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**	:	ORDER 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 February 8, 2001 the Tax Appeals Tribunal issued a decision which affirmed the determination of the Administrative Law Judge, granted the petitions and directed the refund of tax paid by petitioners pursuant to Tax Law § 1107. On March 8, 2001, petitioners filed an application for administrative costs pursuant to Tax Law § 3030. The Division of Taxation appearing by Barbara G. Billett, Esq. (Cynthia McDonough, Esq., of counsel) filed a response to the motion which was received on April 16, 2001. On April 25, 2001, the Division of Tax Appeals received a response to the Division of Taxation's opposition to petitioners' application for administrative costs.

Based upon petitioners' application for costs, the Division's affirmation in opposition, petitioners' response and all pleadings and documents submitted in connection with this matter, Arthur S. Bray, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioners are entitled to an award of costs pursuant to Tax Law § 3030.

FINDINGS OF FACT

1. Petitioners filed claims for refunds of tax paid on the purchase of utilities pursuant to Tax Law § 1107. The Division of Taxation denied the claims for refund on the basis that the Private Housing Finance Law ("PHFL") only allows an exemption to limited dividend housing companies for sales and use taxes imposed by New York State and petitioners were requesting a refund of a local tax. On February 8, 2001, the Tax Appeals Tribunal affirmed the determination of the Administrative Law Judge and held that the payment of tax pursuant to Tax Law § 1107 constituted the payment of taxes pursuant to PHFL § 93(1) and, therefore, petitioners were exempt from the payment of such tax.

2. In support of their motion, petitioners' representative annexed copies (or copies of excerpts) of invoices setting forth the time expended and tasks performed for each billing period during the course of these cases. The invoices also detail the expenses incurred in connection with the six applications for a refund. The time expended on the six proceedings was 148.8 hours and the total expenses claimed is $296.26. At a rate of $75.00 per hour, petitioners' representative seeks $11,130.00 plus expenses of $296.26 for a total of $11,426.26 for the six proceedings.

3. Petitioners' representative contends that the Division's position was not substantially justified and that the statutory language granting petitioners an exemption was clear from the start of the proceedings. It is further noted that the Administrative Law Judge and the Tax Appeals Tribunal found unanimously for petitioners. Petitioners' representative then makes reference to the following language of the Tribunal's decision on the issue of whether the sales taxes petitioners pay under Tax Law § 1107 are paid to the State:

> Moreover, whether or not Tax Law § 1107 is a State tax is not the ultimate question. PHFL § 93(1) provides that limited dividend housing companies as defined in Article IV of the PHFL are "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." The sales tax imposed by section 1107 is undeniably a tax. It is also undeniably paid to the State. As petitioners point out, we are not called upon to review the Division's position that taxpayers such as petitioner are only exempt from that portion of the sales and use tax enacted pursuant to Article 28 (and not Article 29).
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> The Division argues that we should follow the money. Indeed, that is what PHFL § 93 requires the taxpayer to do. If the money is to be paid to the State as a tax, then petitioners are exempt from having to pay it. There is no requirement that petitioners first pay the money to the State and then follow it as it passes through the State's coffers into the hands of its ultimate recipient in order to determine if they were required to have paid it in the first instance. (***Matter of Electchester First Housing Co.***, Tax Appeals Tribunal, February 8, 2001.)

4. According to petitioners, the statutory scheme involved in these proceedings was not complex and the Commissioner's attempt to evade the clear intent of the Public Housing Finance Law was without precedent. It is further submitted that his refusal to grant petitioners' their claim for refund was unfounded and unreasonable.

5. On March 23, 2001, the Division of Tax Appeals received a letter from petitioners' representative which sought to correct a typographical error in his prior submission. This letter stated that, in fact, the net worth of Knickerbocker Housing Company was less than $2,000,000.00.

6. In opposition to the motion, the Division of Taxation ("Division") argues that petitioners are not entitled to the recovery of administrative costs because the Division's position was substantially justified. The Division notes that there were no existing regulations or formal advisory opinions that directly addressed the legal issue of whether Tax Law § 1107 was considered a "State" tax. In addition, there were no existing regulations or formal advisory opinions that directly addressed the question of whether the exemption under PHFL § 93(1)

included the sales taxes imposed under § 1107 that were initially remitted to the State and were, in turn, conveyed to the Municipal Assistance Corporation and New York City. According to the Division, ***People v. Brooklyn Garden Apartments*** (283 NY 373) was the only case that interpreted the exemption at issue. Relying on this case, the Division's counsel determined that this was not a State tax. The Division further submits that the use of Federal case law is appropriate to interpret Tax Law § 3030 and that, under this standard, there is substantial justification for the Division's position. As a second point, the Division argues that petitioners are not entitled to an award of administrative costs because the application is defective. The Division submits that in order to be eligible for an award of administrative costs, Tax Law § 3030(c)(5)(A)(ii)(II) requires that the net worth of a corporation cannot exceed seven million dollars at the time the civil action was filed. Unlike the other corporate petitioners, Knickerbocker Village Housing Company ("Knickerbocker") is not a cooperative corporation and therefore it must prove that its net worth was less than seven million dollars when it commenced the administrative proceeding. The Division notes that the original application for costs states that Knickerbocker has a net worth of $10 million and that subsequent computer printouts of balance sheets show that Knickerbocker's net worth was less than $2 million for the year 1998. However, these worksheets are not in the form of a sworn affidavit. The Division submits that since the application for costs does not itemize the costs for each petitioner which would allow one to deduct the costs for Knickerbocker Village, the entire application must be rejected because Knickerbocker did not show that its net worth was less than $7 million at the time the civil action was commenced.

7. In a letter received on April 2, 2001, petitioners' representative enclosed computer printouts of the balance sheet of Knickerbocker Village, Inc. for the years 1998, 1999 and 2000.

The financial statements show that the corporation's net worth for these years was, respectively, $1,595,634.00, $1,806,528.00 and $1,813,406.15.

8. On April 25, 2001, the Division of Tax Appeals received a letter from petitioners' representative in response to the Division's opposition to petitioners' application for administrative costs. In this letter, petitioners' representative states that the statute granting petitioners an exemption from costs is clear and that the Division's position was attenuated. On the second point, petitioners' representative states that there is no requirement of an affirmation to accompany an application for costs. Moreover, it is asserted that there were no additional costs associated with including Knickerbocker in the litigation of the cases.

CONCLUSIONS OF LAW

A. Tax Law § 3030(a) provides, generally, as follows:

> In any administrative or court proceeding which is brought by or against the commissioner in connection with the determination, collection, or refund of any tax, the prevailing party may be awarded a judgment or settlement for:
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> (1) *reasonable administrative costs* incurred in connection with such administrative proceeding within the department, and
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> (2) reasonable litigation costs incurred in connection with such court proceeding. (Emphasis added.)

As relevant herein, *reasonable administrative costs* include reasonable fees paid in connection with the administrative proceeding (***see***, Tax Law § 3030[c][2][B]). Such costs include reasonable fees for the services of attorneys in connection with the administrative proceeding, "except that such fees shall not be in excess of seventy-five dollars per hour unless the [Division of Tax Appeals] determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for such proceeding, justifies a higher rate" (Tax Law § 3030[c][1][B][iii]; ***see also*** Tax Law § 3030[c][2][B]). Reasonable administrative

costs "only include costs incurred on or after the date of the . . . document giving rise to the taxpayer's right to a hearing" (Tax Law § 3030[c][2][B]).

> *Prevailing party* is defined for purposes of section 3030, in relevant part, as follows:
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> (A) In general. The term "prevailing party" means any party in any proceeding to which [Tax Law § 3030(a)] applies (other than the commissioner or any creditor of the taxpayer involved):
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> (i) who (I) has substantially prevailed with respect to the amount in controversy, or (II) has substantially prevailed with respect to the most significant issue or set of issues presented, and
>
> (ii) who (I) within thirty days of final judgment in the action, submits to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from an attorney or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed . . . and (II) is an individual whose net worth did not exceed two million dollars at the time the civil action was filed. . . .
>
> (B) Exception if the commissioner establishes that the commissioner's position was substantially justified.
>
> (i) General rule. *A party shall not be treated as the prevailing party in a proceeding to which subdivision (a) of this section applies if the commissioner establishes that the position of the commissioner in the proceeding was substantially justified.*
>
> (ii) Burden of proof. The commissioner shall have the burden of proof of establishing that the commissioner's position in a proceeding referred to in subdivision (a) of this section was substantially justified, in which event, a party shall not be treated as a prevailing party.
>
> (iii) Presumption. For purposes of clause (i) of this subparagraph, the position of the commissioner shall be presumed not to be substantially justified if the department, inter alia, did not follow its applicable published guidance in the administrative proceeding. Such presumption may be rebutted.
>
> (iv) Applicable published guidance. For purposes of clause (ii) of this subparagraph, the term "applicable published guidance" means (I) regulations, declaratory rulings, information releases, notices, announcements, and technical

> services bureau memoranda, and (II) any of the following which are issued to the taxpayer: advisory opinions and opinions of counsel.
>
> (C) Determination as to prevailing party. Any determination under this paragraph as to whether a party is a prevailing party shall be made by agreement of the parties or (i) in the case where the final determination with respect to tax is made at the administrative level, by the division of tax appeals, or (ii) in the case where such final determination is made by a court, the court. (Tax Law § 3030[c][5]; emphasis added.)

B. Tax Law § 3030 is clearly modeled after Internal Revenue Code § 7430. Therefore, it is proper to use Federal cases for guidance in analyzing this state law (***see***, ***Matter of Levin v. Gallman*** 42 NY2d 32, 396 NYS2d 623; ***Matter of Sener***, Tax Appeals Tribunal, May 6, 1988). Federal case law holds that a position is substantially justified if it has a reasonable basis in both fact and law (***see***, ***Information Resources, Inc. v. United States***, 996 F2d 780, 785). The fact that the Division lost the case on the merits does not preclude a finding that its position was substantially justified (***see***, ***Heasley v. Commr.***, 967 F2d 116, 120).

C. Petitioners' motion must be denied because the position of the Commissioner was "substantially justified" (Tax Law § 3030[c][5][B]). Accordingly, petitioners may not be treated as the prevailing parties for purposes of Tax Law § 3030 and, therefore, may not recover costs.

As noted by the Division, there were no existing regulations or formal advisory opinions that directly addressed the issue of whether Tax Law § 1107 was a "State" tax despite the fact that it was created by the Legislature to assist New York City and the Municipal Assistance Corporation. In addition, there were no regulations or formal advisory opinions that addressed the question of whether the exemption under PHFL § 93(1) included sales tax imposed by Tax Law § 1107 that was remitted to the State but was, in turn, conveyed to MAC and New York City as a ministerial act. The only existing case which had interpreted the exemption in issue was ***People v. Brooklyn Garden Apts.*** (283 NY 373). In this case, the court contrasted a tax

from the charge at issue "which is payable to the Department of State for a specific purpose" (***People v. Brooklyn Garden Apts., supra,*** at 380). The court noted that, in a strict sense, a tax is payable into the general fund of the government to defray usual governmental expenditures (***Id*** at 380-1). Relying upon, in part, upon ***Brooklyn Garden Apartments***, the Division's counsel issued an opinion, in a letter dated October 1, 1998, stating that Tax Law § 1107 was not a tax within the meaning of PHFL § 93(1). On the basis of the foregoing, it is clear that the Division's position was "substantially justified" within the meaning of Tax Law § 3030[c][5][B]).

D. Inasmuch as petitioners' application for costs fails for the reason discussed above, this order will not discuss whether petitioners satisfied the net worth requirements of Tax Law § 3030(c)(5).

E. Petitioners' application for costs is denied.

DATED: Troy, New York
July 16, 2001

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE