STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
THE BROOKLYN UNION GAS COMPANY, INC.	:	DECISION DTA No. 813033
for Redetermination of a Deficiency or for Refund of Corporation Tax under Article 9 of the Tax Law for the Period August 1, 1991 through December 31, 1991 and the Years Ending December 31, 1992 and December 31, 1993.	:	

Petitioner, The Brooklyn Union Gas Company, Inc., c/o Richard M. Desmond, Vice President, One MetroTech Center, Brooklyn, New York 11201-3850, filed an exception to the determination of the Administrative Law Judge issued on July 25, 1996. Petitioner appeared by Cullen & Dykman (Joseph P. Stevens, Esq. and Kenneth B. Anker, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Kenneth J. Schultz, Esq., of counsel).

Petitioner filed a brief in support of its exception and a reply brief. The Division of Taxation filed a brief in opposition. Oral argument at petitioner's request was heard on May 1, 1997.

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

ISSUES

I. Whether enactment of section 149 of Chapter 166 of the Laws of 1991 (also referred to as "the 1991 statute") shifted the legal incidence of New York's gross receipts tax imposed on the furnishing of utility services from the utilities to their customers.

II. Whether, as a result of said enactment, petitioner became a mere collection agent for such taxes.

III. Whether, if petitioner is a mere collection agent, such taxes collected by petitioner from its customers should be excluded when calculating petitioner's gross receipts.

IV. Whether petitioner overpaid its gross receipts tax for the subject years and is entitled to a refund.

FINDINGS OF FACT

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

Petitioner, The Brooklyn Union Gas Company ("Brooklyn Union" or "Company"), is a New York corporation with its principal office and place of business at One MetroTech Center, Brooklyn, New York 11201.

During the period under review, August 1, 1991 through December 31, 1993, Brooklyn Union, a public utility, was engaged in the sale of natural gas to customers in the State of New York.

Brooklyn Union's rates and charges are subject to regulation by the New York State Public Service Commission ("PSC"). The Company's rates and charges are set forth in

PSC-approved tariffs.

Gas sales by Brooklyn Union within New York State are subject to the taxes imposed pursuant to Article 9, §§ 186, 186- a, 186-b, 186-c and 188 of the New York Tax Law (hereinafter sometimes referred to as "gross receipts taxes" or "GRT's").

During the period in controversy, Brooklyn Union's rates and charges were governed by tariffs issued pursuant to valid PSC Orders ("tariffs").

The method and calculation by which the Company passes through to its customers the gross receipts taxes on in-state gas sales is set forth in Brooklyn Union's tariffs.

General Information Leaf Nos. 12-F and G of the tariffs which were issued pursuant to Order of the PSC dated July 23, 1991 in Case No. 27611, provide that the rates and charges to the Company's customers under all service classifications shall be increased by a "Revenue Tax Surcharge" to reflect, among others, the gross receipts taxes.

The Revenue Tax Surcharge imposed by Brooklyn Union upon its customers for, among others, the gross receipts taxes, was calculated for the period under review pursuant to the following methodology set forth in the Company's tariffs:

"The total amount of all rates and charges shall be increased by an Effective Aggregate Percentage factor determined by dividing the applicable aggregate percentage rate of taxes by 100% minus the applicable aggregate percentage rate of taxes."

The methodology quoted above may be expressed as the following formula:

$$E = T/1-T$$

Where "E" is the Effective Applicable Percentage Factor and "T" is the applicable aggregate rate of taxes.

At all times under review herein, the Company's aggregate percentage rate of taxes for New York State gross receipts taxes (including surcharges) was 5.61% computed as follows:

SECTION	RATE
(i) § 186	.75%
(ii) § 186-b MTA surcharge	17% x .75%
(iii) § 188 surcharge	15% x .75%
Subtotal (º 186 tax = surcharges)	.99%
(iv) § 186-a	3.5%
(v) § 186c MTA surcharge	17% x 3.5%
(vi) § 188 surcharge	15% x 3.5%
Subtotal (º 186-a tax + surcharges)	4.62%
(vii) Aggregate percentage rate of gross receipts taxes (including surcharges) (4.62% + .99%)	5.61%

Based upon the applicable gross receipts tax rates set forth above, the Effective Applicable percentage Factor ("Effective Tax Rate" or "E") for gross receipts taxes, according to the tariff formula, E = T/1-T, (where "T" is 5.61%) is .059434 computed as follows:

.0561/1 - .0561 = .059434

For all periods at issue in this proceeding, Brooklyn Union timely filed its New York State tax returns and timely paid the gross receipts tax liabilities.

Brooklyn Union's gross receipts for regulated gas sales as reported to the PSC for each of the periods in controversy were as follows:

PERIOD	AMOUNT
8/1/91 - 12/31/91	$ 275,664,509.
1/1/92 - 12/31/92	$1,050,450,588.
1/1/93 - 12/31/93	$1,085,181,860.

The amounts set forth above include the following amounts collected by Brooklyn Union from its customers and paid over to New York State as gross receipts taxes at the Effective Tax Rate of .059434:

PERIOD	AMOUNT
8/1/91 - 12/31/91	$ 15,464,779.
1/1/92 - 12/31/92	$ 58,930,278.
1/1/93 - 12/31/93	$ 60,878,702.

The amounts collected and paid as GRT's for each period under review were derived by applying the Effective Tax Rate to the following revenues derived from PSC-regulated sales of gas:

PERIOD	AMOUNT
8/1/91 - 12/31/91	$ 260,199,730.
1/1/92 - 12/31/92	$ 991,520,310.
1/1/93 - 12/31/93	$1,024,303,158.

By letters dated March 21 and March 31, 1994 Brooklyn Union requested refunds of gross receipts taxes as follows:

PERIOD	AMOUNT
8/1/91 - 12/31/91	$ 867,574.
1/1/92 - 12/31/92	$ 3,305,989.
1/1/93 - 12/31/93	$ 3,415,295.

The amounts requested as refunds represent the difference between applying (i) the Effective Tax Rate of .059434 and (ii) the aggregate statutory gross receipts tax rate of .0561, to the Company's revenues from PSC-regulated gas sales set forth above.

Petitioner submitted the affidavit of its vice president, comptroller and chief accounting officer, Richard Desmond, who reiterated the method of calculation of its gross receipts taxes. Mr. Desmond established that petitioner seeks to recover the .33% differential in rates for the benefit of its customers.

Effective August 1, 1991, the New York State Legislature enacted the Gas Import Tax (L 1991 ch 166, ºº 146-149-a). The Gas Import Tax ("GIT"), codified in part in Tax Law º 189, imposes a monthly tax on natural gas importers for the privilege of importing gas services into New York for their own use or consumption.

Subsequent to the enactment of Tax Law º 189, the Division of Taxation ("Division") issued TSB-M-91(5)C providing guidance and explanation in reference to such section. Certain key provisions, pertinent to the matter herein, are reproduced below:

> "DEFINITIONS
>
> 1. Gas services means the delivery of natural gas through mains or lines.
>
> 2. Gas importer means every person who imports gas services or causes gas services to be imported into New York State for their own use or consumption.
>
> * * *
>
> 7. Public utility means a public utility subject to the jurisdiction of the Public Service Commission as to the matter of rates on sales to customers making delivery of gas services in New York to a gas importer.
>
> * * *
>
> IMPOSITION
>
> A tax is imposed on every gas importer at the rate of 4 1/4% (plus applicable surcharges) of the consideration given or contracted to be given for gas services imported or caused to be imported into New York.
>
> 1. If importation is through a regulated public utility the public utility is required to collect the tax monthly from the gas importer. The public utility shall

separately state the tax and show it on all invoices, receipts or other memoranda of price regarding the transportation of gas services.

The public utility is a trustee of the State. Sales tax provisions apply with respect to the tax required to be collected. The sales tax requirements that: the tax be collected when collecting the payment for the transportation of gas services; the tax be separately stated; certain records are required to be kept, all pertain. The sales tax provisions concerning who is liable for the tax also pertain." (Emphasis added.)

By letter dated June 22, 1994, the Audit Division of the New York State Department of Taxation and Finance denied the Company's requests for refunds as follows:

"This is in reference to your claims for refund for the periods ending 12/91, 12/92, and 12/93 based on a deduction for 'gross up' to be taken against your gross receipts to be reported to New York State.

"Article 9, Section 186 imposes a tax on all receipts, 'gross earnings', from the employment of capital without any deductions. Under Section 186A, however, certain deductions are allowed. They are as follows:

1. receipts from sales for resale.
2. cash discounts taken by customers and uncollectible accounts.
3. taxes imposed on the utility's customers by New York State or Its municipalities or the Federal government for which the utility is merely a collecting agency for the taxing authority.

"Article 9, Sections 186 and 186A taxes are imposed upon a utility for selling or furnishing a utility service. Since these taxes are not imposed upon the consumer, as is the case of Section 189 tax, your utility is not considered to be a collecting agency for the taxing authority.

"As the deduction for gross up is not considered to be an allowable deduction, pursuant to Tax Law Section 186A, your claims for refund are denied."

On July 28, 1994, Brooklyn Union filed a petition with the State Division of Tax Appeals seeking review of the Audit Division's determination.

On October 14, 1994, the Department of Taxation and Finance filed an answer to the Company's petition.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Petitioner argued that the passage of the GIT shifted the legal incidence of the GRTs directly to its customers and rendered petitioner a collection agent for the State. Petitioner claimed that the natural result of this change is that the GRTs it collected in gas rates should be excluded from its taxable receipts thereby eliminating the need for the tax "gross-up," and entitling petitioner to a refund from the point in time of the GIT enactment. The Administrative Law Judge rejected this argument.

The Administrative Law Judge pointed out that the 1991 legislation (L 1991, ch 166) deals only with gas imported or caused to be imported into the State by a "gas importer" and delivered by a public utility. In such cases a tax is imposed upon the importer and collected from the importer by the utility. The Administrative Law Judge pointed out that by specific language in the legislation the "import tax" is treated as a sales tax and, as such, is not included in the utility's gross earnings base for Article 9 purposes (Determination, conclusion of law "D").

Petitioner, in support of its argument that there had been a shift in the legal incidence of the GRT, relied on United States v. State of Delaware (958 F2d 555). In that case, the United States government challenged the validity of a state utility gross receipts tax imposed upon electricity provided to and purchased by Dover Air Force Base in Delaware. Under the Delaware tax law, the distributor, not the consumer, nominally pays the tax. However, the Delaware Public Service Commission is required to adjust rates so that the tax is passed through to consumers, and the utility company's earnings are unaffected. This resulted in consumers, including the United States, indirectly paying the Delaware utility tax.

The Delaware court concluded that the since the Delaware tax, by statute, was required to be passed through to consumers, the legal incidence fell directly on the Federal government as the customer and held it to be unconstitutional (see, United States v. State of Delaware, supra, at 561).

Based on this case, petitioner argued that the plain language of Laws of 1991 (ch 166, º 149) requires that utilities pass the GRTs on to their customers. Therefore, petitioner argued, consumers now bear the legal incidence of the GRTs. This shift in legal incidence of the tax, petitioner maintained, as a matter of law, makes the tax one imposed directly on the customer and the vendor becomes merely a collection agent.

Based on her examination of Tax Law ºº 186 and 186-a, in conjunction with the enactment of Tax Law º 189 and the Laws of 1991 (ch 166, º 149), the Administrative Law Judge rejected petitioner's argument. The Administrative Law Judge concluded that the legal incidence of the GRTs remains with the utility providing gas services in this State. The nature of the GRTs places the legal incidence for such taxes on the utility providing the gas services. The Administrative Law Judge pointed out that the statement of legislative intent set forth in Laws of 1991 (ch 166, º 149) specifically acknowledges that fact in its discussion. The Administrative Law Judge concluded that that 1991 enactment made no changes to the provisions governing the gross receipts tax. In particular, the Administrative Law Judge rejected petitioner's argument that section 149 of Chapter 166 expresses a clear legislative mandatethat GRTs be passed on to consumers.

Although the economic incidence for both the GRTs and the GIT fall upon the consumer, the Administrative Law Judge concluded that the legal incidence for the GRTs remains with the utility.

Accordingly, the Administrative Law Judge concluded that the Division properly denied the refunds sought by petitioner.

ARGUMENTS ON EXCEPTION

Petitioner takes exception to the Administrative Law Judge's statement of the issue, to wit: "[w]hether the Division properly denied the deduction of gross receipts and gross income taxes when computing the proper amount of gross receipts and gross income taxes."

Petitioner takes exception to conclusions of law "D," "E" and "F" of the Administrative Law Judge's determination.

Specifically, petitioner objects to the statement in conclusion of law "D" that "[t]he crux of petitioner's argument is that the 'import tax' should apply to sales by petitioner to its customers as well as to transactions where petitioner merely delivers the gas into the state for the 'gas importer' . . . ." It is petitioner's view that this misstatement as well as, in petitioner's view, the misstated issue, reflected a basic misunderstanding of petitioner's position by the Administrative Law Judge.

It is petitioner's position that the 1991 statute, in addition to enacting a new Gas Import Tax, altered the pre- existing statute governing the gross receipts taxes by adding a new mandate that petitioner pass along these taxes to its customers. By adding a new, express mandate that utilities collect the gross receipts taxes from their customers, petitioner argues, section 149 of the 1991 statute effected a shift in the legal incidence of such taxes from utilities to their customers.

Accordingly, petitioner excepts to the Administrative Law Judge's conclusion that the 1991 statute dealt only with the taxation of gas imports and did not alter the legal incidence of gross receipts taxes.

Petitioner also disagrees with the Administrative Law Judge's statement that the 1991 statute intended to substantially narrow the gap between the State tax treatment of gas purchases from in-state and out-of-state suppliers of gas. According to petitioner, the 1991 statute intended to equalize, not narrow, such tax treatment.

Petitioner maintains, as it did below, that the interaction of United States Supreme Court principles followed in United States v. State of Delaware (supra) and the enactment of section 149 of Chapter 166 of the Laws of 1991 caused a shift in the legal incidence of New York's gross receipts taxes from the utility directly to the customer. Petitioner claims that, as a result of the enactment of section 149, New York utility companies became mere collection agents for New York gross receipts taxes. As such, amounts collected from customers to recover such taxes should not be included in computing petitioner's taxable gross receipts.

Petitioner argues that the 1991 statute, in addition to enacting the new Gas Import Tax, took the necessary steps to equalize State tax burdens on all gas consumers by changing the pre-existing framework governing gross receipts taxes that applied to in-state transactions and replacing the pre-existing "permissive" recovery scheme with a new legislative mandate in section 149 of the 1991 statute that utilities collect gross receipt taxes from their customers.

At issue, petitioner argues, is whether, in light of enactment of section 149 of the 1991 statute, the gross receipts taxes now required to be collected from consumers are properly excludable from the gross receipts upon which the tax is based (Petitioner's Reply Brief, p. 2).

The Division argues that enactment of section 149 did not shift the legal incidence of the gross receipts tax from utilities to their customers. The Division argues further that petitioner is not a collection agent for the State with respect to said taxes. The legal incidence of the gross receipts tax, the Division argues, is upon petitioner and not the ultimate consumer. Consequently, the Division argues, the gross receipts taxes collected as reimbursement from its customers should not be excluded when computing petitioner's taxable gross receipts and petitioner is not entitled to a refund.

OPINION

At the outset, we note petitioner's contentions that the Administrative Law Judge misstated the issue and failed to understand petitioner's position. Since we have restated the issue and performed our own de novo review, we need not discuss these contentions.

Tax Law § 186(1), relating to the franchise tax imposed on certain utility companies, provides, in pertinent part, as follows:

> "Every corporation . . . formed for or principally engaged in the business of supplying water, steam or gas, when delivered through mains or pipes, or electricity, or principally engaged in two or more of such businesses shall pay for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity in this state, a tax which shall be three-quarters of one per centum upon its gross earnings from all sources within this state, and four and one-half per centum upon the amount of dividends paid during each year ending on the thirty-first day of December in excess of four per centum upon the actual amount of paid-in capital employed in this state by such corporation . . . . The term 'gross earnings' as used in this section means all receipts from the employment of capital without any deduction" (emphasis supplied).

Tax Law § 186-a, relating to the gross receipts tax imposed on the furnishing of utility services, provides as follows:

"1. Notwithstanding any other provision of this chapter, or of any other law, a tax equal to three and one-half per centum of its gross income is hereby imposed upon every utility doing business in this state which is subject to the supervision of the state department of public service . . . .

"2. . . . the words 'gross income' mean and include receipts received in or by reason of any sale, conditional or otherwise, . . . without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or services or other costs, interest or discount paid, or any other expense whatsoever . . . .

* * *

"6. The tax imposed by this section shall be charged against and be paid by the utilityand shall not be added as a separate item to bills rendered by the utility to customers or others but shall constitute a part of the operating costs of such utility" (emphasis added).

As stated by the Administrative Law Judge, Brooklyn Union was subject to taxes under Tax Law §§ 186, 186-a, 186-b and 186- c, which collectively resulted in the imposition of a rate equivalent to 5.61%. Tariffs which governed petitioner's rates and charges pursuant to Order of the Public Service Commission provided that rates pertaining to petitioner's operation were increased by a Revenue Tax Surcharge to reflect, among other charges, the gross receipts taxes. Prior to Chapter 166 of the Laws of 1991, utility companies like petitioner passed the economic burden of their gross receipts taxes along to customers as operating costs. The amounts collected from customers as gross receipts taxes were themselves subject to taxation because they were included in the company's taxable receipts, creating a "tax-on-tax" effect. In order for petitioner to remain economically whole, petitioner collected from its customers, and remitted to New York State, gross receipts taxes at a higher, "grossed-up" rate of 5.94%. Petitioner now seeks this rate differential as a refund for the benefit of its customers (see, Determination, conclusion of law "B").

By way of background, prior to August 1991 some New York gas consumers avoided gross receipts taxes by purchasing natural gas outside New York and arranging for its transport across state lines into New York for use in the State. The New York State Legislature enacted the Gas Import Tax in an attempt to equalize the tax burdens imposed on consumers who purchased their gas from out-of-state suppliers and those consumers who purchased gas from in-state utilities, such as petitioner.

Tax Law § 189(3)(a)(1), relating to the Gas Import Tax, provides, in relevant part, as follows:

> "If the gas services are delivered in this state to the gas importer by a public utility, then the public utility making such delivery of gas services shall be required to collect the tax imposed by this section pursuant to subparagraph two of this paragraph, and shall be collected monthly from such gas importer and such gas importer shall so pay the tax required to be collected to such public utility. The tax shall be due and owing and shall be required to be paid to the public utility within thirty days from the billing for the tax. The tax required to be collected by such public utility shall be separately stated, charged and shown on all invoices, receipts or other memoranda of price with respect to the transportation of such gas services. Theamount of tax required to be collected shall be paid to such public utility required to collect it as trustee for and on account of the state. . . . All of the provisions of subdivision one of section eleven hundred thirty-one, subdivisions (a) and (e) of section eleven hundred thirty-two, section eleven hundred thirty-three and section eleven hundred thirty- five of this chapter shall apply to the tax imposed by this section with the same force and effect as if the language of those provisions has been incorporated in full in this section and had expressly referred to the tax imposed by this section, with such modification as may be necessary in order to adapt the language of such provisions to the provisions of this section, provided, specifically, that the term 'person required to collect tax' shall refer to a public utility required to collect tax under this section, the term 'customer' shall refer to a gas importer from whom tax under this section is required to be collected by a public utility and the term 'tax' shall refer to the tax imposed by this section" (emphasis added).

As can be seen, the above provisions relating to the Gas Import Tax expressly provide that it is a tax on the consumer, i.e., the gas importer. The statute also expressly provides that

utilities shall collect the import tax in the same manner as a sales tax, and that they shall do so as a trustee for the State of New York. Relevant sales tax provisions are expressly made part of the GIT provisions. A utility will only be liable for the GIT if it fails to collect the tax from its customer (the importer) pursuant to statute. Finally, the amounts collected as GIT are not taxable receipts of the utility and so no "gross-up" is necessary as to these amounts (see, TSB-M-91[5]C).

Petitioner urges that this same treatment should be accorded to it for GRT purposes based on enactment of section 149 of that same GIT legislation.

Section 149 states the legislative intent behind Chapter 166 of the Laws of 1991, in pertinent part, as follows:

> "the main goal of this act is to attempt to equalize the tax burden in relation to consumers of gas service. Presently, consumers of gas services may avoid the burden of the taxes imposed by sections 186 and 186-a of the tax law by purchasing the service out-of-state and hiring transportation to carry that service to the consumer's premises in this state. The legal incidence of the taxes imposed by sections 186 and 186-a of the tax law are on the utility making sales of gas services in this state. However, both of these taxes are presently passed through by the utility separately, and in their entirety, to consumers purchasing gas services from such utility in this state pursuant to rate regulation of the charge for such services by the public service commission. Thus, consumers of gas services purchased in this state from utilities bear the direct pass-through of both such taxes. Sections one hundred forty-six through one hundred forty-nine-a of this act are an attempt to impose on those consumers who purchase gas services outside this state a comparable fair tax burden. Accordingly, to insure continuing comparability, pursuant to regulation by the public service commission, utilities shall be required to continue to pass through the total amount of such taxes to in-state consumers so that such consumers will continue to bear the economic burden of such taxes. In this manner a continuing comparable economic burden is imposed by such sections of this act on these consumers who purchase gas service out-of-state for use or consumption in this state as compared to consumers who purchase gas services in this state from utilities" (emphasis added).

In addition, section 149-a provides, in part:

> "The department of public service and the public service commission shall cooperate with the tax department in assisting such department in matters affecting the administration of the tax imposed by sections one hundred forty-six through one hundred forty-nine-a of this act . . . ."

Arguing that it is now required to pass through the GRT to its customers, petitioner argues that the legal incidence of the GRTs has now been shifted from utilities directly to its customers. This shift in legal incidence of the tax, petitioner argues, rendered petitioner a mere collection agent for the State, i.e., in the same manner as utilities who collect the Gas Import Tax and, like the GIT, the GRTs collected for the subject years should be excluded from its taxable receipts.

Accordingly, petitioner argues it is entitled to a refund of the .33% differential in the tax rates for the period after the enactment of the Laws of 1991, as described above.

The difficulty with petitioner's argument is that section 149 does not say what petitioner urges it says.

First, section 149 of the 1991 statute is a mere statement of legislative intent. It is not a substantive provision. Second, the language in section 149 which states "utilities shall be required to continue to pass through the total amount of such taxes," does not create a new mandate. In this sentence, the word "required" modifies the words "to continue," not "pass through." If the words "to continue" are deleted, then you would have "shall be required to pass through," but that is not what section 149 says. It says utilities shall be required to continue what they were already doing, i.e., pass through the gross receipts tax to their customers. This does not represent a change in substance or intent from prior law and creates no new mandate.

We agree with the Administrative Law Judge that the decision in the Delaware case was distinguishable and should be limited to its facts. The Delaware case is further distinguishable because there is no "mandate" in the instant matter.

Third, there is no other language in section 149 (or anywhere else in Chapter 166 of the Laws of 1991) which shifts the legal incidence of the gross receipts tax from the utilities. In fact, Tax Law º 186(a)(1) (and section 149 itself) specifically states that the GRT is imposed upon the utilities doing business in this State. Accordingly, petitioner's argument that section 149 effected a change in the legal incidence of the tax must fail.

We note that, unlike Tax Law º 189 relating to GIT, the 1991 statute added no new language to the gross receipts tax provisions requiring or permitting the GRT to be collected in the same manner as a sales tax. Further, sales tax provisions of the Tax Law were not expressly incorporated by reference in the gross receipts tax provisions (as they were in Tax Law º 189 relating to GIT). Petitioner cannot take the language of section 149 and by some alchemy convert that language into a substantive change in the GRT provisions of the Tax Law. We do not agree with petitioner that the 1991 statute effected any change in the law with respect to the gross receipts tax. The Legislature, by enacting the 1991 statute, was attempting to impose on those consumers who purchase gas services outside this State a comparable and fair tax burden (L 1991, ch 166 º 149) to those who purchased such services within the State. The Legislature could have used the words "equal tax burden" or "identical fair tax burden," but it did not. The GIT is not equal to the GRT, it is comparable. The economic impact of both the GIT and GRT are on the consumer, but the mechanism used by the Legislature for collecting those taxes is different. The Gas Import Tax, by express statutory provision, is treated in the same manner as a

sales tax and, as such, is not included in the utility's gross earnings base for Article 9. The legal incidence, by statute, is directly on the consumer (the importer), but the duty to collect it on behalf of the State is on the utility (Tax Law º 189[3]).

The statutory scheme for the GRT uses a pass-through mechanism. Although the economic burden is still on the consumer of utility services, the legal incidence of the taxes imposed by sections 186 and 186-a of the Tax Law (relating to the GRT) are on the utility. Both of these GRT taxes, both before and after 1991, are passed through to consumers pursuant to rate regulation of the Public Service Commission. Because the legal incidence of the GRT is on the utility and not the customer, the amounts collected as GRT must be added to the taxable gross receipts of utilities like petitioner. There is nothing in the 1991 statute that changed that.

The Legislature could have amended the GRT provisions to make them the same as the GIT provisions. It did not. What the Legislature failed to do petitioner would have us do by interpretation.

The provisions of the Tax Law governing the GRT are clear on their face. The 1991 statute is also clear and unambiguous, and it made no substantive changes to the GRT.

"Where words of a statute are free from ambiguity and express plainly, clearly and distinctly the legislative intent, resort may not be had to other means of interpretation" (McKinney's Statutes § 76).

* * *

"If the Legislature wished to change the interpretation of a statute, it should make an appropriate change in the language; the fact that no change in wording is made creates a presumption that no change in meaning is intended" (McKinney's Statutes, § 75).

The 1991 statute made no amendments to the GRT provisions of the Tax Law, so we must presume that no change in meaning was intended by the Legislature. We agree with the Administrative Law Judge that the gross-up presently imposed upon in-state gas purchasers, for which there is no analogous charge to gas importers subject to the GIT, is unfortunate, costly and perhaps even unintended. While petitioner has woven a commendable argument, it did so on very thin thread, i.e., the statutory statement of intent in section 149 of the 1991 statute. Unfortunately, neither that statement of intent nor any substantive provision of the 1991 statute, nor any provision of the gross receipts tax provisions of the Tax Law can support petitioner's position.

To summarize, we conclude that the 1991 statute did not add any new mandate, express or by implication, to the GRT provisions of the Tax Law; the 1991 statute did not effect a shift in the legal incidence of the GRT; petitioner did not become a mere collection agent or trustee for the State of New York; and the amount collected by petitioner as GRT must be included in its taxable gross receipts. Thus, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of The Brooklyn Union Gas Company, Inc. is denied;

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

3. The petition of The Brooklyn Union Gas Company, Inc. is denied; and

4. The Division of Taxation's denial of the claim for refund of utility franchise and gross income taxes is sustained.

DATED: Troy, New York
October 30, 1997

_____
Donald C. DeWitt
President

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Carroll R. Jenkins
Commissioner

_____
Joseph W. Pinto, Jr.
Commissioner