STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FIRST FORTIS LIFE INSURANCE COMPANY	:	DETERMINATION DTA NO. 814613
for a Redetermination of a Deficiency or for Refund of Franchise Tax on Insurance Corporations under Article 33 of the Tax Law for the Years 1991 and 1992.	:	

Petitioner, First Fortis Life Insurance Company, 220 Salina Meadows Parkway, P.O. Box 3209, Syracuse, New York 13220, filed a petition for redetermination of a deficiency or for refund of franchise tax on insurance corporations under Article 33 of the Tax Law for the years 1991 and 1992.

Petitioner appeared by LeBoeuf, Lamb, Greene & MacRae, L.L.P. (Hugh T. McCormick, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Kenneth J. Schultz, Esq., of counsel).

Petitioner and the Division of Taxation executed a consent waiving a hearing in this matter and agreeing to have the controversy determined on submission. Documents and briefs were submitted by the Division of Taxation and petitioner. Petitioner's reply brief was received on December 11, 1996, which began the six-month period for issuance of this determination.

After review of the evidence and arguments presented, Roberta Moseley Nero, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner is entitled to compute its additional tax on premiums of insurance corporations as a life insurance corporation under Tax Law § 1510(b), or is required to compute same as a non-life insurance corporation pursuant to Tax Law § 1510(a).

FINDINGS OF FACT

1. Pursuant to section 306 of the State Administrative Procedure Act and 20 NYCRR 3000.15(d)(6), the Division of Taxation (hereinafter "Division") submitted five proposed findings of fact all of which are accepted and incorporated in Findings of Fact "3" and "4" below.

2. During 1991 and 1992, petitioner was an insurance company organized under the laws of New York. During each of these years petitioner held a valid license issued by the New York State Insurance Department that allowed petitioner to write "life, annuities, and accident and health insurance, as specified in paragraphs 1, 2, and 3 of Section 1113 of the New York Insurance Law."[1] Petitioner was a "member insurer" of the Life Insurance Company Guarantee Corporation of New York.

3. For the year 1991, petitioner filed form CT-33, Franchise Tax Return for Insurance Corporations. On Schedule H of the return, Computation of Premiums, petitioner reported "Life insurance premiums" of $5,011,469.00, "Accident and health insurance premiums" of $9,998,633, and "Total" premiums of $15,010,102.00.

For the same year petitioner filed a Federal Form 1120-PC, U.S. Property and Casualty Insurance Company Income Tax Return.

4. For the year 1992, petitioner filed form CT-33, Franchise Tax Return for Insurance Corporations. On Schedule H of the return, Computation of Premiums, petitioner reported "Life insurance premiums" of $22,710,038.00, "Accident and health insurance premiums" of $39,230,710.00, and "Total" premiums of $61,940,748.00.

For the year 1992, petitioner filed an amended form CT-33, Franchise Tax Return for Insurance Corporations. On Schedule H of the return, Computation of Premiums, petitioner

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[1]Petitioner was licensed in 1991 under the name of Financial Security Life Insurance Company, the name under which petitioner transacted business prior to 1992.

reported "Life insurance premiums" of $22,710,038.00, "Accident and health insurance premiums" of $39,230,710.00, and "Total" premiums of $61,940,748.00.

For the same year petitioner filed a Federal Form 1120-PC, U.S. Property and Casualty Insurance Company Income Tax Return.

5. On May 31, 1994 and October 7, 1994, the Division issued to petitioner statements of proposed audit changes for tax due under Article 33 of the Tax Law for the years 1991 and 1992, respectively. In an attachment to the statements the Division informed petitioner that its tax on premiums had been recomputed and further explained that:

> "Section 801(a) of the Internal Revenue Code defines a life insurance company as an insurance company whose life insurance reserves plus unearned premiums and unpaid losses on life products comprise more than 50% of its total reserves. Since you did not meet the test of reserves to be treated as a life company, and are treated as a property and casualty company for Federal purposes, you are treated as a p & c company under Article 33. Only a life company may tax premiums at .8%."

The conclusion explains that rates for non-life companies are 1% for accident and health premiums and 1.2% (for 1991) or 1.3% (for 1992) for all other premiums.

In June of 1994, petitioner responded to the May 31, 1994 Statement of Proposed Audit Changes. The Division responded with a letter dated July 8, 1994, which stated:

> "the starting point for entire net income is either Federal taxable income or LICTI. The NYS Tax Law recognizes the difference in Federal taxation of life and non-life companies. The Audit Division requires Federal conformity and disagrees with the idea that the taxes imposed under Sections 1501 and 1510 are so separate and diverse that a company can be treated as a life company under one section and a non-life company under the other.
>
> "In addition, there have been precedent setting decisions in which it has been ruled that the purpose for which a company has been formed is irrelevant in determining the treatment for tax purposes. 'It has been firmly established that classification for franchise tax purposes is to be determined by the nature of the corporation's business and that the purposes for which the corporation was organized are immaterial.'" (Citation omitted.)

6. On August 1, 1994 the Division issued a Notice of Deficiency (#L-008865671)[2] to petitioner in the amount of $48,016.00 in tax, exclusive of interest. No penalties were asserted. The notice was for franchise tax on insurance corporations for the year 1991.

On November 17, 1994 the Division issued a Notice of Deficiency (#L-009591358) to petitioner in the amount of $819,903.00 in tax, exclusive of interest. No penalties were asserted. The notice was for franchise tax on insurance corporations for the year 1992.

Petitioner requested a conciliation conference on each of these notices. On September 29, 1995 a combined Conciliation Order was issued setting forth the following recomputation of the statutory notices: #L-008865671 (1991) remained the same at $48,016.00 in tax due, exclusive of interest; and #L-009591358 (1992) was recomputed from $819,903.00 in tax due to $258,660.00 in tax due, exclusive of interest.[3]

On December 19, 1995 the Division of Tax Appeals received the petition in this matter contesting both notices as recomputed by the Conciliation Order.

STATEMENT OF THE PARTIES' POSITIONS

7. Petitioner asserts that it is specifically excluded from paying tax on premiums of non-life insurance corporations under Tax Law § 1510(a) because it is transacting the business of life insurance in New York State. Petitioner also asserts that it is specifically included in Tax Law § 1510(b), and should be taxed on its premiums at the lower rate contained in that subdivision for life insurance corporations because it is a life insurance corporation authorized to transact business within this State pursuant to a license issued by the New York State Insurance Department.

In support of its interpretation of the Tax Law petitioner argues that: pursuant to the Insurance Law it is a life insurance company and the Tax Law is to be read in pari materia with

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[2]The Division did not introduce a copy of the Notice of Deficiency. Rather, it introduced a microfiche copy of the notice and an affidavit of a Division employee explaining the Division's practices and procedures regarding the retaining of microfiche copies rather than hard copies of notices. The evidence submitted is sufficient to establish that a notice was issued, especially since no question has been raised in these proceedings as to whether a notice was issued. (See, Matter of Huang, Tax Appeals Tribunal, April 27, 1997.)

[3]The recomputation concerned petitioner's utilization of net operating losses in 1992 which is not an issue in the current matter.

the Insurance Law; the premium tax is a separate tax from the tax on net income and there is nothing in the plain language of the statute that imposes the requirements of IRC § 801 on the making of a determination as to whether petitioner is a life insurance corporation pursuant to Tax Law § 1510(b); the Legislature could have specifically referred to the Federal classification of a company as either a life insurance or non-life insurance company in Tax Law § 1510, but did not do so; and, since the language of the statute is clear, the Division is attempting to expand the scope of the statute in an illegal manner.

8. The Division contends that since petitioner is considered a property and casualty insurance company (or non-life insurance company) for Federal tax purposes, and either Federal insurance company taxable income or Federal life insurance company taxable income (hereinafter "LICTI") is the basis for calculating New York State entire net income under Tax Law § 1503, petitioner cannot claim that it is a life insurance corporation for purposes of calculating the additional tax on premiums contained in Tax Law § 1510.

The Division asserts that the legislative history of Article 33 supports its position that the classification of an insurance corporation as either a life insurance corporation (including health and accident) or a property and casualty insurance corporation is the same for all sections of Article 33. Also, the Division asserts that petitioner cannot rely on the fact that it is licensed by the New York State Insurance Department to conduct a life insurance business because case law has held that it is the nature of the business actually transacted that controls a business's classification for franchise tax purposes, not merely its license or charter. Furthermore, the Division states that regardless of its New York State license, the nature of petitioner's business was not life insurance because petitioner's premiums from life insurance were "significantly less than half of total premiums" for the years in question. Finally, the Division argues that petitioner has not met its burden to prove that its interpretation of the statute is the only logical one or that the Division's interpretation of the statute is irrational.

CONCLUSIONS OF LAW

A. Tax Law § 1501 imposes a franchise tax on insurance corporations to be computed as set forth in Tax Law § 1502. Tax Law § 1502(a) provides that the tax shall be the greater of any of four alternative methods of computing the tax due, two of which require the calculation of a taxpayer's entire net income.[4] Tax Law § 1503 provides for the calculation of a taxpayer's New York State entire net income by starting with either its Federal insurance company taxable income or its Federal LICTI and then making certain modifications.[5] Tax Law § 1510 imposes a tax on the premiums of insurance corporations over and above the tax imposed on entire net income.

There is no issue as to petitioner's calculation of tax due under Tax Law §§ 1502, 1503. Petitioner's calculations utilized its Federal insurance company taxable income as a starting point, which, in turn, was based on its Federal property and casualty insurance company return. The Division's position is that since petitioner properly calculated its entire net income based on its Federal insurance company taxable income rather than LICTI (i.e., for Federal purposes petitioner did not qualify as a life insurance company), petitioner cannot now claim that it is a life insurance corporation for purposes of the additional tax on premiums imposed by Tax Law § 1510.

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[4]Tax Law § 1502(b), which is not at issue in the present matter, provides that in addition to the tax calculated pursuant to Tax Law § 1502(a) there shall be a tax based upon subsidiary capital allocated to New York for the taxable year.

[5]Under the Internal Revenue Code, taxation of insurance companies differs depending on whether a company is classified as a life insurance company (IRC § 801) or other than a life insurance company (IRC § 831). For purposes of the Internal Revenue Code petitioner was considered other than a life insurance company for the years in question and properly filed Form 1120-PC, U.S. Property and Casualty Insurance Company Income Tax Return. Petitioner filed as a property and casualty company (i.e., other than a life insurance company) for Federal purposes because it did not meet the requirements of IRC § 816(a) which provides that a life insurance company is one that is engaged in the business of life insurance if:

"(1) its life insurance reserves (as defined in subsection [b]), plus

"(2) unearned premiums, and unpaid losses (whether or not ascertained), on noncancellable life, accident, or health policies not included in life insurance reserves,

"comprise more than 50% of its total reserves. . . ."

B. Tax Law § 1510(former [a]) imposes an additional tax on the premiums of insurance corporations, other than life insurance corporations, as follows:

> "(a) Domestic, foreign and alien insurance corporations except life insurance corporations. Except as hereinafter provided, every domestic insurance corporation, . . . other than such corporations transacting the business of life insurance . . . shall . . . pay a tax on all gross direct premiums, less return premiums thereon, written on risks located or resident in this state. The rate of tax imposed by this subdivision shall be . . . one and two-tenths percent on premiums written on or after January first, nineteen hundred seventy-eight and before January first, nineteen hundred ninety-two and one and three-tenths percent on premiums written on and after such date. Provided, however, that the rate of tax imposed by this subdivision on all gross direct premiums, less return premiums thereon, for accident and health insurance contracts shall be . . . one percent . . . ." (Emphasis added.)

Tax Law § 1510(b) imposes an additional tax on the premiums of life insurance corporations as follows:

> "(b) Domestic, foreign and alien life insurance corporations. (1) Except as hereinafter provided, every domestic life insurance corporation, and every foreign and alien life insurance corporation authorized to transact business in this state under a certificate of authority from the superintendent of insurance, shall . . . pay a tax on all gross direct premiums, less return premiums thereon, received in cash or otherwise on risks resident in this state, including supplemental contracts for total and permanent disability benefits and accidental death benefits. The rate of such tax shall be . . . eight-tenths percent . . . ." (Emphasis added.)

The question presented in the current matter is simply one of statutory construction; whether petitioner is a life insurance corporation under Tax Law § 1510, or is precluded from being classified as a life insurance corporation under Tax Law § 1510 because it is classified as a non-life insurance company for Federal taxation purposes, uses its Federal income in calculating its tax due under Tax Law § 1503, and has life insurance premiums of less than 50% of its total premiums.

C. When construing a statute the primary focus is on the intent of the Legislature in enacting the statute (McKinney's Cons Laws of NY, Book 1, Statutes § 92[a]; see, Matter of Sutka v. Connors, 73 NY2d 395, 541 NYS2d 191; Matter of American Communications Technology v. State of New York Tax Appeals Tribunal, 185 AD2d 79, 592 NYS2d 147, affd 83 NY2d 773, 611 NYS2d 125). When that intent is clear from the wording of the statute itself, the inquiry ends (McKinney's Cons Laws of NY, Book 1, Statutes § 76; see, Matter of

American Communications Technology v. State of New York Tax Appeals Tribunal, supra). However, when there is an ambiguity in the words of the statute, the inquiry extends to other methods of ascertaining legislative intent, including review of statutes in pari materia (see, McKinney's Cons Laws of NY, Book 1, Statutes, §§ 76, 92, 221; Matter of Guardian Life Ins. Co. v. Chapman, 302 NY 226; Matter of American Communications Technology v. State of New York Tax Appeals Tribunal, supra). In questions of statutory interpretation where the issue is the imposition of a tax, the statute cannot be read to allow the government to tax anything more than the clear terms of the statute allow (see, Matter of Grace v. New York State Tax Commn., 37 NY2d 193, 371 NYS2d 715, lv denied 37 NY2d 708, 375 NYS2d 1027; Matter of Debevoise & Plimpton v. New York State Dept. of Taxation and Fin., 80 NY2d 657, 593 NYS2d 974). Furthermore, when the question presented is strictly statutory construction, there is no cause to defer to the expertise of the state agency that administers the statute (see, Matter of Debevoise & Plimpton v. New York State Dept. of Taxation and Fin., supra; Matter of Trump-Equitable Fifth Avenue Co. v. Gliedman, 57 NY2d 588, 457 NYS2d 466).

Contrary to the Division's assertion, this is not a case where petitioner is required to prove that its interpretation of the statute is the only reasonable interpretation, or that the Division's interpretation is unreasonable. In support of this position the Division cites Matter of Marriott Family Rests. v. Tax Appeals Tribunal of State of New York (174 AD2d 805, 507 NYS2d 741, lv denied 78 NY2d 863, 578 NYS2d 877) and Matter of Aetna Casualty & Surety Co. v. Tax Appeals Tribunal (214 AD2d 238, 633 NYS2d 226, lv denied 87 NY2d 811, 644 NYS2d 144). These cases show that the Division is correct when the issue to be decided is whether the taxpayer is entitled to an exclusion or exemption from tax (see also, Matter of Grace v. State Tax Comm., supra; Matter of Federal Insurance Co. v. State Tax Comm., 146 AD2d 888, 536 NYS2d 595). However, the present case involves the imposition of a tax, not the taxpayer's requesting an exclusion or exemption from the tax.[6] The final case

[6]It could be argued that petitioner is seeking an exemption from Tax Law § 1510(a). However, since the purpose of Tax Law § 1510 is clearly the imposition of the additional tax on insurance corporation premiums, and petitioner is seeking to have the tax imposed pursuant to Tax Law § 1510(b), it is logical to conclude that this case

cited by the Division in support of its argument that petitioner must prove its interpretation of the statute is the only reasonable one, or that the Division's is unreasonable, is Matter of Custom Shop Fifth Ave. Corp. v. Tax Appeals Tribunal (195 AD2d 702, 600 NYS2d 295). However, in Custom Shop the standard of review applied was applied by the Appellate Division, Third Department, to a decision of the Tax Appeals Tribunal. The Division of Tax Appeals is not limited to the standard of review utilized by the Appellate Division in an Article 78 proceeding. Indeed, the function of the Division is to provide a de novo review of the notice issued by the Division (see, Matter of 300 East 74th Owners Corp., Tax Appeals Tribunal, July 25, 1996; Matter of OK Petroleum Products Corp., Tax Appeals Tribunal, November 1, 1990).

D. Tax Law § 1510(b) provides for a .8% tax on premiums for life insurance corporations "authorized to transact business in this state under a certificate of authority from the superintendent of insurance. . . ."[7] Petitioner was licensed by the Insurance Department of the State of New York during the years in question to write "life, annuities, and accident and health insurance." Tax Law § 1510(a) provides for a 1.2% (for 1991) or 1.3% (for 1992) tax on other than accident and health insurance premiums and a 1% tax on accident and health insurance premiums, for insurance corporations other than those insurance corporations that are "transacting the business of life insurance. . . ." Petitioner conducted life insurance business in New York to the extent that 33% and 37% of petitioner's premiums for the years in question were from life insurance.

The terms "life insurance corporation" and "transacting business" are not defined in the Tax Law. While it is clear that petitioner was authorized to transact business pursuant to its licence issued by the New York State Insurance Department, the question is whether petitioner was a life insurance corporation authorized to transact business. The second question is

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involves the imposition of a tax, not petitioner's attempting to be excluded from coverage.

[7]The Tax Law refers to insurance corporations while the Insurance Law refers to insurance companies. The petitioner went to some length to explain that these terms may be used interchangeably. The Division has not raised any specific argument that the terms corporation and company have any different meaning, and I have been unable to ascertain any reason not to use them interchangeably.

whether the Division is prohibited from taxing petitioner under Tax Law § 1510(a) because petitioner transacts the business of life insurance.

E. Since the term life insurance corporation is not defined in the Tax Law, it is appropriate to rely on the Insurance Law in making a determination as to whether petitioner is a life insurance corporation. The Court of Appeals, in Matter of Guardian Life Ins. Co. v. Chapman (supra) held that Tax Law § 187 (the predecessor to Tax Law § 1510) was in pari materia with the Insurance Law and that:

> "Since the two laws are in pari materia, they must be read together and applied harmoniously and consistently." (Matter of Guardian Life Ins. Co. v. Chapman, supra, at 231 [citations omitted].)

The Division itself has looked to the Insurance Law for assistance in interpreting Tax Law Article 33 on the issue of whether a particular company was carrying on an insurance business:

> "Under Article 33 of the Tax Law, 'doing an insurance business' is not defined. Historically, the Department of Taxation and Finance has looked to whether a company must be licensed by the Superintendent of Insurance to determine if it is doing an insurance business. Under Section 187 of Article 9 (the predecessor to Article 33), the Court of Appeals held that the premiums tax was 'in pari materia' with the provisions of the Insurance Law (Guardian Life Ins v Chapman, 302 NY 226 (1951)). In KPMG Peat Marwick, Adv Op Comm T & F, January 12, 1993, TSB-A-93(4)C, the Department held that an HMO that was exempt from licensing by the Superintendent of Insurance was not considered to be doing an insurance business under Article 33 and was subject to tax under Article 9-A." (TSB-A-96[22]C, September 12, 1996.)

It should also be noted that by its terms Tax Law § 1510(b) refers indirectly to the Insurance Law by imposing tax on insurance corporations "authorized to transact business in this state under a certificate of authority from the superintendent of insurance. . . ."

Section 107(a)(28) of the Insurance Law defines a life insurance company as any corporation with the power to conduct life insurance and/or annuity business. By virtue of petitioner's license authorizing it to write life insurance, annuities, accident and health insurance, it has the power to conduct life insurance and annuity business, and is therefore a life insurance company within the meaning of Insurance Law § 107(a)(28).

Furthermore, Insurance Law § 107 contains separate definitions for accident and health insurance companies and property and casualty insurance companies. Insurance Law

§ 107(a)(1) defines an accident and health insurance company as one having the power to do the kinds of business set forth in Insurance Law § 1113(a)(3)(i) (i.e., insurance against death, or personal injury by accident, insurance against sickness, ailment or bodily injury including disability, and noncancellable disability), provided that such a company does not have the power to do any other kind of insurance business. While petitioner is authorized to write accident and health insurance, it is also authorized to write life insurance and annuities. Therefore, by definition, petitioner cannot be considered an accident and health insurance company.

Insurance Law § 107(a)(36) defines a property and casualty insurance company as having the power to write one or more of the basic kinds of insurance set forth in Insurance Law § 4101(a) (i.e., fire, burglary and theft, glass, boiler and machinery, elevator, animal, personal injury liability, property damage liability [basic as to stock companies only], worker's compensation and employer liability, fidelity and surety, credit, marine and inland marine, marine protection and indemnity [basic as to mutual companies only]). Petitioner's license does not give it the power to write these kinds of insurance. Indeed, petitioner is prohibited from writing these kinds of insurance by Insurance Law § 4205. Pursuant to Insurance Law § 4205, a life insurance company is not allowed to do any business other than life insurance, annuities, accident and health insurance, reissuance of those risks, funding agreements and any business incidental thereto. Therefore, a life insurance company in New York State is not one that writes property and casualty insurance. This provision directly contradicts the Division's position that for purposes of Tax Law § 1510 petitioner should be considered a property and casualty insurance company.

Petitioner was a member insurer of the Life Insurance Company Guarantee Corporation of New York. A member insurer, pursuant to Insurance Law § 7705(h), is a life insurance company. Furthermore, Tax Law § 1511(f) allows a credit for a portion of the assessment paid by a member insurer to the Life Insurance Company Guarantee Corporation of New York. This

is another example of the Tax Law's referring to the Insurance Law for purposes of administering the tax under Article 33.

It is clear that petitioner is a life insurance company under the Insurance Law. Therefore, interpreting the Insurance Law and the Tax Law consistently requires the conclusion that petitioner was also a life insurance corporation under Tax Law § 1510(b) for the years in question.

F. Contrary to this analysis, the Division argues that petitioner is not entitled to be taxed as a life insurance corporation. The Division argues that Federal taxable income and or Federal LICTI is the tax basis for all provisions of Article 33, including Tax Law § 1510(b) but does not refer to any statutory language or case law in support of this proposition. The Division also argues that it is the business transacted by a company that determines its classification for franchise tax purposes and not its stated purpose in the certificate of insurance, citing Matter of McAllister Brothers v. Bates (272 App Div 511, 72 NYS2d 532). McAllister dealt with whether a taxpayer should be classified as a transportation and transmission company under Article 9 of the Tax Law or taxed as a general business corporation under Article 9-A. The Court upheld the action of the Division that changed the taxpayer's classification and stated that one must look to the business being conducted by the company as opposed to its articles of incorporation to determine if it were a transportation company. However, the Court continued by stating:

> "This rule with respect to classification for franchise tax purposes applies especially to corporations organized under the general business corporation laws which have within their certificates of incorporation a wide variety of chartered powers. The Tax Commission under the authorities may change its classification for franchise tax purposes as the corporation shifts from one conduct of business to another. . . ." (Matter of McAllister Brothers v. Bates, supra at 536.)

Petitioner in the present case is licensed to do business under specific requirements set forth in the Insurance Law. As detailed in Conclusion of Law "E", such requirements do not allow petitioner the same flexibility in altering the nature of its business as a corporation organized under the Business Corporation Law. Petitioner does not have a wide variety of powers but is specifically limited by the license it was granted and the Insurance Law. In short, an insurance

company licensed to do business by the New York State Insurance Department has a license that substantively describes its business with particularity, as opposed to the taxpayer in McAllister whose charter allowed it to conduct "almost any legitimate business" (Matter of McAllister Brothers v. Bates, supra at 533).

G. The theme of the Division's argument throughout the Statement of Proposed Audit Adjustment, Notice of Deficiency and these proceedings has been that there must be some type of Federal conformity and that petitioner cannot be a non-life insurance company for Federal taxation purposes, use that status for calculating part of its New York State franchise tax and then claim it is a life insurance company for purposes of the additional tax on premiums.

There are several reasons that the Federal conformity argument is not convincing as it relates to Tax Law § 1510. First, the franchise tax on insurance companies is a separate tax from the Federal income tax on insurance companies (see, Matter of Guardian Life Ins. Co. v. Chapman, supra; Matter of U.S. Life Ins. Co., Tax Appeals Tribunal, April 2, 1992, confirmed 194 AD2d 952, 599 NYS2d 168). As stated by the Court in Guardian Life, the franchise tax on insurance corporations:

> "is not a tax upon income as such, but rather a fee paid by a domestic insurance company for the privilege of exercising a corporate franchise measured by its premiums reasonably attributable to the business of this State. . . ." (Matter of Guardian Life Ins. Co. v. Chapman, supra at 239.)

Second, the Federal basis of classifying insurance companies by type utilizes a completely different measurement than either the New York State Tax or Insurance Law. For Federal taxation purposes an insurance company is classified as either a life insurance company or a non-life insurance company based upon the percentage of its reserves that are life insurance reserves (see, IRC § 816). Article 33 taxes insurance companies based upon premiums, and classifies companies by referring to them as a either a life insurance corporation or excluding them as a business that transacts life insurance. Neither of these terms is defined, so resort to the Insurance Law is appropriate. The Insurance Law defines the types of businesses done by the power each business has to write certain types of insurance, the power being granted by the Insurance Department in a licence to conduct business. Nowhere in these New York State

statutory schemes is there any reference to utilizing either the amount or type of reserves a company has in defining whether a company is a life insurance or non-life insurance company.

The mere use of a Federal taxable income figure in the calculations done pursuant to Tax Law § 1503, where the Federal figure is based on whether the taxpayer is classified as a life or non-life insurance company, does not require Federal conformity with Tax Law § 1510. There are simply too many differences between the State and Federal schemes and the nature of the taxes themselves to construe such a requirement without a specific statutory directive.

In contrast, Tax Law § 1503 specifically states that Federal insurance company taxable income or LICTI is the starting point for calculating New York State entire net income. This is an example in Article 33 where the Legislature specifically placed a reference to Federal income, yet it did not do so when describing which companies were to be taxed at which rate for the purposes of the additional tax on premiums.

The Division also argues that the legislative history of the statute supports its argument that a company must be classified as the same type of company for Federal or Tax Law § 1503 purposes and for Tax Law § 1510(b) purposes. The Division points to a legislative memorandum where a chart is presented showing a comparison of tax rates for several years for the franchise tax based on net income and the additional tax based on premiums. The chart is separated into two categories, life insurance companies and property and casualty companies. Whatever implication may be made from that chart, it simply is not strong enough by itself to support the proposition that the Legislature intended the result requested by the Division in this matter.

H. Having concluded that petitioner is a life insurance company subject to taxation pursuant to Tax Law § 1510(b), the remaining issue is whether petitioner is excluded from taxation pursuant to Tax Law § 1510(a) which excludes corporations "transacting the business of life insurance. . . ."

The term transacting business is not defined in the Tax Law. On this issue the provisions of the Insurance Law do not provide specific guidance. Insurance Law § 1102(a) provides that

no one shall do an insurance business in New York State without a license and that anyone who transacts any insurance business without a license is subject to penalties. Furthermore, Insurance Law § 1101(a) provides that making any contract is doing an insurance business within the State requiring a license under Insurance Law § 1102. It could be implied from these provisions that one transaction would amount to transacting the business of life insurance. However, it is not necessary to test that definition in the present circumstances, when applying the term as it is commonly understood resolves the issue.

I agree with petitioner that transacting business is not a term susceptible to being quantified. It appears that the commonly understood legal definition of transacting business involves something more than one transaction, but not as much as doing business, and requires examination of the individual circumstances in each case (see generally, Black's Law Dictionary 1341 [5th ed], Siegel, NY Practice §§ 122-130 [2d ed]). Such an analysis is not difficult in the present case. For the years in question petitioner's premiums from life insurance as a percentage of its total premiums were 33% for 1991 and 37% for 1992. These percentages show that for the years in question petitioner's life insurance transactions were a substantial part of its own business. Furthermore, the dollar amounts of petitioner's premiums from life insurance were substantial, $5,011,469.00 for 1991 and $22,710,038.00 for 1992. It is simply not possible to reach any other conclusion except that petitioner was transacting life insurance business in New York State.

The Division argues that petitioner's premiums from its life insurance business were "significantly less than half of total premiums. . . ." The Division does not explain why this is significant, nor does it cite any authority for the proposition that this fact is significant. I have been unable to locate any legislative or case authority for the proposition that there is any 50% requirement connected with the term transacting business.

I. Petitioner is a life insurance corporation that transacts business in New York State as those terms are used in Tax Law § 1510 imposing an additional tax on insurance company

premiums. Therefore, petitioner is entitled to be taxed on its premiums at the lower rate provided for in Tax Law § 1510(b).

J. The petition of First Fortis Life Insurance Company is granted, and the Notices of Deficiency dated August 1, 1994 (#L-008865671) and November 17, 1994 (#L-009591358) are cancelled.

DATED: Troy, New York
June 5, 1997

/s/ Roberta Moseley Nero
ADMINISTRATIVE LAW JUDGE