STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

KENSINGTON GATE OWNERS INCORPORATED :

:

for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1992 through December 31, 1994. :

In the Matter of the Petition :

of :

SUNRISE POINT EAST CONDOMINIUM :

for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period October 1, 1992 through December 31, 1994. :

In the Matter of the Petition :

of :

TOPPER REALTY CORP. :

for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 1992 through December 1, 1994. :

DECISION
DTA NOS. 817445, 817446, 817447, 817448, 817449, 817450 and 817451

In the Matter of the Petition :

of :

WESTBURY TERRACE CONDOMINIUM :

for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period October 1, 1992 through December 31, 1994. :

In the Matter of the Petition :

of :

WHITE OAKS NURSING HOME f/k/a WOODBURY HEALTH RELATED FACILITY :

for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period August 1, 1993 through December 30, 1995. :

In the Matter of the Petition :

of :

WILLOW HOUSE OWNERS CORP. :

for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 1992 through November 30, 1995. :

In the Matter of the Petition	:
of	:
30 GRACE AVENUE APARTMENTS CORP.	:
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 1992 through December 1, 1994.	:

Petitioners Kensington Gate Owners Incorporated, c/o Einsidler Mgt., 535 Broadhollow Road, Melville, New York 11747, Sunrise Point East Condominium, c/o M. Topper, 84 East Park Avenue, Long Beach, New York 11561, Topper Realty Corp., 84 East Park Avenue, Long Beach, New York 11561, Westbury Terrace Condominium, 135 Post Avenue, Westbury, New York 11590, White Oaks Nursing Home f/k/a Woodbury Health Related Facility, 8565 Jericho Turnpike, Woodbury, New York 11797, Willow House Owners Corp., c/o Einsidler Mgt., 535 Broadhollow Road, Melville, New York 11747 and 30 Grace Avenue Apartments Corp., c/o Einsidler Mgt., 535 Broadhollow Road, Melville, New York 11747 filed exceptions to the determination of the Administrative Law Judge issued on August 16, 2001. Petitioners appeared by Robert A. Wagner, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Cynthia McDonough, Esq., of counsel).

Petitioners filed a brief in support of their exception and the Division of Taxation filed a brief in opposition. Petitioners did not file a reply brief. Oral argument, at petitioners' request, was heard on October 9, 2002 in New York, New York.

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

ISSUE

Whether the Division of Taxation properly determined that refunds issued to petitioners for sales tax paid on gas and utility purchases made by them from LILCO were erroneously paid.

FINDINGS OF FACT

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

Petitioners, Kensington Gate Owners, Inc. ("Kensington"), Sunrise Point East Condominium ("Sunrise"), Topper Realty Corp. ("Topper"), Westbury Terrace Condominium ("Westbury"), White Oaks Nursing Home f/k/a Woodbury Health Related Facility ("Woodbury"), Willow House Owners Corp. ("Willow"), and 30 Grace Avenue Apartments Corp. ("Grace"), filed refund claims for the respective periods in issue for sales and use taxes paid to Long Island Lighting Company ("LILCO") for the purchase of energy products used for residential purposes. The refund claims were reviewed along with petitioners' backup documentation, consisting of handwritten worksheets prepared by a company known as Utility Bill Analysis ("UBA"), computer sheets stamped with "LILCO," and a summary statement of bills rendered by LILCO, and the refunds were thereafter granted to petitioners. The Division of Taxation ("Division") now contends petitioners were not properly entitled to such funds.

The Division has, in prior years, relied upon the accuracy of, and accepted, LILCO computerized billing summaries which were submitted in support of petitioners' claims for refund.

Subsequent to the payment of petitioners' refund claims, the Division discovered discrepancies in similar utility tax refund claims between the summary sheets submitted by UBA and the actual amount of sales taxes billed by LILCO in its invoices to its other customers. The Division's auditors compared actual LILCO invoices for the other refund claims and found that the invoices: (i) did not show any sales taxes charged, or (ii) showed only a reduced sales tax amount charged to reflect only the reduced local sales tax rate, or (iii) showed a tax amount charged at a rate which included local school taxes not subject to refund. Having discovered such discrepancies, the Division requested petitioners to provide actual LILCO invoices and canceled checks for selected months of the refund periods in issue or, in the alternative, a statement from LILCO (now Long Island Power Authority or LIPA) indicating the actual amount of tax billed to each petitioner for the refund periods in question, in order to verify the actual amount of sales taxes paid. Petitioners either did not provide the requested documentation or provided documentation which did not satisfy the Division's request, and the Division concluded that all the refunds were paid in error. The assessments issued in this matter reflect the Division's conclusion that the refunds were erroneous.

Petitioners are all residential customers for the purpose of the purchase of utilities, and the LILCO utilities purchased were for residential use.

The Division issued a notice of determination to Kensington dated July 13, 1998, asserting additional sales and use taxes for the period ended November 13, 1995 in the amount of $12,428.35 (the amount of the refund paid), plus penalty and interest, for a total amount due of $20,835.45.

The Division issued a notice of determination to Sunrise dated March 20, 1998, asserting additional sales and use taxes for the period ended December 11, 1995 in the amount of $8,223.11 (the amount of the refund paid), plus penalty and interest, for a total amount due of $13,265.88.

The Division issued a notice of determination to Topper dated March 20, 1998, asserting additional sales and use taxes for the period ended January 22, 1996 in the amount of $5,256.88 (the amount of the refund paid), plus penalty and interest, for a total amount due of $8,385.80.

The Division issued two notices of determination to Westbury dated May 11, 1998, asserting additional sales and use taxes for the periods ended December 11, 1995 and December 12, 1995 in the amounts of $5,654.30 (the amount of the refund paid), plus penalty and interest, for a total amount due of $9,249.73, and $981.53 (the amount of the refund paid) plus penalty and interest, for a total amount of $1,605.13, respectively.

The Division issued two notices of determination to White Oaks Nursing Home (f/k/a Woodbury) dated May 22, 1998, asserting additional sales and use taxes for the period ended November 13, 1996 in the amount of $31,954.50 (the amount of the refund paid) plus penalty and interest, for a total amount due of $47,296.94, and $12,758.54 (the amount of the refund paid) plus penalty and interest, for a total amount due of $18,884.28, respectively.

The Division issued a notice of determination to Willow dated June 8, 1998, asserting additional sales and use taxes for the period ended January 24, 1996 in the amount of $12,736.53 (the amount of the refund paid), plus penalty and interest, for a total amount due of $20,745.18.

The Division issued a notice of determination to Grace dated July 13, 1998, asserting additional sales and use taxes for the period ended January 24, 1996 in the amount of $13,927.21 (the amount of the refund paid), plus penalty and interest, for a total amount due of $22,899.87.

The seven petitioners appeared before the Bureau of Conciliation and Mediation Services on May 13, 1999 in protest of the above-referenced notices, each of which was sustained by Conciliation Orders (CMS Nos. 169607, 167836, 167826, 168343, 168528, 169078, and 169608) dated October 22, 1999.

Petitioners commenced a proceeding in the Division of Tax Appeals by the filing of seven petitions in a timely manner on December 8, 1999. Their representative Robert A. Wagner, Esq. submitted the seven petitions in the same mailing. Each of the petitions bore assertions of identical error by the Division and were differentiated only by the amount of asserted tax and the assessed tax period in some instances. The petitions alleged that petitioners paid sales and use tax to LILCO for the periods indicated, though petitioners were exempt from such tax. The petitions assert that LILCO acknowledges in its computer account ledger statements that tax was improperly included in its calculation concerning petitioners' accounts.

The Division filed answers to each of the seven petitions dated February 10, 2000, denying knowledge or information sufficient to form a belief as to the factual allegations in the petition and affirmatively setting forth the basis of the Division's assessment, that petitioners did not submit invoices which substantiated the refund claims.

In the case of Kensington, Willow and Grace, petitioners did not provide any additional documentation, i.e. LILCO invoices, to support the refund claim. The computer billing summaries for each show tax computed at the rate of 8 ½%.

In the case of Woodbury and Westbury, the LILCO invoices provided by petitioners indicated that no sales tax was billed to them. However, the computer billing summaries show tax computed at the rate of 8 ½%. When petitioners' representative raised the discrepancy with LIPA (LILCO's successor), he received the following June 1, 1999 response concerning Westbury:

> The above mentioned account [of Westbury] is tax exempt. The gas statement you refer to erroneously shows tax amounts subsequent to that date.
>
> Please be assured that both the gas and electric services have been tax exempt since May 1992. The total (dollars + tax) is correct; the computer simply backed the taxes out of the total amount.

As to Sunrise and Topper, petitioners provided several invoices which show that sales tax at the rate of 3% was charged, representing only the local school district sales tax rate for which no statutory exemption or reduced rate exists. The computer billing summaries show tax computed at the rate of 11 ½%.

Another LILCO document submitted by petitioner Willow, entitled Statement of Bills Rendered, showed tax computed at the rate of 8 ½%. This document bore similar information to the computer billing summaries: gas date, days (in the cycle), consumption figure, therm factor, therms (used after application of the factor), dollars and tax. Entries on the Statement of Bills Rendered correspond to entries for the same time periods on the related computer billing summary.

The total dollars amount, kilowatt hours and therm usage as shown on the LILCO computer billing summaries match the LILCO monthly invoices and the one Statement of Bills Rendered that were presented as part of the record. The only item in which there is a

discrepancy between the LILCO computer billing summaries and the LILCO monthly invoices is the indication of sales tax included as part of the charges, or stated in an amount representing a different rate.

Introduced by the Division as part of the record was a memo from Audit Team Leader Marsha Eisner, who testified at the hearing, to other Division employees, including her District Audit Manager, describing a meeting on April 7, 1997, with Roger Ehrler, Director of Corporate Taxes for LILCO. At that meeting the Division discovered that the discrepancy between the LILCO invoices and LILCO's computer printouts occurred due to a computer programming error which used the invoice amount to back into the taxable and tax amounts. The computer printouts were determined to be incorrect.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In her determination, the Administrative Law Judge noted that pursuant to Tax Law § 1105-A, the retail sale of gas and electric utilities to residential customers which is used for residential purposes is subject to a reduced New York State sales tax rate. The Administrative Law Judge also noted a corresponding optional reduced rate of local sales tax pursuant to Tax Law § 1210(a)(3). As petitioners were residential customers, and the LILCO utilities were purchased for residential use, the Administrative Law Judge found that the only issue for resolution was whether petitioners had met their burden of proving that sales tax was included in the amounts paid to LILCO for utility usage where the sales tax was not, in whole or in part, reflected on petitioners' invoices.

The Administrative Law Judge noted that when petitioners first presented their refund claims with the LILCO computer billing summaries to the Division, they were accepted. The

Administrative Law Judge also noted that the Division had a long-standing practice of accepting such summaries when filed in support of refund claims. However, when the Division sought to clear up an apparent discrepancy between the computer summaries and the actual invoices, the Administrative Law Judge concluded that the weight of the evidence showed that the computer billing summaries were incorrect. Specifically, the computer summaries showed more tax paid than was actually billed to petitioners on their invoices.

The Administrative Law Judge acknowledged petitioners' argument that with the exception of the tax, all items matched on both the computer summaries and the monthly invoices. The Administrative Law Judge observed, however, that neither of these documents indicated the cost per kilowatt or therm. Had this item been included, the Administrative Law Judge determined, it would have made any error between the LILCO summary sheets and the monthly invoices more obvious. As the Division is permitted to recover erroneous tax refunds, the Administrative Law Judge found that the Division properly issued notices of determination in this matter.

The Administrative Law Judge found, however, that petitioners had filed for refunds of tax in good faith based on information from LILCO. Further, the Division had historically accepted the same or similar documentation in past years for claims of this nature. As a result, the Administrative Law Judge determined that petitioners had demonstrated an absence of willful neglect to cause any delinquency in payment and it was reasonable for petitioners to have relied on the LILCO computer summaries. Accordingly, the Administrative Law Judge abated the penalties imposed by the Division.

ARGUMENTS ON EXCEPTION

On exception, petitioners argue that they have met their burden to show that sales and use tax was included in the amounts paid to LILCO for gas and electric usage. Petitioners maintain that the LILCO summary sheets and LILCO monthly invoices match in all relevant matters except for taxes paid. Petitioners assert that the amount of each of their monthly bills is mathematically consistent with sales tax having been included in the total.

In opposition, the Division argues that petitioners have failed to substantiate their entitlement to the refunds at issue. The Division asserts that petitioners have failed to supply a single monthly invoice which shows that sales tax (except for local sales tax for school districts, where appropriate) was included in the total amount charged by LILCO. Despite the fact that the LILCO summary sheets indicated that sales tax had been a part of the charges billed to petitioners, LILCO's own statements in the record belied the reliability of those summary sheets. The Division maintains that petitioners' mathematical recalculations of the LILCO bills does not prove that sales tax was collected, since at no time was the sales tax separately stated on the monthly bills as required by Tax Law § 1132(a)(1).

OPINION

As observed by the Administrative Law Judge, Tax Law § 1105-A provides that the retail sale of gas and electrical utilities to residential customers which is used for residential purposes is subject to a reduced New York State sales tax rate. Tax Law § 1210(a)(3) provides a corresponding optional reduced rate of local sales tax. The single issue in this matter is whether petitioners, who are residential customers that purchased utilities from LILCO for residential

use, have substantiated that sales tax was improperly included in the amounts they paid to LILCO for utility usage.

Petitioners bear the burden of establishing by clear and convincing evidence that the notices of determination issued to them are erroneous and that petitioners are entitled to the tax refund they seek (***Matter of Surface Line Operators Fraternal Org. v. Tully,*** 85 AD2d 858, 446 NYS2d 451). If petitioners meet their burden of proof in this regard, they are entitled to a refund of that sales tax pursuant to Tax Law § 1139 and 20 NYCRR 534.8. There is an obvious discrepancy between the LILCO computer summaries and the monthly invoices presented concerning whether or not sales tax was included in the amount paid by petitioners for their utility service. Information obtained from LILCO by the Division indicates that it is the computer summaries and not the invoices which are incorrect in this regard. Despite the fact that the reason for this discrepancy is not clear, the record supports the conclusion of the Administrative Law Judge that petitioners did not pay sales tax as part of their utility bills for the period at issue herein and petitioners were erroneously issued a refund for the amount of this tax.

We find that the Administrative Law Judge completely and adequately addressed the issues presented to her and we see no reason to modify them in any respect. As a result, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of Kensington Gate Owners Incorporated, Sunrise Point East Condominium, Topper Realty Corp., Westbury Terrace Condominium, White Oaks Nursing Home f/k/a Woodbury Health Related Facility, Willow House Owners Corp., and 30 Grace Avenue Apartments Corp. are denied;

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

3. The petitions of Kensington Gate Owners Incorporated, Sunrise Point East Condominium, Topper Realty Corp., Westbury Terrace Condominium, White Oaks Nursing Home f/k/a Woodbury Health Related Facility, Willow House Owners Corp., and 30 Grace Avenue Apartments Corp. are granted to the extent set forth in Conclusion of Law "C" of the Administrative Law Judge's determination, but in all other respects are denied; and

4. The notices of determination dated March 20, 1998, May 11, 1998, May 22, 1998, June 8, 1998 and July 13, 1998, as modified in accordance with paragraph "3" above, are sustained.

DATED: Troy, New York
March 20, 2003

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner