STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FIRST UNUM LIFE INSURANCE COMPANY	:	DETERMINATION DTA NO. 813883
for Redetermination of a Deficiency or for Refund of Insurance Corporation Franchise Tax under Article 33 of the Tax Law for the Period January 1, 1989 through December 31, 1991.	:	

Petitioner, First Unum Life Insurance Company, 120 White Plains Road, Tarrytown, New York 10591-5522, filed a petition for redetermination of a deficiency or for refund of insurance corporation franchise tax under Article 33 of the Tax Law for the period January 1, 1989 through December 31, 1991.

Petitioner and the Division of Taxation executed a waiver consenting to have the controversy determined on submission of documents without a hearing. Both parties submitted documents and briefs. Petitioner's reply brief was submitted on September 11, 1996 which date began the six-month statutory period for issuance of this determination. Petitioner appeared by Paul Standish, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Andrew J. Zalewski, Esq., and Kenneth J. Schultz, Esq., of counsel). Upon consideration of the pleadings, documents and briefs submitted in this matter, Jean Corigliano, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner may compute the additional tax on premiums imposed under section 1510 of the Tax Law using the tax rates appropriate for life insurance corporations as provided for in Tax Law § 1510(b) or, instead, isrequired to use the tax rate for all other insurance corporations as provided for in Tax Law § 1510(a).

FINDINGS OF FACT

1. Pursuant to section 306 of the State Administrative Procedure Act, the Division of Taxation ("Division") submitted 11 proposed findings of fact all of which have been accepted and incorporated into this determination.

2. The Division issued to petitioner, First Unum Life Insurance Company, a Notice of Deficiency, dated August 30, 1993, asserting a deficiency of insurance corporation franchise tax in the amount of $197,924.00 for the period January 1, 1989 through December 31, 1991.

3. The method by which the tax deficiency asserted in this Notice of Deficiency was computed is set forth in a Statement of Proposed Audit Adjustment dated July 19, 1993. None of the audit adjustments described in that statement were challenged by petitioner, either in its request for conference or its petition to the Division of Tax Appeals. Consequently, those adjustments need not be considered here.

4. For each of the years in issue, petitioner filed a form CT-33, Franchise Tax Return for Insurance Corporations. On these returns, petitioner computed its premiums and reported them as follows:

Year	Life Insur.	Accident & Health Insur.	Total
1989	$ 9,894,792.00	$120,501,323.00	$130,396,115.00
1990[1]	14,004,209.00	122,733,411.00	136,737,620.00
1991	15,634,608.00	117,809,192.00	133,443,800.00

5. For the years 1989, 1990 and 1991, petitioner reported its income on a Federal form 1120-PC, "U.S. Property and Casualty Insurance Company Income Tax Return". For each year, petitioner attached a copy of its Federal income tax return to its corresponding state return.

6. On or about September 3, 1993, the Division issued a notice to petitioner asserting a greater deficiency of franchise tax and metropolitan transportation business tax surcharge (MTBS). The amount of the additional deficiencies computed for each year is as follows:

Year	Tax Asserted	Amount

[1]These figures are from an amended 1990 franchise tax return. Petitioner's original return reported $13,579,409.00 for life insurance premiums and $116,840,403.00 for accident and health insurance premiums yielding a total of $130,419,812.00.

1989	franchise tax	$ 268,610.00
1989	MTBS	29,126.00
1990	franchise tax	244,471.00
1990	MTBS	22,731.00
1991	franchise tax	341,243.00

7. Petitioner is challenging only one aspect of the Division's recalculation of tax due. Section 1510 of the Tax Law imposes an additional franchise tax on premiums. The tax rate applied to premiums is lower for life insurance corporations than it is for other insurance corporations. In computing the tax on premiums, petitioner applied the life insurance corporation tax rate of 0.8%, as provided for in Tax Law § 1510(b). The Division determined that petitioner is not a life insurance corporation and applied the tax rates appropriate for insurance corporations other than life insurance corporations, 1% on premiums from accident and health insurance policies and 1.2% on all other premiums (Tax Law § 1510[a]), which in this case included premiums from life insurance. In its letter to petitioner of September 3, 1993, the Division explained the basis for its conclusion that petitioner is not a life insurance corporation under the statute.

> "Article 33, Section 1510 imposes a tax on all insurance companies for the privilege of doing business in New York State on all direct gross premiums, less return premiums, written on risks located or resident in New York.
>
> "By filing an 1120PC for federal purposes, you are allowed the adjustments to unearned premiums and unpaid losses based on the fact that most of your premiums are accident and health premiums.
>
> "However, for New York State purposes, since over 50% of your premiums are due to accident and health policies, tax is computed at the rate of 1% and your life insurance premiums are considered 'other premiums' and taxable at 1.2%."

CONCLUSIONS OF LAW

A. New York imposes a franchise tax on every domestic, foreign and alien insurance corporation for the privilege of exercising its corporate franchise or doing business or employing capital or owning or leasing property in New York in a corporate or organized capacity or maintaining an office in New York (Tax Law § 1501[a]). Every insurance corporation subject to the tax imposed must pay an amount that is the greatest of four alternative amounts calculated on the basis of entire net income, total business and investment

capital allocated within New York, entire net income plus compensation to officers or a minimum of $250.00 per year, plus a tax on subsidiary capital (Tax Law § 1502). In addition, each insurance corporation is required to pay a tax on all gross direct premiums less returns written on risks located or resident in New York (Tax Law § 1510). This additional tax on premiums is the source of the dispute between the parties.

As pertinent, Tax Law § 1510(a) provides:

> "[E]very 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, for the privilege of exercising corporate franchises . . ., pay a tax on all gross direct premiums, less return premiums thereon, written on risks located or resident in this state."

For the years in issue, the tax rate to be applied to premiums taxed by section 1510(a) was 1.2% with the exception of "accident and health insurance contracts" which were taxed at a rate of 1% (Tax Law § 1510[a]).

Tax Law § 1510(b) provides, as relevant:

> "[E]very domestic life insurance corporation, and every foreign or alien life insurance corporation authorized to transact business in this state under a certificate of authority from the superintendent of insurance, shall, for the privilege of exercising corporate franchises or for carrying on business in a corporate or organized capacity within this state, and in addition to any other taxes imposed for such privilege, pay a tax on all gross direct premiums, less return premiums thereon, received in cash or otherwise on risks resident in this state, including supplemental contracts for total and permanent disability benefits and accidental death benefits."

The tax rate imposed under section 1510(b) was 0.8% for the years in issue.

B. The primary issue in this proceeding is whether petitioner must calculate the additional tax on insurance premiums using the rates set forth in Tax Law § 1510(a) for most insurance corporations or should apply the reduced rate applicable to life insurance corporations under Tax Law § 1510(b).

Petitioner claims that it is a "life insurance corporation" as that term is used in section 1510 of the Tax Law and that it appropriately calculated its additional tax on premiums in accordance with Tax Law § 1510(b). It contends that the language of section 1510 supports its position making it unnecessary to look beyond the statute to discern the meaning of the

enactment. According to petitioner, section 1510 directs the Division to look to the grant of authority under which the corporation operates rather than the mix of premiums received by the corporation to determine whether the corporation is to be taxed as a life insurance corporation or a nonlife insurance corporation. If guidance is needed to construe the statutory language, then petitioner, relying on Guardian Life Insurance Co. v. Chapman (302 NY 226), argues that Article 33 of the Tax Law and the Insurance Law are in pari materia and must be read together and applied consistently. According to petitioner, the Insurance Law supports its position that the writing of accident and health insurance policies is an activity of a life insurance corporation.

The Division claims it properly categorized petitioner as a corporation other than a life insurance corporation based on the nature and quantity of petitioner's business activities. It argues that petitioner's grant of authority to transact business as a life insurance corporation is not the crucial factor in determining the proper tax rate to be applied to premiums. Relying on Matter of McAllister Bros., Inc. v. Bates (272 App Div 511), the Division maintains that a determination of a corporation's tax status must be made based on the nature the corporation's business activities in New York and not on its grant of authority. In addition, the Division maintains that in determining whether petitioner is a life insurance corporation within the meaning of Tax Law § 1510, it is appropriate to look to Federal tax law, specifically IRC § 816. Pursuant to the Federal statute, petitioner filed its Federal returns as a property and casualty insurance company for the years in issue. In the Division's view, this fact alone precludes petitioner from claiming that it is a life insurance corporation under Tax Law § 1510.

Petitioner offers several challenges to the Division's position. It argues that the holding in McAllister is confined to corporations organized under the general business corporation laws and has no value in deciding the matter at hand. Petitioner also maintains that its classification for Federal tax purposes is irrelevant for state purposes. It bases this argument on two factors. First, petitioner notes that the criteria used to determine its status under Federal law is based on reserves held rather than premiums received or contracts written during the tax year. Petitioner

also disputes the Division's contention that the writing of accident and health insurance policies does not constitute the business of a life insurance company.

C. I find that petitioner is a life insurance corporation for purposes of Tax Law § 1510 and properly calculated its additional franchise tax on premiums using the rate set forth at Tax Law § 1510(b). This conclusion is based primarily on my agreement with petitioner that Tax Law § 1510 must be read in pari materia with the Insurance Law and that such a reading supports petitioner's contention that it is a life insurance corporation for purposes of calculating the additional franchise tax on premiums.

Article 33 was enacted in 1974 to replace section 187 of Article 9 of the Tax Law (L 1974, ch 649) which imposed a franchise tax on insurance corporations calculated on the basis of premiums written on risks located or resident in New York (Tax Law former § 187). The Article 33 tax on insurance corporations was modeled after the tax on general business corporations imposed under Article 9-A, i.e., both are taxes measured by the greatest of four alternative tax bases which in most cases is entire net income apportioned to New York. In addition, however, by the inclusion of section 1510, Article 33 retained the tax on premiums previously imposed by Tax Law former § 187, and, in doing so, retained the distinction between life insurance corporations and other insurance corporations that existed in former section 187. Finally, Tax Law former § 187 and Tax Law § 1510 contain almost identical language. Several amendments to section 1510 that have occurred since its enactment in 1974 have not materially changed the enactment which remains substantially the same as Tax Law former § 187.

In Matter of Guardian Life Ins. Co. v. Chapman (302 NY 226, supra), the Court of Appeals was called upon to construe certain provisions of Tax Law former § 187. In doing so, it held that those provisions of the Tax Law which deal with the taxation of insurance companies and provisions of the Insurance Law dealing with the same general subject matter are in para materia and "must be read together and applied harmoniously and consistently" (Matter of Guardian Life Ins. Co., v. Chapman, supra, at 231). As noted, Tax Law § 1510 which is the subject of this determination is substantially the same as Tax Law former § 187.

Their similarity demonstrates that the Legislature did not intend to change the older provision in any material way. Consequently, it remains appropriate to read section 1510 of the Tax Law together with applicable provisions of the Insurance Law, and where identical terms appear in both they must be deemed to have the same meaning in both statutes.

Insurance Law § 1102 prohibits anyone from conducting an insurance business in New York unless authorized by a license. The kinds of insurance which may be authorized are enumerated in Insurance Law § 1113. Petitioner is licensed to do the business of life insurance (Insurance Law § 1113[a][1]), annuities (Insurance Law § 1113[a][2]) and accident and health insurance (Insurance Law § 1113[a][3]). In fact, it transacts all three kinds of business, although its accident and health insurance premiums far exceeded its life insurance premiums during the audit period.

Insurance Law § 107(a)(28) defines a life insurance company as "any corporation having power to do either one or both of the kinds of insurance specified in paragraphs one and two of [Insurance Law § 1113(a)]", i.e., the business of life insurance and annuities. Insurance Law § 107(a)(1) defines an accident and health insurance company as "any corporation having power to do the kinds of insurance business specified [in paragraph three of Insurance Law § 1113(a)], provided such company does not have power to do any other kind or kinds of insurance business." Since petitioner has the power to do the business of life insurance and annuities as well as accident and health insurance, it is not an accident and health insurance corporation pursuant to Insurance Law § 107(a)(1).

As petitioner points out, it also cannot be considered to be a property/ casualty insurance corporation under the Insurance Law since it is not authorized to write the basic kinds of insurance appropriate to a property/casualty insurance corporation (Insurance Law § 107[36]; § 4101[a]). Under section 4102(b) of the Insurance Law, a "property/casualty insurance company" may be licensed to write accident and health insurance, but the latter is considered to be a nonbasic type of insurance, and a property/casualty insurance company can only write accident and health insurance if it also is licensed to write one or more of the basic kinds of

insurance which are listed in Insurance Law § 4101(a) (Insurance Law § 4102[b]). Pursuant to the statutory scheme of the Insurance Law, it appears that (1) an accident and health insurance company has the power to do the business of accident and health insurance only; (2) a property/casualty insurance company may do the business of accident and health insurance but only if it is licensed to write the basic kinds of insurance and neither life insurance nor accident and health insurance is a basic kind of insurance; and (3) only a life insurance company may be authorized to do a life insurance business, and it may also do an accident and health insurance business. This supports petitioner's claim that the sale of accident and health insurance contracts is a life insurance company business activity. Based on the foregoing discussion, I find that petitioner was a "life insurance company" under the Insurance Law.

As I have already noted, Tax Law § 1510 must be deemed to be in pari materia with the Insurance Law. Moreover, the court in Matter of Guardian Life, stated that in dealing with matters of insurance taxation, it may be assumed that "the Legislature used words in the sense commonly understood in the insurance world" (Matter of Guardian Life Ins. Co. v. Chapman, supra, 302 NY, at 243). When it enacted Article 33, the Legislature adopted the language of Article 9-A, indicating that it intended to tax insurance corporations in the same way that other business corporations are taxed. However, the Legislature continued the taxation of premiums under section 1510. This tax has no equivalent in Article 9-A. In addition, the Legislature retained the language of Tax Law former § 187, a section of the Tax Law that was once identical to an equivalent provision of the Insurance Law (Matter of Guardian Life Ins. Co. v. Chapman, supra, at 233). All of these factors militate in favor of construing the terms "life insurance corporation" and "transacting the business of life insurance" as they are used in Tax Law § 1510 in a manner consistent with the use of the same or similar terms in the Insurance Law. For that reason, I find that petitioner was a life insurance corporation under Tax Law § 1510 during the subject years.

I agree with petitioner that a plain reading of the statute shows that the Legislature intended that the tax rate on premiums be determined in accordance with the classification of

the insurance corporation as life or nonlife and not by the premiums written. Tax Law § 1510(b) requires every "life insurance corporation authorized to transact business in this state . . . [to] pay a tax on all gross direct premiums". The statute does not speak of "life insurance premiums" or the transaction of a "life insurance business".

For all of the reasons discussed above, I find that petitioner accurately computed the additional franchise tax under Tax Law § 1510(b).

D. The Division's arguments for classifying petitioner as other than a life insurance company are not persuasive. The Division's first argument is based on the holding in Matter of McAllister Bros., Inc. v. Bates (272 App Div 511, 72 NYS2d 532, supra). The taxpayer in that case was a corporation organized under the former Stock Corporation Law. It had the authority to conduct almost any legitimate business, including the business of marine transportation. The taxpayer transferred all of its assets to a related corporation, including its vessels, and ceased to have more than one employee, but continued to file franchise tax reports as a corporation engaged in a transportation and transmission business. After an investigation of the taxpayer's business activities, the State Tax Commission notified petitioner that it had been reclassified to a business corporation and should file reports pursuant to Article 9-A. The Court upheld the determination, stating:

> "[I]t has firmly been established that classification for franchise tax purposes is to be determined by the nature of [a corporation's] business and that the purposes for which the Corporation was organized are immaterial. This rule with respect to classification for franchise tax purposes applies especially to corporations organized under the general business corporation laws which have within their certificates of incorporation a wide variety of chartered powers (Matter of McAllister Bros. v. Bates, supra, 72 NYS2d, at 536)."

The holding in McAllister is not relevant to construing Tax Law § 1510 for two reasons: because of the differences that exist between general business corporations and insurance corporations and because of the uniqueness of Tax Law § 1510. Tax Law § 1500(a) defines the term "insurance corporation" broadly to include corporations, associations, joint stock companies, partnerships or individuals "doing an insurance business". It is undisputed that petitioner is an insurance corporation pursuant to this provision and subject to the tax imposed

under Article 33. The business activities of insurance corporations are more restricted than those of general business corporations. Insurance corporations are prohibited from doing any insurance business in New York unless authorized by a license (Insurance Law § 1102), and they must be authorized to do a specific kind of insurance business. Petitioner could not, for instance, write contracts for fire insurance because it was not authorized to do so. In short, the licensing requirements for insurance corporations set them apart from general business corporations: one may not conduct an insurance business in New York, whether in corporate or other form, unless licensed to do so by the Superintendent of Insurance; and the licensing requirements strictly limit the insurance businesses that any particular insurance corporation may engage in. Consequently, the certificate of authority under which the insurance corporation does business limits its activities in a way that a general business corporation's charter does not.

Second, the additional franchise tax on premiums is unique to insurance corporations and the nature of the insurance business. A similar provision does not appear in articles 9 or 9-A of the Tax Law. Thus, the rules generally applicable to construing franchise tax statutes are not necessarily applicable to Tax Law § 1510, which has its roots in Tax Law former § 187 and has no equivalence in other franchise tax provisions. Tax Law § 1510 cannot be read in such a way as to bring it under the general rule stated in McAllister if it is to be read in para materia with the Insurance Law, as it must.

The Division also contends that since petitioner files Federal income tax returns as a property and casualty insurance corporation for Federal purposes, it cannot be a life insurance corporation under Tax Law § 1510. The Division did not offer any explanation to support this contention. The starting point for determining insurance corporation entire net income under Tax Law § 1503 is Federal taxable income reported to Federal tax authorities for the same taxable year. It is not apparent to me that this provision of section 1503 has any application to section 1510. Moreover, in Matter of The United States Life Insurance Company in the City of New York (Tax Appeals Tribunal, April 2, 1992), the Tax Appeals Tribunal rejected the

petitioner's claim that Tax Law § 1503(b) and the provisions of the Internal Revenue Code taxing insurance companies must be read consistently. It stated:

> "There is a strong legislative intent indicating uniformity in interpretation where a State statute is copied verbatim from a Federal statute or contains substantially similar tax provisions (Matter of Mosbacher v. Graves, 254 App Div 438, 5 NYS2d 553, 555, affd 279 NY 793; see, Matter of Marx v. Bragalini, 6 NY2d 322, 189 NYS2d 846, 854). However, it is a settled principle that "[f]ranchise taxes are separate and distinct from income taxes" and are "imposed on the privilege a state grants a corporation to conduct business within its territory" (Matter of Zurich Ins. Co. v. State Tax Commn., 144 AD2d 202, 534 NYS2d 515, 517, lv denied 74 NY2d 602, 541 NYS2d 985; see also, Tax Law § 1501[a]). Thus, the Federal income tax imposed on insurance corporations by the Internal Revenue Code is separate and distinct from the franchise tax imposed by Tax Law § 1501. Notwithstanding petitioner's argument that inequitable treatment may result from the failure to make modifications to entire net income under § 1503(b) in the same percentage as adjustments made to Federal LICTI, the tax levied by New York State remains a franchise tax calculated by entire net income as defined by the Legislature. Because the Legislature's authority to impose a corporate franchise tax arises under the term 'privilege,' the Legislature has wide discretion in selecting the subject and the parameters of said tax (see, Association of the Bar of City of New York v. Lewisohn, 34 NY2d 143, 356 NYS2d 555, 564)."

The principles discussed by the Tribunal must apply with equal or greater force to Tax Law § 1510 than they do to Tax Law § 1503 which is concerned with calculation of income. I know of no principle of statutory construction or State and Federal conformity that would require Tax Law § 1510 to be read consistently with the provisions of the Internal Revenue Code applicable to insurance corporations.

The specific Federal provision relied on by the Division, IRS § 816, even lends some support to petitioner's claim that accident and health insurance is considered a life insurance business. IRS § 816(a) provides:

> "(a) LIFE INSURANCE COMPANY DEFINED.--For purposes of this subtitle, the term 'life insurance company' means an insurance company which is engaged in the business of issuing life insurance and annuity contracts (either separately or combined with accident and health insurance), or noncancellable contracts of health and accident insurance, if--
>
> (1) its life insurance reserves (as defined in subsection (b)), plus
>
> (2) unearned premiums, and unpaid losses (whether or not ascertained), on noncancellable life, accident, or health policies not included in life insurance reserves, comprise more than 50 percent of its total reserves . . . ."

Inasmuch as Tax Law § 1510 does not refer to Federal law or to the concept of an insurance corporation's reserves to determine the tax rate, I cannot understand the Division's contention that the Federal definition of a life insurance company is controlling for purposes of section 1510. In fact, petitioner filed its Federal returns on a form 1120-PC, "U.S. Property and Casualty Insurance Company Income Tax Return", and it is not authorized to transact business in New York as a property/casualty insurance corporation (see, Insurance Law §§ 4101, 4102).

E. The only audit adjustment contested by petitioner is the adjustment to the franchise tax on premiums. The Division is directed to recompute the tax deficiencies asserted in the Notice of Deficiency dated August 30, 1993 and the notice asserting a greater deficiency, dated September 3, 1993, by eliminating the deficiencies based on the additional franchise tax imposed under Tax Law § 1510.

F. The petition of First UNUM Life Insurance Company is granted to the extent indicated in Conclusion of Law "E"; the Notice of Deficiency and the notice asserting a greater deficiency of tax shall be recomputed accordingly; and in all other respects, the notices are sustained.

DATED: Troy, New York
January 30, 1997

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE