STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NEW HAMPSHIRE INSURANCE COMPANY	:	DETERMINATION DTA NO. 817073
for Redetermination of a Deficiency or for Refund of Franchise Tax on Insurance Corporations under Article 33 of the Tax Law for the Years 1993 and 1994.	:	

Petitioner, New Hampshire Insurance Company, 70 Pine Street, Tax Department, 2nd Floor, New York, New York 10270, 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 1993 and 1994.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on November 18,1999 at 10:45 A.M., with all briefs to be submitted by May 16, 2000, which date began the six-month period for the issuance of this determination. Petitioner appeared by Bryan Sloan, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Clifford M. Peterson, Esq., of counsel).

ISSUES

I. Whether finance and service charges received by petitioner from its policyholders constitute taxable premiums pursuant to Tax Law § 1510(c)(1).

II. Whether petitioner, in its calculation of total gross premiums, may deduct the reinsurance premiums received from Lexington Insurance Company, an insurer that is not authorized to transact business in New York.

FINDINGS OF FACT

1. Petitioner, New Hampshire Insurance Company, is a Pennsylvania domiciled insurance company which provides property and casualty insurance to commercial enterprises and operates throughout the United States, including New York, as a licensed/admitted insurer. Its main lines of business are auto liability, workman's compensation and commercial multi-peril insurance. Petitioner's principal place of business is located at 70 Pine Street, New York, New York. It is an insurance company subsidiary of American International Group, Inc. ("AIG"), a publicly-traded insurance and financial services firm.

2. During the years in issue, petitioner was an excess line[1] broker licensed by New York State. Excess line brokers licensed in New York are licensed insurance brokers who have also been issued licenses to procure policies of insurance from insurers who are not authorized to transact business in New York.

3. All New York excess line insurance brokers are members of the Excess Line Association of New York ("ELANY"). Eligible nonadmitted foreign insurers listed by ELANY are unauthorized insurers in New York, from whom excess line brokers licensed in New York may procure policies of insurance. Eligible nonadmitted foreign insurers are not members of ELANY.

4. During the years in issue, petitioner received reinsurance premiums from Lexington Insurance Company ("Lexington"). Lexington is not authorized to transact business in New

[1] Petitioner uses the terms excess line and surplus line interchangeably in its submissions.

York under a certificate of authority from the New York State Superintendent of Insurance. It is not a New York excess line insurance broker. Rather, Lexington is listed by ELANY as an eligible nonadmitted foreign insurer.

5. Petitioner is required to file an annual statement with the insurance departments of each of the 50 states in which it is licensed. Included as part of each annual statement is a schedule entitled "Schedule T- Exhibit of Premiums Written" which lists, in column form by state, the amount of: direct premiums written (column 2), direct premiums earned (column 3), dividends paid or credited to policyholders on direct business (column 4), direct losses paid (deducting salvage) (column 5), direct losses incurred (column 6), direct losses unpaid (column 7), finance and service charges not included in premiums (column 8), and direct premiums written for Federal purchasing groups (included in col. 2).

6. In its 1993 Annual Statement on Schedule T, with respect to New York, petitioner reported finance and service charges not included in premiums in the amount of $106,929.00.

In its 1994 Annual Statement on Schedule T, with respect to New York, petitioner reported finance and service charges not included in premiums in the amount of $77,741.00.

7. Petitioner filed New York CT-33 franchise tax returns and accompanying CT-33M insurance corporation Metropolitan Transit Authority ("MTA") surcharge returns for the years 1993 through 1995. For the years in issue, the Schedule T, described above, was included as part of the franchise tax returns filed by petitioner.

8. As a result of a field audit conducted of petitioner's franchise tax returns for the years 1993 through 1995, the Division of Taxation ("Division") issued a Notice of Deficiency, dated

November 28, 1997, asserting additional franchise taxes due[2] in the total amount of $15,628.00, plus interest, for the years 1993 and 1994. No audit adjustment was made for the year 1995.

9. As a result of the audit, the Division determined that petitioner had understated its total gross premiums which resulted in an understatement of its limitation on tax, the basis for its tax liability for the years 1993 and 1994. There were three audit adjustments made for the years 1993 and 1994.

The first adjustment, made for both years, involves the adding back of finance and service charges to total gross premiums. The additional franchise and MTA surcharge taxes determined to be due based on the inclusion of finance and service charges in total gross premiums are $3,711.00 and $2,500.00, for 1993 and 1994, respectively.

The second audit adjustment concerned the adding back of reinsurance premiums, which petitioner received from Lexington, to total premiums. This adjustment, made only for 1994, resulted in $6,670.00 in additional franchise and MTA surcharge taxes due.

The third and final audit adjustment involved a recalculation of the MTA surcharge for 1993, other than the increase to the MTA surcharge resulting from the finance and service charges audit adjustment, because petitioner understated the MTA wage allocation percentage.[3] During the audit, petitioner acknowledged that it had incorrectly understated the wage allocation percentage. The additional MTA surcharge due based on the adjustment to the wage allocation percentage is $2,747.00. This adjustment is not in dispute.

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[2] The additional franchise taxes determined to be due includes additional MTA surcharge.

[3] Petitioner excluded wages in the MTA outside of the New York City region from the numerator of the wage allocation percentage.

10. The Insurance Department conducted an audit of petitioner's 1993 Report of Premiums ("report"). Upon completion of its audit of petitioner's 1993 report, the Insurance Department by letter dated September 18, 1997 notified the Division that petitioner had understated net taxable premiums by $107,112.00 because finance and service charges had been excluded from the tax base. It further stated that "Schedule H of the Corporation Franchise Tax Return should be amended to $25,550,759."

11. The auditor received the Insurance Department letter after he had already made his own calculations concerning the inclusion of the finance and service charges. There was less than $100.00 difference between the amount of finance and service charges which the auditor found during his audit for the year 1993 and those found by the Insurance Department during its audit for the same year. The effect of that difference on total taxable premiums was $3.00.

12. The Division issued a technical services memorandum (TSB-M-80[8]C) on October 14, 1980 which provided guidance on the issue of whether a flat fee service charge for installment payments charged by an insurance company is includable as a taxable premium for the purposes of the premium tax imposed by Tax Law § 1510(a). The memorandum stated that the "flat fee service charge imposed by the insurer on the insured for paying the insurance in installment payments would fall within the definition of 'premium' of Section 1510(c)(1) of the Tax Law. Therefore, the flat fee service charge is includable in the computation of taxable premiums for the purpose of the premium tax imposed by Section 1510(a) of the Tax Law."

13. On August 15, 1967, the Insurance Department issued to all fire and casualty insurance companies Circular Letter No. 6 (1967) which stated, in pertinent part, as follows:

> The Office of General Counsel has recently been asked if premium payment service charges attributable to New York risks are properly includible in taxable premiums pursuant to Section 187 of the Tax Law and Article XVII of the

> Insurance Law. For your information and guidance the reply is quoted in part below:
>
> > 'It is my opinion that *all* additional charges for service, except such as are derived from direct financing of premiums by the company upon a premium finance agreement as defined in Section 554 of the Banking Law, made by an insurer to an insured in connection with the voluntary extension of credit to the latter in payment of any insurance premium, is deemed part of the premium collected and, therefore, taxable under Article XVII of the Insurance Law pursuant to the provisions of Section 187 of the Tax Law.' (Emphasis in original.)

This circular letter went on to state that it was effective with reference to "charges (including interest)" written or received on or after January 1, 1967. It further stated that companies taxable under Tax Law § 187 "should include such charges received or written between January 1, 1967 and June 30, 1967 in their quarterly report due in August of 1967, and quarterly thereafter."

14. Petitioner is not disputing the calculations of the additional franchise taxes resulting from the audit adjustments. Rather, petitioner is challenging the Division's determination that the finance and service charges should be included in total gross premiums and its disallowance of petitioner's deduction of reinsurance premiums that it received from Lexington from total gross premiums.

SUMMARY OF THE PARTIES' POSITIONS

15. Petitioner argues that the Division has made two improper audit adjustments, one resulting from the Division's use of an overly broad meaning of the word "premium" and the other resulting from the Division's use of a very narrow definition of the term "authorized." It asserts that the more natural definitions of both terms should be used in finding that the Division's audit adjustments were in error.

Petitioner contends that the Division erroneously included the finance and service charges, which petitioner received from some of its policyholders, as part of New York gross direct premiums. Petitioner's position is that finance charges are not part of the basic "risk" premium

associated with an insurance contract and, therefore, do not constitute New York premiums. It argues that the Division's policy of including finance charges in New York gross direct premiums "unnaturally stretches the definition of New York taxable premiums" (Petitioner's brief, p. 13). Petitioner contends that finance charges incurred by some of its policyholders for paying their premiums in installments constitute interest, not taxable premiums. It asserts that the additional charge to policyholders who pay their premiums in installments is no different than individuals paying interest on consumer products because they chose to pay the purchase price in installments.

With respect to the second issue, the Division's disallowance of petitioner's deduction of reinsurance premiums received from Lexington in computing its taxable premiums in New York, petitioner asserts that Lexington is an "authorized" insurer for purposes of Tax Law § 1510(c)(3)(A). Petitioner points out that in Tax Law §§ 1510(a) and 1551, the statutory language refers specifically to insurers "authorized to transact business in this state under a certificate of authority from the superintendent of insurance," while Tax Law § 1510(c)(3)(A) refers more generally to "insurers authorized to transact business in this state." Based on the principles of statutory construction, petitioner asserts that it is reasonable to assume that the omission of the words "under a certificate of authority from the superintendent of insurance" from Tax Law § 1510(c)(3)(A) was intentional.

Petitioner argues that the term "authorized" as used in Tax Law § 1510(c)(3)(A) should not be interpreted so narrowly to require that the insurer be "licensed," but rather should be interpreted more broadly to mean that the insurer is "approved" or "permitted." It concedes that Lexington is not licensed to transact business in New York State under a certificate of authority from the superintendent of insurance of New York. However, petitioner's position is that

Lexington is "authorized" to issue contracts in New York for purposes of Tax Law § 1510(c)(3)(A) by virtue of its status as an eligible surplus lines insurer in New York. Petitioner avers that the use of a slightly more expansive definition of the term "authorized" for purposes of this section is appropriate because of the explicit omission of the requirement that the insurer be authorized "under a certificate of authority from the superintendent of insurance." Petitioner also argues that such a reading of the statute would conform to the legislative goal of avoiding double taxation since those premiums are originally taxed under New York insurance law (Insurance Law § 2118[d][1]) when surplus lines brokers procure policies of insurance from eligible nonadmitted insurers in New York.

16. The Division contends that petitioner failed to present any direct evidence in support of its assertion that the finance charges, which it received from some of its policyholders, are not taxable. It also contends that, under the broad definition of premiums contained in Tax Law § 1510(c)(1), the costs that petitioner called finance charges would be included in premiums even if the costs were to be classified as interest. Citing relevant authority, the Division states that premiums are comprised of two factors: "net premiums" - the price for the insurance company to assume and carry the risk, and the "loading factor" - the amount that is added to the "net premium" in order for the insurance company to cover the cost of its expenses for administering the contract including those for management and operating expenses. The Division argues that the finance charges, which petitioner characterizes as interest and as an additional charge to policyholders, are operating, administrative or management expenses that petitioner incurs in order to offer its policyholders the opportunity to pay their premiums in installments and, therefore, are part of the "loading factor." It further argues that if the finance charges are part of the "loading factor," they are part of the premiums that petitioner's policyholders pay for their

insurance coverage and are properly includible in total taxable gross premiums under the definition in Tax Law § 1510(c)(1). The Division also argues that its interpretation of "premiums" should be given deference since it is reflective of a continuous interpretation of the law.

With respect to the second issue, the Division asserts that petitioner's definition of "authorized insurer" ignores well-established New York law and rules of statutory construction. It also argues that petitioner has not met its burden of proof in establishing that the Division's interpretation of "authorized insurer" is unreasonable or irrational, and that petitioner's definition is the only reasonable one.

17. In its reply brief, petitioner argues that its interpretation of the term "premiums" follows the legal analysis adopted by the New York courts, which requires that charges that are a condition precedent to the issuance of insurance be included in New York taxable premiums. It contends that finance charges are not a condition precedent to the issuance of insurance and are not includible in taxable premiums in New York. With respect to the second issue, petitioner asserts that its reading of the term "authorized" for purposes of Tax Law § 1510(c)(3)(A) is more reasonable than the Division's restrictive interpretation. Petitioner avers that its reading of the term "authorized" conforms with the legislative goal of avoiding double taxation of premiums, and is also consistent with the exact wording of the statute.

CONCLUSIONS OF LAW

A. New York imposes a franchise tax on every domestic, foreign and alien insurance corporation for the privilege of exercising its corporate franchise or doing business or employing capital or owning or leasing property in New York in a corporate or organized capacity or maintaining an office in New York (Tax Law § 1501[a]). Every insurance corporation subject to

tax imposed must pay an amount that is the greatest of four alternative amounts calculated on the basis of the entire net income, total business and investment capital allocated within New York, entire net income plus compensation to officers or a minimum of $250.00 per year, plus a tax on subsidiary capital (Tax Law § 1502). In addition, each insurance corporation is required to pay a tax on all gross direct premiums less returns written on risks located or resident in New York (Tax Law § 1510). Tax Law § 1505 provides a limitation on the amount of taxes which may be imposed under Tax Law §§ 1502 and 1510. Pursuant to Tax Law § 1505, the amount of taxes imposed shall not exceed the amount computed under Tax Law § 1510, the tax on premiums.

B. Tax Law § 1510(a) provides, in pertinent part:

> [E]very domestic insurance corporation, and every foreign or alien insurance corporation authorized to transact business in this state under a certificate of authority from the superintendent of insurance other than such corporations transacting the business of life insurance, shall, for the privilege of exercising corporate franchises . . ., pay a tax on all gross direct premiums, less return premiums thereon, written on risks located or resident in this state.

During the period in issue, Tax Law § 1510(c)(1) defined the term "premium" to include "all amounts received as consideration for insurance contracts or reinsurance contracts, other than for annuity contracts, and shall include premium deposits, assessments, policy fees, membership fees, and *every other compensation for such contract*." (Emphasis supplied.)

C. Relying on ***American Credit Indemnity Company of New York v. State Tax Commission*** (31 AD2d 27, 294 NYS2d 818, ***affd*** 25 NY2d 707, 307 NYS2d 216), petitioner argues that the finance and service charges that some of its policyholders pay when they pay their premiums in installments are not a condition precedent to the underwriting of insurance and, therefore are not includable in taxable premiums. The record does not include either sample policies issued by petitioner or sample billing statements sent by petitioner to its policyholders. It does include a "typical" billing invoice that insurance companies issue to policyholders that

offer policyholders the opportunity to either pay their premiums in full, and avoid incurring a finance charge, or to pay their premiums in installments, and be subject to finance charges for the late payment. Petitioner did not present any evidence concerning the manner in which it calculates the finance and service charges that it requires its policyholders to pay when they pay their premiums in installments. However, petitioner characterizes those finance and service charges as "interest" and an "additional charge to policyholders" (Petitioner's brief, p. 13).

D. Petitioner's reliance on ***American Credit Indemnity Company of New York v. State Tax Commission (supra)*** is misplaced. In the ***American Credit Indemnity Company*** case the question involved was whether collection fees earned, pursuant to the terms of a contingent fee schedule embodied in a credit insurance policy, upon the collection by the insurer of accounts of the insured's trade customers, were subject to the franchise tax specifically levied on premiums. The court held that the collection services provided for in a separate provision of the contract were "independent of the insuring provisions for which consideration is paid in the form of a premium calculated according to the risk. The payment of a fee, additional to the basic premium, for collateral benefits extended under a policy does not necessarily constitute the payment of a premium or additional premium." (***American Credit Indemnity Company of New York v. State Tax Commission***, ***supra***, 294 NYS2d, at 822). I find that the finance and service charges that petitioner receives from some of its policyholders are an integral part of the cost of those policyholders' insurance contracts.

An insurance "premium" has been variously defined as the sum paid for undertaking the risk, and the consideration for which the insurer undertakes to indemnify the insured (69 NY Jur 2d, Insurance, § 902). In general, insurance premiums are payable in advance, and if the application provides that a certain sum shall be paid each year, the payment must be made in

advance even though there is no specific provision to this effect in the insurance policy (69 NY Jur 2d, Insurance, § 928). The time for payment of the insurance premium may be extended by the insurer. However, each installment payment must be paid when it falls due, according to the terms of the contract, in order to keep the insurance policy in effect, unless the insurer excuses or waives such payment (69 NY Jur 2d, Insurance, § 932). The insurance premium consists of two components, the "net premium" and the "loading rate." The net premium is intended to meet the cost of casualty losses, both current and future, while the loading rate is the sum added to the net premium to cover management and administrative expenses, risk charges, taxes, profits and interest. (***See***, Couch on Insurance, § 69.1 [3rd ed].)

Based on petitioner's characterization of those charges as interest, I find that the finance and service charges that petitioner receives from some of its policyholders are an expense of administering their insurance contracts that petitioner, as insurer, is passing on to them, as policyholders, because they choose to pay their premiums in installments. Therefore, the finance and service charges are part of the loading factor, and are part of the premiums that petitioner's policyholders pay for their insurance coverage. Additionally, it is clear that those policyholders who paid the finance and service charges paid them as part of the cost of the insurance they wanted. In order to receive insurance coverage, an insured must pay his premium. The only option available to an insured is the method of payment of the premium, i.e., cash or installment payments which include finance and service charges. An insured, in order to keep his insurance contract in force, must pay the installment payments (which include the finance and service charges) as they fall due. The entire cost to the policyholder arising out of the issuance and performance of the contract of insurance constitutes the taxable premium. Accordingly, the Division properly included the finance and service charges in total gross premiums.

E. Tax Law § 1510(c)(3)(A) allows a taxpayer to deduct from total gross premiums, "premiums, less return premiums thereon, which have been received by way of reinsurance from corporations or other insurers *authorized to transact business in this state.* (Emphasis added.)

In the instant matter, petitioner, an excess line broker, received reinsurance premiums from Lexington, an insurer not licensed to transact business in New York under a certificate of authority from the superintendent of insurance. The Division disallowed petitioner's deduction of the premiums that it received from Lexington because Lexington was not licensed to transact business in New York State, and included those reinsurance premiums in total gross premiums. Petitioner argues that the term "authorized" as used in Tax Law § 1510(c)(3)(A) should not be interpreted so narrowly to require that the insurer be "licensed," but rather should be interpreted more broadly to mean that the insurer is "approved" or "permitted." The Division's interpretation of Tax Law § 1510(c)(3)(A) is in issue, specifically, its interpretation of the phrase "insurers authorized to transact business in this state."

F. Interpretation of a statute by the agency charged with its enforcement is, as a general matter, given great weight and judicial deference so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute (***Matter of Trump Equitable Fifth Ave. Co. v. Gliedman***, 62 NY2d 539, 545, 478 NYS2d 846). When construing a statute the primary focus is on the intent of the Legislature in enacting the statute (McKinney's Cons Law 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***).

The language of this statute is ambiguous, the term "authorized insurer" is not defined in the Tax Law.

G. Since the term authorized insurer is not defined in the Tax Law, it is appropriate to rely on the Insurance Law in making a determination as to whether petitioner, an excess line broker, is entitled to deduct the reinsurance premiums that it received from Lexington, an insurer not licensed to transact business in New York under a certificate of authority from the superintendent of insurance. 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: "[s]ince 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].) Moreover, the Court in ***Matter of Guardian Life*** stated that, in dealing with matters of insurance taxation, it may be assumed that "the Legislature used words in the sense commonly understood in the insurance world" (***Matter of Guardian Life Ins. Co. v. Chapman, supra***, 302 NY, at 243).

An excess line broker is authorized, subject to certain restrictions, to procure insurance policies from insurers that are not authorized to transact business in this state of most kinds of insurance with the exception of life insurance, accident and health insurance, workers' compensation and employers' liability insurance, title insurance, marine protection and

indemnity insurance, and ocean marine insurance (Insurance Law § 2105[a]); ***see***, ***B. & R. Excess Corporation. v. Thacher***, 37 Misc 2d 307, 234 NYS2d 486, ***affd*** 18 AD2d 1137, 239 NYS2d 531). An excess line broker is required to use due care in selecting the unauthorized insurer from whom policies are procured under his license (Insurance Law § 2118[a][1]).

11 NYCRR 27 contains the governing standards for excess line placements. The definition of "authorized insurer," for excess line placement purposes, is defined in 11 NYCRR 27.1(a) as the "meaning ascribed by section 107(a)(10) of the Insurance Law."

Section 107(a)(10) of the Insurance Law defines an authorized insurer as:

> an insurer authorized as such to do an insurance business in this state in compliance with this chapter, by reason of a license so to do issued and in force pursuant to the laws of this state or of a corporate charter granted and in force pursuant to the laws of this state, but not including any insurer herein exempted from compliance with the requirement that it obtain a license to do business.

There is no dispute that Lexington is not licensed in New York. Therefore, according to Insurance Law § 107(a)(10), Lexington is not an "authorized insurer."

As for petitioner's argument that "authorized" should be interpreted as "approved" or "permitted" to transact business in this state, it is without merit. The statutory provisions relating to surplus line insurance do not have the effect of either admitting the insuring company to the state or authorizing the carrier to transact business here (***Empire Mutual Ins. Co. v. International Tram-Po-Line Manufacturers, Inc.***, 39 Misc 2d 810, 242 NYS2d 28, 30, citing ***Friedland v. Commonwealth Fire Insurance Company of Ottumwa , Iowa***, 143 App Div 570, 128 NYS 705, ***affd*** 207 NY 705).

It is clear that Lexington is not an authorized insurer under the Insurance Law. Therefore, interpreting the Insurance Law and the Tax Law consistently requires the conclusion that

Lexington is not an insurer authorized to transact business in this state for purposes of Tax Law § 1510(c)(3)(A).

H. Contrary to this analysis, petitioner contends that the definition of "authorized insurer" under Insurance Law § 107(a)(10) and the Division's restrictive reading of the term "authorized" for purposes of Tax Law § 1510(c)(3)(A), do not take into account the special needs of the tax system relating to surplus line insurers and the unusual way that surplus lines insurance is taxed, i.e., the tax is generally paid by the surplus line broker or the party obtaining a policy of insurance from an unlicensed insurer (Insurance Law § 2118[d][1]; Tax Law § 1551). It asserts that the Division's narrow interpretation of the term "authorized" essentially results in the double taxation of premiums, which is a result not intended by the Legislature.

Applying the Division's interpretation of the term "authorized insurer" does not result in double taxation of the reinsurance premiums that petitioner receives as an excess line broker from Lexington. Petitioner, a domestic insurance company, is also licensed as an excess line broker. As an excess line broker, it is allowed to procure excess line insurance policies for its insureds from unauthorized insurers. Insurance Law § 2118(d)(1) requires every excess line broker to pay to the superintendent of insurance a sum equal to 3.6% of the total gross premium charged the insured for the excess line insurance policy procured by that excess line broker. The tax imposed under Article 33 of the Tax Law "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 business of this state" (***Matter of Guardian Life Ins. Co. v, Chapman, supra***, 302 NY, at 239). The tax is a corporate franchise fee imposed upon insurance companies for the privilege of doing business (***Matter of Mutual Life Insurance Company of New York v. New York State Tax Commission***, 32 NY2d 348, 345 NYS2d 475,

477). Insurance Law § 2118(d)(1) is a tax on the procurement of insurance from an unauthorized or unadmitted insurance company, it is not a franchise tax. Furthermore, I cannot find any authority for the concept that an excess line broker can deduct the premiums on which it has already paid the tax imposed by Insurance Law § 2118(d)(1) when it calculates its franchise tax under Article 33 of the Tax Law.

I. Tax Law § 1510(c)(3)(A) allows a taxpayer to deduct from total gross premiums, "premiums, less return premiums thereon, which have been received by way of reinsurance from corporations or other insurers authorized to transact business in this state." A deduction is "functionally a particularized species of exemption from taxation" (***Matter of Grace v. New York State Tax Commn.***, 37 NY2d 193, 371 NYS2d 715). In turn, it is well settled that exemptions from taxation are to be strictly and narrowly construed since "an exemption is not a matter of right, but is allowed only as a matter of legislative grace," with the burden of establishing entitlement thereto resting upon the party seeking the same, i.e., petitioner (***id., see, Matter of Saratoga Harness Racing, Inc. v. State Tax Commn.***, 119 AD2d 919, 501 NYS2d 200, ***lv denied*** 68 NY2d 610, 508 NYS2d 1027).

Petitioner has failed to carry its burden of proving that its interpretation of "insurers authorized to transact business in this state" is the only reasonable interpretation and that the Division's interpretation is irrational or unreasonable (***Matter of Cove Hollow Farm v. State of New York Tax Commission***, 146 AD2d 49, 539 NYS2d 127, 129; ***Matter of Sanjaylyn Company v. State Tax Commission***, 141 AD2d 916, 528 NYS2d 948, ***appeal dismissed*** 72 NY2d 950, 533 NYS2d 55).). The Division's interpretation is rational and reasonable. It is based on long-standing New York case law holding that, in order to transact an insurance business in New York, one must be authorized by the superintendent of insurance and on well-

settled New York case law holding that the Tax Law and Insurance Law are *in pari materia*, and that "authorized insurer" is defined in the Insurance Law as an insurer having authority to transact business in this state by virtue of a license granted to it by the superintendent of insurance. Accordingly, the Division properly disallowed petitioner's deduction of the reinsurance premiums that it received from Lexington, an insurer unauthorized to transact business in New York, from its total gross premiums.

J. The petition of New Hampshire Insurance Company is denied, and the Notice of Deficiency, dated November 28, 1997, is sustained.

DATED: Troy, New York
November 16, 2000

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE