

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

PRINCIPAL MUTUAL LIFE :
INSURANCE COMPANY :

ORDER AND OPINION
DTA NO. 815265

for Redetermination of a Deficiency or for Refund of
Franchise Tax on Insurance Corporations under Article 33 :
of the Tax Law for the Years 1990 and 1991.

On March 29, 1999, MONY Life Insurance Company, by its representative, Morrison & Foerster, LLP (Paul H. Frankel, Esq., of counsel), filed a motion for leave to file a brief as amicus curiae. The motion was supported by the affirmation of Paul H. Frankel, Esq. The Division of Taxation, by Terrence M. Boyle, Esq. (James P. Connolly, Esq., of counsel), filed a letter in response, dated April 7, 1999, in which it did not raise any opposition to the motion filed herein. Petitioner, Principal Mutual Life Insurance Company, did not respond to the motion.

Commissioner Jenkins took no part in the consideration of this order and opinion.

ORDER

Upon reading and filing the motion, the proposed amicus brief, the response of the Division of Taxation thereto, and due deliberation having been had thereon,

Now, on the motion of MONY Life Insurance Company, it is

ORDERED that said motion by MONY Life Insurance Company as requests leave to file a brief as amicus curiae be and the same is hereby granted.

FINDINGS OF FACT

On July 30, 1998, the Administrative Law Judge issued a determination that held that receipts reported in column six of petitioner's annual statements filed with the State Insurance Department for tax years 1990 and 1991 were not premiums within the meaning and intent of Tax Law § 1504(b). However, the Administrative Law Judge concluded that the Division of Taxation (hereinafter the "Division") was authorized to adjust petitioner's allocation percentage by including receipts reported in column six in petitioner's allocation fraction in order to accurately reflect its income in New York State pursuant to Tax Law § 1504(d). Lastly, the Administrative Law Judge stated that the Division was entitled to apply its policy of including column six monies in the allocation fraction retroactively to the periods in issue. On September 30, 1998, petitioner filed an exception to the determination of the Administrative Law Judge. Petitioner filed a brief in support of its exception on November 9, 1998 and the Division filed its brief in opposition on January 11, 1999. Petitioner filed its reply brief on February 11, 1999.

On March 26, 1999, MONY Life Insurance Company filed a Notice of Motion for leave to file an amicus curiae brief. The movant filed an affidavit in support as well as the amicus curiae brief. The Division did not oppose the motion and petitioner failed to respond to the motion.

OPINION

Acceptance of an amicus curiae brief remains in the discretion of this Tribunal. We established our standards for acceptance of such briefs in *Matter of Standard Mfg. Co.* (Tax Appeals Tribunal, July 11, 1991) wherein we adopted the standard of the New York State Court of Appeals set forth in their Rules of Practice, in pertinent part, at Rule 500.11(e), as follows:

A brief may be filed only by leave of court granted on motion, or upon the court's own request.

Motions for amicus curiae relief, when appropriately made on notice to all of the parties and sufficiently in advance of the argument of the appeal to allow adequate court review of the motion and the proposed brief, must include consideration of and satisfaction of the court of at least one of the following criteria:

(1) a showing that the parties are not capable of a full and adequate presentation and that movants could remedy this deficiency;

(2) that movants would invite the court's attention to law or arguments which might otherwise escape its consideration; or

(3) that amicus curiae briefs would otherwise be of special assistance to the court.

We find that the proposed amicus brief meets the criteria set forth in the second and third subparagraphs and will accept the brief on those grounds.

ACCORDINGLY, we grant the motion of MONY Life Insurance Company to submit a brief amicus curiae. Petitioner, Principal Mutual Life Insurance Company, and the Division of Taxation are granted thirty (30) days from the date of this order to respond to the brief amicus curiae filed by MONY Life Insurance Company.

DATED: Troy, New York
June 10, 1999

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.
Commissioner