STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

MUNICIPAL BOND INVESTORS ASSURANCE CORPORATION : DECISION DTA No. 811060

for Redetermination of a Deficiency or for Refund of Franchise Tax on Insurance Corporations under Article 33 of the Tax Law for the Years 1987 and 1988. :

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on September 30, 1993 with respect to the petition of Municipal Bond Investors Assurance Corporation, 113 King Street, Armonk, New York 10504. Petitioner appeared by Kaye, Scholer, Fierman, Hays & Handler (Peter L. Faber, Esq., Laurie Abramowitz, Esq., and Anne S. Levin, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (John O. Michaelson, Esq., of counsel).

The Division of Taxation submitted a brief in support of its exception. Petitioner submitted a brief in opposition. Oral argument, requested by the Division of Taxation, was heard on June 15, 1994, which date began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether petitioner is entitled to a retaliatory tax credit for retaliatory taxes paid to California, Kansas, Pennsylvania and Connecticut ("the taxing states") imposed as a result of the Temporary Metropolitan Transportation Business Tax Surcharge on insurance corporations ("the tax surcharge").

FINDINGS OF FACTS

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

On May 24, 1991, the Division of Taxation ("Division") issued to petitioner, Municipal Bond Investors Assurance Corporation, a Statement of Audit Adjustment and corresponding Notice of Deficiency asserting the tax surcharge in the amount of $67,128.00, plus interest, for calendar year 1987. Under the heading "Explanation", this Statement of Audit Adjustment stated:

> "Refund of 9/14/89 $32,892.00
> Refund of 6/20/90 $34,236.00
> Total Amount Due $67,128.00"
>
> On the same day, the Division issued to petitioner a second Statement of Audit Adjustment and corresponding Notice of Deficiency asserting the tax surcharge in the amount of $7,276.00 plus interest, for calendar year 1988. This second Statement of Audit Adjustment stated under the heading "Explanation" that:

> "Section 1505a(d)(2) [sic] allows a domestic insurance corporation a credit only for retaliatory taxes it pays which it is legally obligated to pay. The credit is not allowable for retaliatory taxes which a domestic insurance company may pay or self-assess which are not legally due to another state.
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> "Since California, Pennsylvania, Connecticut and Kansas statues [sic] do not clearly and unambiguously retaliate against the Metropolitan Transportation Surcharge, Municipal Bond Investors Assurance Corp was not legally obligated to pay such retaliatory tax. Therefore the refunds previously issued were erroneous and additional MTA Surcharge is due."

The tax asserted by the above notices of deficiency represents amounts which the Division had originally refunded to petitioner as retaliatory tax credits under Tax Law Article 33 for the years 1987 and 1988. After first allowing the refunds, the Division determined that the refunds should not have been granted. The subject notices were issued in an attempt to recapture the amounts refunded.

Petitioner was advised in writing by public officials of each of the foreign states that pursuant to the laws of those states, the Temporary Metropolitan Transportation Business Tax

Surcharge was subject to retaliatory tax, since insurers domiciled in those states with offices in the Metropolitan Commuter Transportation District,[1] would be required to pay the tax surcharge.

OPINION

The Administrative Law Judge held that in order to receive the tax credit:

> "petitioner only needs to show: 1) that the tax was required by the laws of another state or by the acts of a public official of such other state; and 2) that such
>
> payments were required for the privilege of doing business in such other state" (Determination, conclusion of law "F").

The Administrative Law Judge held that each of the taxing states have retaliatory tax provisions which required petitioner to pay retaliatory tax with respect to the Temporary Metropolitan Transportation Business Tax Surcharge. In addition, the Administrative Law Judge held that:

> "petitioner has also shown by clear and convincing evidence that public officials of each of those states have acted to require it to pay the tax surcharge to those states for the privilege of doing business there" (Determination, conclusion of law "G").

With regard to the Division's argument that the Temporary Metropolitan Transportation Business Tax Surcharge is not the type of tax covered by the respective statutes of the taxing states when imposing their retaliatory taxes because it is a regional tax and not a state tax, the Administrative Law Judge held the tax surcharge is a state tax authorized by the State Legislature.

On exception, the Division asserts that petitioner is not entitled to a credit because the respective statutes relied on by the taxing states are too vague and do not describe how to compute a retaliatory tax against a regional tax such as the Temporary Metropolitan Transportation Business Tax Surcharge. The Division also asserts that petitioner should have

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[1]The Metropolitan Commuter Transportation District embraces the City of New York and the counties of Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk and Westchester (Public Authorities Law § 1262).

sought judicial review with the taxing authorities of the respective taxing states. The Division contends that:

> "the retaliatory tax statutes [of the taxing states] are so ambiguous that they must be construed against imposition of tax" (Division's brief on exception, p. 10).

The Division contends that:

> "[t]he State of New York is not obligated to provide a credit for payments which are being made voluntarily by the petitioner to other states for a tax which is not legally valid in those states" (Division's brief on exception, p. 11)

In response, petitioner contends that it was required by the laws of the taxing states and the acts of public officials of such states to pay the retaliatory taxes imposed as a result of the Temporary Metropolitan Transportation Business Tax Surcharge. Petitioner asserts that in no way were the payments of the retaliatory taxes to the taxing states voluntary as the Division alleges. Petitioner contends that the payments were made only after authorities in the taxing states notified petitioner that retaliatory tax was due with respect to the tax surcharge. Finally, petitioner contends that it is not a requirement of the statute that petitioner seek judicial review in the taxing states before it becomes eligible for the credit.

We affirm the determination of the Administrative Law Judge for the reasons set forth below.

Tax Law § 1505-a imposes a tax surcharge on insurance corporations for the privilege of doing business in the metropolitan commuter transportation district. Tax Law § 1505-a(d)(2) provides as follows:

> "[i]f, by the laws of any state other than this state, or by the action of any public official of such other state, any insurer organized or domiciled in this state, or the duly authorized agents thereof, subject to the business tax surcharge imposed by this section shall be required to pay taxes for the privilege of doing business in such other state which taxes are imposed or assessed because of the taxes imposed or assessed under this section, in computing the tax imposed by this section a credit shall be allowed for taxes paid to other states, which credit shall be determined pursuant to the provisions of this section; provided, however, the credit allowed any insurer under this subdivision shall in no event be greater than the tax surcharge payable by such insurer pursuant to this section for the taxable year with respect to which such amount has been imposed or assessed by such other states."

When interpreting statutes:

> "words of ordinary import are to be construed according to their ordinary and popular significance, and are to be given their ordinary and usual meaning" (McKinney's Cons Laws of NY, Book 1, Statutes § 232).

The plain meaning of Tax Law § 1505-a(d)(2) allows a New York insurance corporation doing business in another state a tax credit to be applied against the tax surcharge if: (1) the insurer is required to pay a retaliatory tax to such other state imposed because of the tax surcharge and (2) the retaliatory tax was required by the laws of such other state or by the acts of a public official of such other state.

In this case, petitioner is clearly entitled to the tax credit in section 1505-a(d)(2). Each of the taxing states have statutes which provide for imposition of retaliatory tax on foreign insurers doing business in that state (see, Conn. Gen. Stat. § 12-211; Kan. Stat. Ann. § 40-253; Cal. Const. Article VIII, § 28[f][3]; Pa. Stat. Tit. 40, § 50). Furthermore, petitioner was advised in writing by a public official in each of the taxing states that pursuant to the laws of that respective state, the tax surcharge was subject to retaliatory tax.

We find the Division's assertion that petitioner should have sought judicial review as to the validity of the retaliatory tax assessments in each of the respective taxing states to be without merit. The Division merely makes these assertions and offers no basis for its belief. Because the literal words of Tax Law § 1505-a(d)(2) afford petitioner a credit against the tax surcharge, and because the application does not lead to an absurd result (see, Matter of United States Life Ins. Co. v. Tax Appeals Tribunal, 194 AD2d 952, 599 NYS2d 168, lv denied 82 NY2d 657, 604 NYS2d 556), we conclude petitioner is entitled to the credit.

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; and
3. The petition of Municipal Bond Investors Assurance Corporation is granted; and

4. The notices of deficiency dated May 24, 1991 are cancelled.

DATED: Troy, New York
December 1, 1994

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

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