STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK	:	DECISION DTA No. 809614
for Revision of a Determination or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	

Petitioner United States Life Insurance Company in the City of New York, 125 Maiden Lane, New York, New York 10038, and the Division of Taxation each filed an exception to the determination on remand of the Administrative Law Judge issued on January 18, 1995. Petitioner appeared by Dreyer and Traub (Jay I. Gordon, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Kenneth J. Schultz, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception on February 16, 1995. Petitioner filed a brief in support of its exception and in opposition to the Division of Taxation on March 27, 1995. The Division of Taxation filed a reply brief on April 19, 1995. Petitioner filed a reply brief which was received on April 28, 1995 and began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam. Commissioner Francis R. Koenig took no part in the consideration of this decision.

ISSUES

I. Whether the Administrative Law Judge properly allowed petitioner an original purchase price based on amounts paid pursuant to a contract with use and occupancy.

II. If it is determined that petitioner has overpaid real property gains tax, whether the Division of Tax Appeals has the authority to grant a refund of the same.

FINDINGS OF FACT

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

United States Life Insurance Company in the City of New York ("petitioner") and the Division of Taxation ("Division") stipulated to numerous facts which have been fully incorporated into the findings below.

Petitioner is a domestic life insurance company having its principal place of business and home office in Manhattan. On January 6, 1960, petitioner petitioned for the approval of the New York State Superintendent of Insurance to enter into a contract for the purchase of land located at 125 Maiden Lane in New York City. Such petition was the result of petitioner's projection in January 1954 of its own growth rate and the desirability of a site capable of handling petitioner's operations vis-a-vis its growth rate. After review of numerous sites, land was purchased in 1955 by Continental Casualty Company, a corporation which then owned the majority of petitioner's stock, for the purpose of erecting on such property a new home office building for petitioner. In July 1956, Continental Casualty Company sold its majority interest in petitioner and abandoned its plans to construct petitioner's office space.

Petitioner was unable to acquire the land itself and construct a building thereon because of its status as a regulated insurance company. Its petition to the Superintendent of Insurance indicated that the economics of New York City real estate coupled with the investment limitations imposed by the New York Superintendent of Insurance under the law precluded petitioner from owning a building providing the desired floor area and requisite space for its growth. Thus, petitioner sought approval of the Superintendent of Insurance to the transactions which will be described in this matter.

Although petitioner was prohibited from directly acquiring or constructing a building due to regulatory restrictions, petitioner sought the approval of the Superintendent of Insurance of the transactions described below which were designed to effect a "proprietary interest".

Petitioner presented its position in its petition to the Superintendent of Insurance, describing the proposal for which it sought approval as follows:

> "[W]hereas the occupancy lease . . . makes no provision for petitioner's acquisition of a proprietary interest in the building occupied as its home office, and whereas it is desirable that there be such a proprietary identification of petitioner with the building, and whereas it would be to petitioner's advantage to invest in the subject property in consideration of the return offered, and whereas petitioner is desirous of securing control over future allocations of space . . . . "

In 1958, a developer, 125 Maiden Lane Building Company ("MLBC"), acquired the land located at 125 Maiden Lane ("Land") from Continental Casualty Company for $1,300,000.00. MLBC sold the Land to General Electric Pension Trust ("GEPT") for $1,400,000.00 under a bargain and sale deed dated March 1, 1960 pursuant to a sale/leaseback arrangement under which GEPT immediately leased the Land back to MLBC (the "Ground Lease") for 30 years and 10 days. MLBC issued a deed to the Land to GEPT in exchange for payment of $1,400,000.00, the price paid by MLBC for the Land, plus a reasonable allowance for taxes and carrying expenses from the date of acquisition to the passing of title. MLBC reserved title in the building for itself. The Ground Lease provided that MLBC would retain no interest or other rights in the building upon termination of the lease, but instead the building would by contract and operation of law become the property of the owner of the Land. The Ground Lease between GEPT and MLBC was at an annual rate of $77,000.00, which was equivalent to interest at the rate of 5½% on the $1,400,000.00 advance to purchase the Land. At the end of 30 years and 10 days GEPT would have unencumbered legal title to the property comprised of the Land and the building. Since it was petitioner who desired to own the Land and building at the end of the Ground Lease, petitioner and GEPT simultaneously entered into a purchase agreement requiring petitioner to acquire the land 30 years later in 1990 upon termination of the Ground Lease for $1,400,000.00, the same acquisition cost established in the 1960 transaction.

In order for MLBC to construct the building on the Land, it required additional financing of $6,750,000.00. GEPT (as mortgagee) agreed (pursuant to the Consolidation, Extension, Modification and Spreading Agreement dated March 1, 1960) to loan this amount to MLBC (as mortgagor) based on the credit of petitioner since it was petitioner's funds that would ultimately

repay the debt through its rental obligation. Thus, GEPT loaned $6,750,000.00 to MLBC secured by a mortgage (the "Leasehold Mortgage") on MLBC's Ground Lease and required MLBC to re-lease the entire building to petitioner (the "Building Lease"). According to petitioner, the Building Lease required an annual rental equivalent to the ground rent described above plus the Leasehold Mortgage debt service and other items, including real estate taxes. In the event of refinancing of the Leasehold Mortgage, the Building Lease incorporated a rental adjustment to maintain equality with the debt service. Petitioner claims that, as a result of the fact that MLBC pledged the Building Lease to GEPT as further security for the Leasehold Mortgage, petitioner became directly and unconditionally obligated to make payments to GEPT of all expenses of the property as well as amounts due under the Leasehold Mortgage and Ground Lease.

As petitioner described the transactions proposed in its petition for approval of the New York Superintendent of Insurance, petitioner indicated that it desired an arrangement under which it could expand into areas of a site location as its growth required. However, the agreements obligated petitioner to pay rent and occupy the entire building. In order to compromise these competing factors, petitioner entered into an arrangement with MLBC which provided MLBC an opportunity to profit. Petitioner subleased the entire building back to MLBC (the "Sublease"), who in turn leased the majority of the building to petitioner and the remainder to unrelated third parties with terms identical to that of the Building Lease requiring MLBC to pay petitioner exactly that which petitioner was obligated to pay MLBC under the Building Lease. MLBC's opportunity to profit existed if it was able to attract tenants other than petitioner who would pay rent at levels higher than that which was to be paid by MLBC under the Sublease. The components of the form of the transaction and the flow of the funds was as follows:

(a) funds received by MLBC from the rental of a portion of the building to unrelated third parties and petitioner would be paid by MLBC to petitioner pursuant to the Sublease;

(b) in form such funds would be paid from petitioner to MLBC under the Building Lease; and

(c) then flow from MLBC to GEPT and others for the expenses of maintaining the property, such as for payment of the debt service and real estate taxes. In reality, GEPT sought payment from petitioner directly, bypassing MLBC.

It is noted that petitioner's cost to occupy the building was not set at a market rate of rent. In fact, petitioner rented the space for approximately $4.00 per square foot as a result of the March 1960 transactions when it would have otherwise had to pay $4.75 per square foot.

Another simultaneous agreement entered into in March 1960 was established to pay MLBC a fee for developing the property. This agreement between petitioner and MLBC provided that upon the acquisition by petitioner of legal title to the property petitioner would enter into a new ground lease (the "Second Ground Lease") with MLBC for an initial term of 20 years at an annual rent of $140,000.00 plus 50% of the annual net income from the building. Petitioner asserts that MLBC's right to 50% of the net income for a predetermined period represented compensation to MLBC.

In 1975 MLBC defaulted under the Sublease and filed for bankruptcy. Petitioner's rights under the agreement entitled it to accelerate the purchase of land under the Purchase Agreement with GEPT. Petitioner and MLBC settled the matter by entering into a Joint Venture Agreement dated May 24, 1976 which was deemed effective October 1, 1975 and was to supersede the Building Lease and the Sublease to the extent of any inconsistencies. Although the Joint Venture Agreement provided that petitioner and MLBC would be required to make equal contributions to cover expenditures of the building, if in fact MLBC failed to make its required contribution, petitioner was required to advance amounts due and thereafter to be paid therefor (with interest) from the interest of MLBC in all future distributions that would have been payable to MLBC under such agreement. Petitioner waived further rights against MLBC for its failure to make required contributions. From October 1, 1975 to the dissolution of such agreement on September 9, 1986, only petitioner made cash contributions to the Joint Venture.

Petitioner claims to have incurred a primary and direct legal obligation to satisfy all obligations of the property in lieu of its obligations under the Building Lease. Petitioner asserts that it acquired a "beneficial interest" in the property and directly assumed liability for the Leasehold Mortgage (the balance of which was $4,478,288.00) and all other debts and expenses under the terms of the Joint Venture Agreement. The termination of the Joint Venture Agreement was March 10, 1990 and upon termination MLBC was obligated to convey its interest in the property to petitioner at no cost.

In 1986 petitioner paid MLBC $3,342,400.00 in exchange for all of its rights, title and interest in the Joint Venture Agreement, the Land and the building. Petitioner obtained the ground lease position and title to the building subject to the Purchase Agreement and Leasehold Mortgage. On November 26, 1986, petitioner acquired legal title to the Land from GEPT in accordance with the Purchase Agreement for $1,300,000.00. GEPT had agreed to accelerate the closing date from the original proposed date of March 1, 1990 and discount the purchase price from $1,400,000.00 to $1,300,000.00. Petitioner subsequently sold the property to RREEF USA Fund III ("RREEF") in December 1986 for $48,333,000.00. When petitioner filed its gains tax documents with reference to the sale of 125 Maiden Lane to RREEF, petitioner calculated its total original purchase price in the amount of $9,120,628.00 for gains tax purposes as follows:

(a) $4,478,228.00 represented the outstanding balance of the Leasehold Mortgage as of October 1, 1975;

(b) $3,342,400.00 represented funds paid to MLBC in exchange for its interest in the building in 1986; and

(c) $1,300,000.00 was the amount paid by petitioner to acquire legal title to the Land from GEPT.

The basis for the parties' disagreement relates to the amount of the Leasehold Mortgage properly includable in original purchase price. The Division allowed $1,423,811.54 of the Leasehold Mortgage in petitioner's original purchase price which was equivalent to the

outstanding balance of such debt as of the date petitioner acquired legal title in August 1986. The disallowed portion in the amount of $3,054,416.46 represented that portion of the mortgage balance outstanding as of October 1, 1975 which was amortized through payments by petitioner between 1975 and 1986.

MLBC carried the building as an asset on its balance sheet and depreciated the building for income tax purposes at all relevant times prior to the transfer of the building to petitioner in 1986. Petitioner took no depreciation expense deductions with respect to the building for income tax purposes until after it acquired legal title to the building in 1986.

Petitioner took no interest deductions attributable to the amortization of the mortgages encumbering the Land and building for income tax purposes until after it acquired legal title to the Land and building in December 1986.

Transferor and transferee questionnaires were properly issued by petitioner and RREEF in accordance with the sale between petitioner and RREEF dated December 5, 1986. On December 16, 1986 a Tentative Assessment and Return was computed by the Division based on the filing of such questionnaires indicating total gains tax due of $3,782,888.10. A post-audit review of the information provided with the questionnaires reporting the transfer of 125 Maiden Lane indicated the following:

> "The Joint Venture Agreement between U.S. Life and 125 Maiden Lane Bldg. Co. provides that '[e]ach joint venturer shall retain the basis that it now has in the Joint Venture property'. Based on the foregoing, the claimed mortgage assumption of $4,478,228.00 by U.S. Life, has been disallowed."

A Statement of Proposed Audit Changes dated October 30, 1989 was issued assessing additional tax of $447,822.80,[1] plus interest in the amount of $124,516.43, for a total amount assessed of $572,339.23. Subsequently, on December 26, 1989, the Division issued to petitioner a notice of determination assessing additional tax due of $305,441.65, plus interest in the amount of $92,888.72, for a total amount assessed of $398,330.37.

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[1]This amount represented tax on the claimed mortgage assumption by petitioner of $4,478,228.00 which the Division disallowed. It was adjusted before the issuance of the notice to reflect the fact that the Division ultimately allowed $1,423,811.54 of the Leasehold Mortgage in original purchase price (balance in August 1986).

The Division's Request for Findings of Fact - Supplemental Determination

Pursuant to the State Administrative Procedure Act, the Division requested an additional Finding of Fact be incorporated into the determination. The information as reflected by documents in evidence is provided below.

Transferor and transferee questionnaires dated August 18, 1986 were filed in preparation of the transfer of legal title to the property in question to U.S. Life (Petitioner's Ex. "6"). Such questionnaires, which were filed in connection with petitioner's acquisition of the developer's interest in the property, reflected the following sums and allocation thereof:

Transferor	Interest Transferred	Consideration Paid by U.S. Life	OPP (of Papock, Tuttle & the Maiden Lane Partnership)
Herbert Papock	13.730% interest in fee of bldg. and leasehold	$ 458,900.00	$ 866,916.00
Wylie F.L. Tuttle	17.102% interest in fee of bldg. and leasehold	$ 571,600.00	$1,079,825.00
125 Maiden Lane Bldg., LP and 125 Maiden Lane Bldg., a partnership	69.168% interest in fee of bldg. and leasehold	$2,311,900.00	$4,367,287.00
Total:		$3,342,400.00[2]	$6,314,028.00

OPINION

When we reviewed the Administrative Law Judge's first determination in this matter, we summarized her conclusions as follows:

> "that petitioner had obtained a beneficial interest in the property on March 1, 1960 and that it was entitled to calculate its original purchase price as if it had acquired the property in 1960. The Administrative Law Judge stated that this original purchase price was $11,492,400.00, less $100,000.00 for the discount negotiated by GEPT, which included $6,750,000.00 for the assumption of the leasehold mortgage. The original purchase price determined by the Administrative Law Judge based on the 1960 acquisition of the real property exceeded that claimed by petitioner on its transferor questionnaire, the latter having been calculated under the theory that petitioner acquired the property

[2] This amount corresponds to the amount provided above.

> in 1975 through the Joint Venture Agreement. As a result, the Administrative Law Judge determined that petitioner not only did not owe the tax assessed in the Notice of Determination, but had overpaid the tax calculated on its transferor questionnaire. Based on these findings, the Administrative Law Judge cancelled the Notice of Determination and ordered a refund based on her calculation of original purchase price. The Administrative Law Judge decided not to address petitioner's argument that the 1960 transaction constituted a transfer for gains tax purposes (i.e., the execution of a contract to sell real property with the use and occupancy of the property) because of her disposition of the case under the beneficial interest theory" (Matter of United States Life Ins. Co. in the City of New York, Tax Appeals Tribunal, March 24, 1994).

The Division filed an exception to this determination. In our decision on this exception, we did not rule on the merits of any issues but, instead, remanded the matter to the Administrative Law Judge to issue a supplemental determination to address the contract with use and occupancy theory advanced by petitioner and to explain the factual and legal basis of her authority to grant the refund. We retained jurisdiction over the case based on the exception filed by the Division.

In her supplemental determination, the Administrative Law Judge concluded that the granting of a lease with an option to purchase the real property was a transfer for gains tax purposes and petitioner's original purchase price should be determined pursuant to former 20 NYCRR 590.27 which defines the consideration for such a transfer. The Administrative Law Judge accepted petitioner's calculation of original purchase price, which relied on former 20 NYCRR 590.27 and which:

> "computed the present value of the annual (net rent) payments of $511,825.11 [footnote omitted] due under the Building Lease ($8,144,384) and the present value of the $1,400,000.00 due under the Purchase Agreement ($352,962) for the land over 30 years at 4.70% [footnote omitted]. The combined total of $8,497,346.00 added to the $3,342,400.00 paid to MLBC in exchange for all of its rights, title and interest in the Joint Venture Agreement, the land and the building results in an original purchase price of $11,839,746.00" (Determination, conclusion of law "E").

As a result, the Administrative Law Judge modified her original determination of original purchase price and found the correct amount to be $11,839,746.00.

In its exception, the Division argues that the Administrative Law Judge erred because she offset

> "the consideration received on the transfer of the fee interest against, among other things, the hypothetical original purchase price of the lease and contract of sale. As a matter of law, the hypothetical original purchase price of the lease and contract cannot be offset against the consideration for the fee interest for the purposes of determining 'gain.' The definition itself indicates that the consideration for the particular 'transfer of real property' must be offset against the original purchase for 'such property'" (Division's brief in support of supplemental notice of exception, p. 7).

The Division has not taken issue with petitioner's and, thus, the Administrative Law Judge's method of calculating the value of the lease and contract of sale, but has only argued that the amounts attributable to these interests may not be included in original purchase price for the transfer at issue. Further, the Division has never contested the portion of original purchase price claimed by petitioner with respect to the 1986 payment of $3,342,400.00 made to MLBC. Therefore, the only question before us is whether the Administrative Law Judge correctly held that on the transfer of its fee interest petitioner was entitled to an original purchase price that reflects the contract with use and occupancy interest.

Tax Law § 1440(5)(a) defines original purchase price, in part, as "the consideration paid or required to be paid by the transferor . . . to acquire the interest in real property."

We agree with the Division's general premise, that the original purchase price for an interest in real property must be determined for the specific interest being transferred and that the consideration for interests other than the one being transferred cannot be included in the original purchase price of the interest being transferred. However, we do not agree with the Division that the matter is simply disposed of by stating that because petitioner acquired a contract with use and occupancy, but transferred the fee, that no amounts paid by petitioner for the former interests are allowable for the original purchase price of the latter. Logic and the Division's own regulations at former 20 NYCRR 590.28 indicate that the question must depend on an analysis of the nature of the interest acquired and transferred, not simply on the names of the interests. The regulation at former 20 NYCRR 590.28 explaining the original purchase

price of a lessee states, in part, that "[a]lthough rent payments generally are not includible in the lessee's original purchase price, a lessee/optionee may include that amount of payments made under the lease that are proven to the State Tax Commission to be payments for the option or the real property, rather than for the occupancy of the premises prior to the exercise of the option." Thus, the issue, as we see it, is whether petitioner has demonstrated that the amounts payable under the Building Lease were paid to acquire the fee interest and are, thus, allowable as an element of original purchase price, or were paid to obtain use and occupancy and, thus, are not allowable.

We conclude that the facts of this case indicate that the payments under the lease were payments for the fee interest and were not payments for occupancy. The most important fact that leads us to this conclusion is that under the contract to purchase petitioner had the right to acquire the land and the building in 1990 from GEPT for the same amount, $1,400,000.00, paid by GEPT for the land only in 1960. We think it obvious that GEPT, as the fee owner of undeveloped real property, would not agree to transfer the real property 30 years from the date the property was acquired for the same amount paid to acquire the real property, even if the property were to remain undeveloped. Because the property was required to be developed with a building with a cost of $6,750,000.00, the improbability of such a transaction is heightened. The only way such a transaction makes economic sense is if consideration for the fee interest in the land and building was paid through another element of the transaction, i.e., the Building Lease payments. Stated differently, the Building Lease payments were not for use and occupancy of the property, but were instead installment payments on the transfer of the fee interest. Because the Division has not specified any error in petitioner's valuation of the Building Lease payments or in the valuation of the $1,400,000.00 due under the Purchase Agreement, we affirm the Administrative Law Judge's use of $8,497,316.00 as the consideration for these interests and of $11,839,746.00 as petitioner's total original purchase price.

With respect to the Division's contention that petitioner's original purchase price cannot be increased because petitioner did not assume or take subject to the mortgage in 1960, we respond that the "amount of any mortgage, purchase money mortgage, lien or other encumbrance, whether the underlying indebtedness is assumed or taken subject to" is only one portion of the definition of consideration in section 1440(1)(a) of the Tax Law which is incorporated into the definition of original purchase price by section 1440(5)(a) of the Tax Law. More generally, consideration "means the price paid or required to be paid for real property or any interest therein" (Tax Law § 1440[1][a]). We have concluded that petitioner has established that the Building Lease payments were in fact part of the consideration required to be paid for the fee interest.

Next, in response to the Division's contention that petitioner did not treat itself as the owner of the real property for Federal income tax purposes, we note that Federal income tax principles are not determinative of gains tax issues (see, Matter of SKS Associates, Tax Appeals Tribunal, September 12, 1991).

The Division also contends that in the 1986 transaction in which petitioner bought out the Developer's interest "it is clear that the Developer claimed, as part of its original purchase price, the amount which was used in the original Determination to increase Petitioner's original purchase [price]. . . . If the Developer and the Petitioner are both permitted to claim the mortgage as part of their original purchase prices, the Division of Taxation will have been 'whipsawed'" (Division's Memorandum of Law for Supplemental Determination, p. 21). Our first response to this point is that the Division has merely alleged, without proving, that the Developer's original purchase price duplicated amounts included in petitioner's original purchase price. Even if this were established, it is not obvious to us why the solution should be to eliminate these items from petitioner's original purchase price, rather than from the Developer's original purchase price. If petitioner is entitled under the statute to include these amounts in its original purchase price, we can see no basis for disallowing these amounts simply because the Division erred in allowing them in the Developer's original purchase price

(see, Matter of East 61st St. Co., Tax Appeals Tribunal, May 25, 1995). This is particularly so as petitioner did not benefit from any overstatement of original purchase price by the Developer, i.e., petitioner's original purchase price for the Developer's interest was based on the consideration petitioner paid to acquire this interest, $3,342,400.00, not the original purchase price claimed by the Developer, $6,391,617.00.

The next issue before us is whether the Administrative Law Judge properly issued petitioner a refund in her first determination. In our decision remanding the matter to the Administrative Law Judge, we asked that the Administrative Law Judge "explain the factual and legal source of her authority to grant the refund" (Matter of United States Life Ins. Co. in the City of New York, supra). In deliberating, on remand, on her authority for granting a refund that had not been requested by petitioner within the period of limitations imposed by section 1445(1)(a) of the Tax Law, the Administrative Law Judge considered the theory of equitable recoupment. However, with respect to the question of whether this theory would allow a taxpayer a positive benefit beyond that of overcoming the assessment, i.e., an affirmative recovery of money, a refund, the Administrative Law Judge stated:

> "the history of recoupment reveals that a party raising recoupment may not obtain affirmative relief against its opposition for any balance proven in such party's favor, because as a recoupment, such party's claim may only serve to abate, in whole or in part that demanded by the opposition [citations omitted]. Thus, when the benefits of the recoupment doctrine are sought by a taxpayer, the function of the doctrine is to allow the taxpayer to reduce the amount of a deficiency recoverable by the Government by the amount of an otherwise barred overpayment of the taxpayer [citations omitted].
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> "It appears that the operation of the doctrine of recoupment, though applicable, may not in any way benefit petitioner. Nonetheless, it is held to apply in the event it is needed to further a just determination between the parties. With the exception of the application of the recoupment theory, no additional basis is available for the granting of a refund of overpaid real property gains tax in this matter" (Determination on remand, conclusions of law "H" and "J").

We understand the Administrative Law Judge's determination on remand to say that she had no authority to grant petitioner a refund. Petitioner took exception to only one portion of the Administrative Law Judge's determination on this issue, i.e., her conclusion that no basis

other than equitable recoupment was available to grant a refund in this case. Petitioner argues that:

> "[t]he Division of Tax Appeals is given the authority to make a 'determination' of the proper amount of tax due with respect to a taxable transfer under the Gains Tax pursuant to Tax Law Section 1444.1. This grant of authority is broad, allowing the Division of Tax Appeals to determine the correct amount of tax whether it is the amount requested by the Division of Taxation, the taxpayer or some other correct amount" (Petitioner's brief in support of its exception to the Supplemental Determination of the Administrative Law Judge, p. 7).

We disagree. Section 1444(1) grants us the authority to review notices of determination issued by the Division. We see nothing in section 1444(1) of the Tax Law that grants us the authority when reviewing a notice of determination to go beyond the notice and find, in addition, that the taxpayer has made an overpayment and is entitled to a refund. When the Legislature intended to grant such power it has explicitly done so in sections 687(f) and 1087(f) of the Tax Law with respect to assessments of personal income tax and corporate franchise tax. Contrary to petitioner's argument, we believe that the failure of the Legislature to include such a specific grant of authority in Article 31-B is meaningful and it means that we do not have authority to grant a refund in this case. Accordingly, we agree with the Administrative Law Judge that she did not have authority to grant a refund and we reverse her granting of the refund.

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted to the extent that the refund ordered by the Administrative Law Judge is denied, but such exception is otherwise denied;

2. The exception of United States Life Insurance Company in the City of New York is denied;

3. The original determination of the Administrative Law Judge is reversed to the extent indicated in paragraph "1" above, but the original and supplemental determinations of the Administrative Law Judge are otherwise affirmed;

4. The petition of United States Life Insurance Company in the City of New York is granted to the extent the Notice of Determination dated December 26, 1989 is cancelled, but such petition is otherwise denied; and

5. The Notice of Determination dated December 26, 1989 is cancelled.

DATED: Troy, New York
October 5, 1995

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner