primarily", and the Division has offered neither legislative history nor case law to indicate that any such broadening of the scope of the statute was ever contemplated by the Legislature (Patrolmen's Benevolent Assn. v. City of New York, supra, at 208, 391 NYS2d at 546).

Furthermore, it is clear that Internal Revenue Code § 816 has no application to the instant matter. Article 33 contains no language indicating that the Internal Revenue Code definition of life insurance company is in any way relevant to the imposition of tax under Tax Law § 1510. Indeed, as discussed previously, the terms "life insurance corporation" and "insurance corporation" are defined, for purposes of Tax Law § 1510, by the language of the relevant sections of Article 33 and by reference to the relevant sections of the Insurance Law. Moreover, it is noted that the Legislature has expressly referred to the Internal Revenue Code in those sections of the Tax Law (including Article 33) where the Code is relevant (see, e.g., Tax Law §§ 208, 1503). In other instances Tax Law provisions have been modeled after similar provisions in the Internal Revenue Code (e.g., Tax Law § 685[g]; IRC § 6672). In this case, however, there is no relevant reference to the Internal Revenue Code and there is no parallel Federal tax on premiums. Finally, it is clear that IRC § 816 is inapplicable to the instant matter because life insurance company is defined in that section in terms of life insurance reserves and total reserves, and these terms have no relation to a tax based on premiums received. Accordingly, petitioner's classification for Federal tax purposes (see, Finding of Fact "6") is immaterial to its classification for purposes of Tax Law § 1510.

F. The petition of CUNA Mutual Insurance Society is granted; petitioner's claim for refund for 1990 is granted; the Notice of Deficiency dated February 28, 1995 is cancelled; and petitioner's claim for refund for 1991 is granted.

DATED: Troy, New York
December 26, 1996

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE