STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
ELECTCHESTER FIRST HOUSING COMPANY **ELECTCHESTER SECOND HOUSING COMPANY** **ELECTCHESTER THIRD HOUSING COMPANY** **ELECTCHESTER FOURTH HOUSING COMPANY** **ELECTCHESTER FIFTH HOUSING COMPANY** **KNICKERBOCKER VILLAGE HOUSING COMPANY**	:	DETERMINATION DTA NOS. 816912, 816913, 816914, 816915, 816916 AND 816917
for Revision of Determinations or for Refunds of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period April 5, 1995 through May 5, 1998.	:	

Petitioner Electchester First Housing Company, 161-04 Jewel Avenue, Flushing, New York 11365, filed a petition 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 April 5, 1995 through May 5, 1998.

Petitioner Electchester Second Housing Company, 161-29 Harry Van Arsdale Avenue, Flushing, New York 11365, filed a petition 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 31, 1995 through May 5, 1998.

Petitioner Electchester Third Housing Company, 65-52 160th Street, Flushing, New York 11365, filed a petition 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 May 3, 1995 through April 6, 1998.

Petitioner Electchester Fourth Housing Company, 65-94 162nd Street, Flushing, New York 11365, filed a petition 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 April 5, 1995 through May 5, 1998.

Petitioner Electchester Fifth Housing Company, 65-83 160th Street, Flushing, New York 11365, filed a petition 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 June 2, 1995 through May 5, 1998.

Petitioner Knickerbocker Village Housing Company, 10 Monroe Street, New York, New York 10002, filed a petition 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 May 8, 1995 through April 8, 1998.

On April 19, 1999 and May 4, 1999, respectively, petitioners, by Stephen P. Kramer, Esq., and the Division of Taxation, by Terrence M. Boyle, Esq. (Robert Tompkins, Esq., of counsel), waived a hearing and agreed to submit this matter for determination based on documents and briefs to be submitted by August 27, 1999, which date began the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Timothy J. Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether Private Housing Finance Law § 93(1) exempts petitioners, limited dividend housing companies under Article IV of the Private Housing Finance Law, from tax imposed pursuant to Tax Law § 1107.

FINDINGS OF FACT

1. Petitioners, Electchester First Housing Company, Electchester Second Housing Company, Electchester Third Housing Company, Electchester Fourth Housing Company,

Electchester Fifth Housing Company and Knickerbocker Village Housing Company, filed claims for refunds of tax paid on purchases of utilities pursuant to Tax Law § 1107 as follows:

Petitioner	***Date of Claim(s)***	***Period of Claim(s)***	***Amount of Claim(s)***
Electchester First Housing Co.	6/8/98	4/5/95-5/5/98	$45,471.39
Electchester Second Housing Co.	5/12/98	8/31/95-5/5/98	$63,456.65 1,602.01 1,319.68 37.66
Electchester Third Housing Co.	5/12/98	5/3/95-4/6/98 6/2/95-4/6/98	$82,418.60 1,525.81
Electchester Fourth Housing Co.	6/8/98	4/5/95-5/5/98	$38,623.17
Electchester Fifth Housing Co.	5/12/98	10/31/95-5/5/98 6/2/95-5/5/98	$20,021.78 18,667.26
Knickerbocker Village Housing Co.	5/13/98	5/8/95-4/8/98	$105,931.31

2. By letters dated October 13, 1998, the Division of Taxation ("Division") denied petitioners' claims in full. The letters provided that "although the Private Housing Finance Law allows an exemption to limited dividend housing companies to [sic] sales and use taxes imposed by New York State, the tax you are requesting to be refunded is a local tax and cannot be refunded on this basis."

3. Petitioners are located in New York City and are limited dividend housing corporations within the meaning of Article IV of the Private Housing Finance Law. The tax at issue is a four percent sales tax added to petitioners' residential energy bills by their utility company. Petitioners paid the tax at issue and such tax was remitted to the State of New York. There is no dispute regarding the computation of petitioners' refund claims.

4. By letter dated October 1, 1998, the Division's former counsel responded to petitioners' letter to the Division's Sales Tax Instructions and Interpretations Unit asking whether limited dividend housing companies are exempt from paying taxes imposed by Tax Law § 1107. This letter stated that such companies were not so exempt. The position of the Division in the October 1 letter and the arguments raised by the Division in its brief filed in this matter are discussed below.

CONCLUSIONS OF LAW

A. As noted, petitioners are limited dividend housing companies as defined in Article IV of the Private Housing Finance Law ("PHFL") (***see***, PHFL § 70 *et seq*). The Legislature created limited dividend housing companies as a means to encourage investment in low income housing (***see***, PHFL § 70). PHFL § 93(1) provides that "[a]ny housing company shall be exempt from the payment of any and all franchise, organization, income, mortgage recording and other taxes to the state and all fees to the state or its officers." PHFL § 71(1) defines the term "housing company" as "a limited-dividend housing corporation."

B. Tax Law § 1107(a) provides as follows:

> On the first day of the first month following the month in which a municipal assistance corporation is created under article ten of the public authorities law for a city of one million or more, in addition to the taxes imposed by sections eleven hundred five and eleven hundred ten, there is hereby imposed on such date, within the territorial limits of such city, and there shall be paid, additional taxes, at the rate of four percent, which except as provided in subdivisions (b) and (d) of this section, shall be identical to the taxes imposed by sections eleven hundred five and eleven hundred ten. Such sections and the other sections of this article, including the definition and exemption provisions, shall apply for purposes of the taxes imposed by this section in the same manner and with the same force and effect as if the language of those sections had been incorporated in full into this section and had expressly referred to the taxes imposed by this section.

C. Tax Law § 1107 is imposed solely within the territorial limits of New York City. It was enacted by the State Legislature in 1975 as part of a series of measures designed to address a fiscal emergency in New York City. The Municipal Assistance Corporation for the City of New York ("MAC") was created as part of this series of measures (***see***, Public Authorities Law ["PAL"] § 3030 *et seq*). Among MAC's purposes was the issuance of long-term debt obligations (***see***, PAL § 3033). Simultaneous with the enactment of Tax Law § 1107 the City's authority to impose local sales tax pursuant to Tax Law § 1210 was suspended (***see***, Tax Law § 1210[f]). Tax paid pursuant to Tax Law § 1107 is collected by the Division of Taxation and is deposited into a municipal assistance tax fund (***see***, State Finance Law § 92-d[2]). Such funds are, in turn, disbursed by the State Comptroller to MAC in order that MAC may meet its financial obligations (***see***, State Finance Law § 92-d[3]). Any balance in the municipal assistance tax fund after payment to MAC is appropriated to New York City (***id***.). The Governor's Memorandum of Approval of these measures describes this statutory framework in part as follows:

> The municipal assistance tax fund would be established for the benefit of MAC with the State Commissioner of Taxation and Finance and funded by a *sales tax imposed by the State* at the maximum rate being levied by the city, the city's power to levy such tax having been suspended. The suspension of the City's power to impose the sales and use tax triggers a simultaneous substitution of an identical *State sales and use tax*. (Emphasis supplied.)

D. Petitioners are seeking an exemption from sales tax imposed pursuant to Tax Law § 1107. Exemptions from tax are to be strictly construed against the taxpayer (***see***, ***Matter of Grace v. State Tax Commn.***, 37 NY2d 193, 196, 371 NYS2d 715, 718, ***lv denied*** 37 NY2d 708, 375 NYS2d 1027). However, "where the statutory language is clear and unambiguous, [the statute is properly construed] so as to give effect to the plain meaning of the words used"

(***Patrolmen's Benevolent Association v. City of New York***, 41 NY2d 205, 208, 391 NYS2d 544, 546).

E. In this case, the plain meaning of the statutory language compels a finding in favor of petitioners. As noted previously, PHFL § 93(1) exempts limited dividend housing companies, such as petitioners, "from the payment of any and all . . . taxes to the state." The State Legislature enacted Tax Law § 1107. The State collects and administers the tax. The State Legislature determines how the revenue raised by the tax is used. Accordingly, petitioners' payment of section 1107 tax constituted "the payment of . . . taxes to the state" within the meaning of PHFL § 93(1). Petitioners were therefore properly exempt from the payment of such tax.

F. In both the letter of its former counsel dated October 1, 1998 and its brief filed in this matter, the Division asserted that the exemption under PHFL § 93(1) is limited to the payment of State taxes. The Division contended that tax imposed pursuant to section 1107 is local in nature and does not benefit the State. The Division's position was based on the fact that such tax is imposed in lieu of a local sales tax and is imposed only within New York City, and that the revenue raised by such tax is appropriated for the benefit of the New York City Municipal Assistance Corporation with any excess to the City.

Contrary to the Division's assertion, section 1107 is clearly a State tax. It is imposed, collected, and appropriated pursuant to State statutes. Conversely, the City of New York did not enact section 1107; does not collect or administer the tax; and does not control the appropriation of the revenue raised by the tax. Furthermore the State Legislature has explicitly stated that section 1107 is a State tax. Specifically, as petitioners correctly note, included in the package of measures addressing the 1975 New York City fiscal crisis, of which the enactment of Tax Law §

1107 was a part, is a statute directing that the section 1107 tax be considered a local tax for Federal revenue sharing purposes (***see***, L 1975, ch 187). This statute provides, in relevant part:

> Notwithstanding that *the taxes imposed by subdivisions (a) and (c) of section eleven hundred seven* and subdivision (a) of section eleven hundred eight of the tax law of the state *are taxes imposed by the state*, such taxes, solely for the purpose, but not otherwise, of [Federal revenue sharing], shall be deemed to be and treated as a part of the general tax effort of the unit of local government. (Emphasis added.)

Additionally, the Governor's Memorandum of Approval specifically refers to the tax imposed by Tax Law § 1107 as a "sales tax imposed by the State" and "a State sales and use tax." The Division's assertion that Tax Law § 1107 is not a State tax is thus without merit.

As petitioners correctly note in their brief, the issue of whether the section 1107 taxes "benefit" the State is irrelevant to a determination of whether these taxes fall within the PHFL § 93(1) exemption. The statute in question contains no language limiting the exemption to taxes that "benefit" the State. It simply exempts limited dividend housing companies from payment of "any and all . . . taxes to the state." The Division thus seeks to impose a requirement for the exemption that does not appear in the statute. Furthermore, even if the statute in question limited exemptions to those taxes which "benefit" the State, Tax Law § 1107 would qualify, because MAC, the entity which ultimately receives the revenue generated by section 1107, is a public benefit corporation (***see***, Public Authorities Law § 3033). General Construction Law § 66(4) defines a public benefit corporation as a corporation "organized to construct or operate a public improvement wholly or partly within the state, the profits from which inure to the benefit of this or other states, or to the people thereof." As a matter of law, then, appropriations of tax revenue to MAC benefit the State. Also, the Legislature has stated that the funding of MAC to enable MAC to meet its obligations is "in the interests of the State of New York" (***see***, Public

Authorities Law § 3031). The Legislature has thus determined that the funding of MAC through revenues generated by Tax Law § 1107 benefits the State. It is beyond the authority of the Division to substitute its judgment for that of the Legislature.

As to the Division's assertion that the section 1107 tax is a local tax because the proceeds are spent in one locality, as discussed previously, Tax Law § 1107 is a State tax because it is imposed, collected, and appropriated pursuant to State law. That the tax is imposed and its proceeds are spent in one locality is not determinative of whether the tax is properly deemed a local tax (***see***, ***State of New Jersey v. Consolidated Rail Corporation***, 690 F Supp 1061, ***Airlines Parking, Inc. v. Wayne County***, 550 NW2d 490, 452 Mich 527). Contrary to the Division's assertion, the tax imposed under Tax Law § 1107 is distinguished from the local sales tax imposed pursuant to Article 29 of the Tax Law and the local income tax imposed pursuant to Article 30 of the Tax Law. Neither Article 29 nor Article 30 imposes any tax. Article 29 authorizes certain localities to pass a local law and to impose a sales tax and Article 30 authorizes certain localities to pass a local law and to impose an income tax. Taxes under these articles are thus imposed by localities. In contrast, taxes imposed under Article 28, including Tax Law § 1107, are mandated directly by the State. This difference supports the conclusion that the tax at issue is a State and not a local tax. Also contrary to the Division's position, the statement in the Governor's Memorandum of Approval that section 1107 taxes are imposed by the State is significant. This statement evinces an intent by the drafters of the legislation that the tax in question be considered a State tax. More significantly, as noted previously, chapter 187 of the Laws of 1975 expressly states that, except for Federal revenue sharing purposes, "but not otherwise," Tax Law § 1107 is a State tax. If the Legislature had intended for Tax Law § 1107 to be considered a local tax for purposes of PHFL § 93(1), it could have enacted a similar provision.

The fact that the Legislature did not enact such a provision is further support for petitioners' assertion that the section 1107 tax is subject to exemption under PHFL § 93(1).

G. The Division also relied on ***People v. Brooklyn Garden Apartments, Inc.*** (282 NY 373) in support of its position. In that 1940 case a limited dividend housing company sought an exemption under a predecessor to PHFL § 93(1) (former State Housing Law § 39) from payment of a charge imposed by the Legislature on housing companies to reimburse the State for the costs of a State Board of Housing that the Legislature created to regulate such housing companies. In construing statutory language identical in all material respects to the language of PHFL § 93(1), the court held that the imposition in question, designated a "charge" in the statute, was neither a tax nor a fee for purposes of the exemption. In reaching its holding, the court noted that "[a] tax in the strict sense is payable into the general fund of the government to defray customary governmental expenditures" (282 NY at 380, 381). Based on this statement, the Division asserted that ***Brooklyn Garden Apartments*** held that "revenue collected from an imposition must be payable into the general fund of the state in order for the imposition to be a state tax for purposes of the PHFL tax exemption" (Division's brief p. 4). The Division further asserted that since Tax Law § 1107 revenues are not deposited into the State's General Fund, section 1107 is a local and not a State tax and therefore does not fall within the PHFL § 93(1) exemption.

The Division misstates the holding of ***Brooklyn Garden Apartments*** and overstates the import and applicability of that case to the instant matter. The issue in that case was whether a particular "charge" imposed by the State constituted a tax or fee within the meaning of the exemption provision. The quoted language upon which the Division relies was marshaled by the court to show that the charge in question was not a tax. The court used the quoted language to contrast a *tax* - a payment used to "defray customary governmental expenditures" (282 NY at

381) - from the "charge" at issue, which was "payable to [the State] for a specific purpose" (***id***. at 380). Here, there is no doubt that section 1107 imposes a tax. Rather, the issue is whether this particular tax qualifies for exemption under PHFL § 93(1). Based on ***Brooklyn Garden Apartments***, the Division asserted that this particular tax is not exempt because section 1107 tax revenue is not deposited into the State's General Fund. According to the Division, Tax Law § 1107 is therefore a local and not a State tax. However, ***Brooklyn Garden Apartments*** does not address the difference between a State tax and a local tax. Additionally, as noted in petitioners' brief, ***Brooklyn Garden Apartments*** does not address the issue of whether a state tax loses its character as such where, as in the instant matter, the State Finance Law requires the deposit of such tax in a fund other than the General Fund. Furthermore, it is doubtful that the reference in that decision to "the general fund of the government" (283 NY at 381) refers to the General Fund maintained by the State Comptroller pursuant to State Finance Law § 72. As noted by petitioners, the State Finance Law provides for numerous special funds (***see***, State Finance Law §§ 70[1] and 74 through 99-e). Included among such funds are the stock transfer tax fund for the deposit of stock transfer taxes imposed under Article 12 of the Tax Law (***see***, State Finance Law § 92-b), the emergency highway construction and reconstruction fund for the deposit of a portion of the supplemental diesel and motor fuel taxes imposed under Tax Law §§ 282-c and 284-c (***see***, State Finance Law § 89-a) and the environmental protection fund (***see***, State Finance Law § 92-s), which includes revenue collected by the State pursuant to the real estate transfer tax (***see***, Tax Law § 1421). Certainly, such taxes do not cease to be State taxes simply because of the method of accounting for such funds. As petitioners correctly note, however, under the Division's interpretation these taxes would not be State taxes or would not be taxes at all. ***Brooklyn Garden Apartments*** does not stand for such an incongruous result.

H. The petitions of Electchester First Housing Company, Electchester Second Housing Company, Electchester Third Housing Company, Electchester Fourth Housing Company, Electchester Fifth Housing Company and Knickerbocker Village Housing Company are granted, and the Division of Taxation is directed to refund the tax paid by petitioners pursuant to Tax Law § 1107 as set forth in petitioners' refund claims, together with interest as provided by law.

DATED: Troy, New York
December 2, 1999

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE