STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions of **BOP ONE NORTH END, LLC** **ONE NY PLAZA CO., LLC** **BFP 300 MADISON II, LLC** **1114 6th AVENUE, LLC** **450 PARTNERS, LLC** **BOP 245 PARK, LLC** for Revision of Determinations, for Redetermination of Deficiencies or for Refunds of Corporation and Sales and Use Taxes under Articles 9, 28 and 29 of the Tax Law for the Years 2014 through 2016.	:	DECISION DTA NOS. 829228, 829229, 829230, 829231, 829232 AND 829233

Petitioners, BOP One North End, LLC, One NY Plaza Co., LLC, BFP 300 Madison II, LLC, 1114 6th Avenue, LLC, 450 Partners, LLC, and BOP 245 Park, LLC, filed an exception to the determination of the Administrative Law Judge issued on June 9, 2022. Petitioners appeared by Barton, LLP (Alvan L. Bobrow, Esq.). The Division of Taxation appeared by Amanda Hiller, Esq. (Adam Roberts, Esq., of counsel).

Petitioners filed a brief in support of the exception. The Division of Taxation filed a brief in opposition. Petitioners filed a brief in reply. Oral argument was heard in Albany, New York, on June 22, 2023, which date began the six-month period for the issuance of this decision.

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

ISSUES

I. Whether the Division of Taxation properly denied petitioners' refund claims for gross

receipts taxes paid for 2014 through 2016.

II. Whether the Division of Taxation properly denied petitioners' refund claims for New York City sales and use taxes paid for 2014 through 2016.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. Those facts appear below.

1. Petitioners, BOP One North End, LLC, One NY Plaza Co., LLC, BFP 300 Madison II, LLC, 1114 6th Avenue, LLC, 450 Partners, LLC, and BOP 245 Park, LLC, each had properties located in New York City during 2014 through 2016. Petitioners are all related entities owned by Brookfield Properties, Inc. For 2014, 2015 and 2016, petitioners purchased electricity, and Con Edison, Inc. (Con Ed) provided the transportation, transmission, and delivery of the electricity to petitioners.

2. Petitioners each filed with the Division of Taxation (Division) an application for credit or refund of sales or use tax, form AU-11.

3. By way of refund denial letters, each dated August 27, 2018, the Division denied each and every one of the petitioners' refund requests.

4. Petitioners' refund requests and the related refund denials from the Division were as follows:

Petitioner:	Refund amounts requested per form AU-11 filed:	Refund amounts denied per Division's denial letters:[1]
BOP One North End, LLC	$243,489.09	$250,589.08
One NY Plaza Co., LLC	$607,343.60	$551,217.03

[1] Neither party fully explains the differences between the refund amounts requested per the forms AU-11 filed and the amounts the Division denied in its related denial letters. In its brief, the Division does note that there were differences in the periods covered by the forms AU-11 filed and the Division's respective denial letters; the Division does not provide any additional specifics.

BFP 300 Madison II, LLC	$451,797.50	$492,640.62
1114 6th Avenue, LLC	$433,615.21	$422,504.06
450 Partners, LLC	$122,710.55	$149,363.67
BOP 245 Park, LLC	$204,648.99	$204,648.99

5. Petitioners filed applications with the Bureau of Conciliation and Mediation Services (BCMS) seeking review of their respective refund denials. BCMS issued orders, dated December 28, 2018, sustaining the Division's denials of petitioners' refund requests. Petitioners filed petitions with the Division of Tax Appeals challenging the respective BCMS orders.

6. At the hearing on this matter, petitioners offered the testimony of Mary Ann Milsop. Ms. Milsop appears to have filed the original refund requests for petitioners. Ms. Milsop is not an employee of any of the petitioners; rather she works with Remco Energy Solutions, Inc. (Remco). According to Ms. Milsop, Remco audits and pays utility bills for corporate clients. When petitioners' counsel asked Ms. Milsop to provide her qualifications for the work she performs, Ms. Milsop testified: "My background --- actually, I have an IT background, but I'm also qualified to be a public utility commissioner and I'm very knowledgeable about all these issues." Other than the previous statement, petitioners did not offer any specifics as to Ms. Milsop's education, certifications, work experience or other potentially pertinent credentials. Petitioners did not request, nor was Ms. Mislop admitted, as a qualified expert in any subject matter.

7. Petitioners submitted into evidence a copy of one of the petitioners' utility bills from Con Ed for the period at issue. Among other items, the bill indicated a charge for the gross receipts tax (GRT) and the New York City sales tax of 4.5%. Ms. Milsop testified that the separate GRT listed on the bill should not have been billed because, she asserted, the taxes were

included in the utility delivery rates Con Ed charged and the separate line charge for that item resulted in petitioners paying the GRT two times. Ms. Milsop testified that Con Ed should not have billed a 4.5% New York City sales tax for the same reasons (i.e., it was already included in the utility delivery rate and a separate line item for the tax resulted in billing it two times).

8. Petitioners submitted into evidence a copy of the Division's technical memorandum TSB-M-19(1)S. Ms. Milsop testified that TSB-M-19(1)S stated that the state and local tax exemption on energy delivery services was being eliminated as of June 1, 2019, and this was proof that sales tax should not have been charged to petitioners for the periods at issue.

9. Ms. Milsop testified that New York City Tax Law § 1210 was invalid because it was preempted by State law.

10. Petitioners submitted into evidence a copy of two pages of Con Ed's 2018 annual report. Included on the two pages of Con Ed's 2018 annual report was the following statement:

> "Taxes other than income taxes decreased $4 million in 2017 compared with 2016 due to lower gross receipts tax from the sale of the retail electric supply business in September 2016."

Ms. Milsop testified that the above statement establishes that the GRT was included in Con Ed's utility rates.

The two pages of Con Ed's 2018 annual report also include the following statement:

> "The NYSPSC requires utilities to record gross receipts tax revenues and expenses on a gross income statement presentation basis (i.e., included in both revenue and expenses). The recovery of these taxes is generally provided for in the revenue requirement within each of the respective NYSPSC approved rate plans."

Ms. Milsop read the above statement into the record but did not specifically opine in any way regarding the significance of that statement.

11. Petitioners submitted into the record what appears to be one page of several pages of an email chain (the entire email chain of the conversation was not submitted into the record). The document reflects an email from a person named L. Quackenbush who, based upon the email address, appears to work for the New York State Department of Public Service. Quackenbush's email asserts: "Yes, the city tax is included in rates. It is not a separate surcharge." Ms. Milsop testified that this email was the result of her direction to a consultant at Remco to speak to the New York State Public Utility Commissioner. She stated that the email shows the New York City sales tax is included in the rates and is not a surcharge and "only surcharges are allowed on the bill." Other than the State agency name reflected in Quackenbush's email address, there is no evidence regarding Quackenbush's alleged position in the State agency, nor is the email or the statement therein otherwise authenticated or sworn to as accurate.

12. Petitioners submitted into evidence a two-page spreadsheet that they claim was prepared by the Public Service Commission. The spreadsheet is dated January 1, 2013, and has a heading of "MONTHLY COMMERCIAL BILLSINCLUDING (sic) STATE GRT." The spreadsheet has a number of line items for Con Ed including two labeled as "TAXES (NEW YORK CITY)." The spreadsheet also contains a footnote that states: "Total Annual Revenues for all customers include T&D delivery charge and estimated market supply share, monthly adjustment clause, system benefits charge, dynamic load management, and the associated gross receipts taxes." Ms. Milsop testified that this document and the notations highlighted above show that the GRT and New York City sales tax are included in the rates Con Ed charges.

13. Ms. Milsop testified that all the documentation submitted into the record establishes that Con Ed charges the same GRT and New York City taxes to customers two times on each

bill.

14. At petitioners' request the record was left open at the end of the hearing for petitioners to submit certain additional evidence in support of their positions; however, petitioners failed to submit any additional evidence.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge concluded that petitioners failed to establish that Con Ed charged them twice for either GRT or New York City sales taxes during the period at issue. The Administrative Law Judge accorded little or no weight to the opinion testimony of Ms. Milsop because he found that petitioners failed to show that she had any relevant expertise. The Administrative Law Judge also found that the documents submitted lacked evidentiary value because, among other reasons, they lack authentication, are incomplete, or are dated outside the audit period.

The Administrative Law Judge also determined that the Division of Tax Appeals may not consider petitioners' argument that the enabling statute authorizing New York City sales tax on energy delivery services violates the New York State Constitution. Specifically, the Administrative Law Judge found that petitioners' argument challenges the constitutionality of the applicable provision of the Tax Law on its face, and not on an "as applied" basis, and that the Division of Tax Appeals lacks jurisdiction to consider such a challenge.

The Administrative Law Judge thus denied the petitions and sustained the refund denials.

ARGUMENTS ON EXCEPTION

Petitioners assert that the evidence shows that Con Ed charged them twice for the GRT and the New York City sales taxes during the period at issue.

Regarding the New York City sales taxes, petitioners argue that the enabling statute, Tax

Law § 1210 (a) (4) (xi), does not apply to New York City. Petitioners also argue that the local law imposing sales tax on the delivery of electricity adopted by the City in 2009, i.e., NYC Admin Code § 11-2001 (b) (8), was preempted by Tax Law § 1105-C, which provided for an exemption from sales tax on the delivery of electricity.

Petitioners thus contend that the GRT and the New York City sales taxes were illegally, erroneously and unconstitutionally collected from them.

The Division asserts that petitioners are not entitled to a refund of GRT because they are not GRT taxpayers. The Division also argues that petitioners have not proven that they were double billed for GRT by Con Ed, and even if they had, they have not shown that Con Ed remitted such monies to the Division.

The Division similarly contends that petitioners failed to prove that they were charged twice for New York City sales taxes. The Division also asserts that the plain language of the enabling legislation, i.e., Tax Law §§ 1210 (i) and 1210 (a) (4) (xi), permits New York City to impose sales tax on the delivery of electricity, which it did through New York City Administrative Code § 11-2001 (b) (8). The Division further argues that petitioners' claim that NYC Admin. Code § 11-2001 (b) (8) was preempted by Tax Law § 1105-C is without merit.

Finally, the Division contends that petitioners' constitutional argument is a facial challenge to the relevant statutes and, as such, this Tribunal lacks jurisdiction to consider it.

OPINION

A taxpayer may obtain a refund of sales tax "erroneously, illegally or unconstitutionally collected or paid" (Tax Law § 1139 [a]). The Tax Law also provides for refunds of overpayments of GRT (Tax Law § 1086 [a]). Petitioners bear the burden of proof to establish

entitlement to the claimed refunds (20 NYCRR 3000.15 [d] [5]); Tax Law § 1089 [e]; ***Matter of Global Companies, LLC***, Tax Appeals Tribunal, September 22, 2022).

On the facts, petitioners' refund claims rest on their assertion that Con Ed collected GRT and sales tax twice. We agree with the Administrative Law Judge's finding that petitioners did not meet their burden of proof on this point. Petitioners did not establish Ms. Milsop's expertise and, accordingly, her testimony is properly given little weight. We also agree that the partial email chain is of little probative value, as neither the complete email chain nor the credentials of the writer are in the record. Additionally, we find that the statements from the Con Ed annual report are inconclusive. Further, the document from the State Public Service Commission is not authenticated and bears a date that is outside the audit period.

We also agree with the Division's legal argument that petitioners may not receive a refund of GRT because the Tax Law does not impose that tax upon them. The GRT is imposed on utilities under article 9 of the Tax Law (Tax Law § 186-a [1] [b]). Petitioners are not utilities. They do not file returns under article 9. Hence, even if Con Ed double billed petitioners for GRT, they would not be entitled to a refund from the Division.

The Tax Law does allow a utility subject to the GRT to list the GRT as a line item on the customer's bill (***see*** Tax Law § 186-a [6] [the tax "may be added as a separate item to bills rendered by the utility to customers"]). Contrary to petitioners' contention, however, this provision does not indicate that the tax is imposed on the customer, as the same subsection also states that the GRT "shall be charged against and be paid by the utility" (***id.***).

Turning to petitioners' argument that the New York City sales tax provision at issue was not authorized, Chapter 200 of the Laws of 2009 amended Tax Law § 1210 (i) to authorize a city with a population of one million or more to adopt a local law imposing sales tax at a rate of

4.5%. The same legislation also amended Tax Law § 1210 (iv) (a) (4) (xi) to provide that any local law enacted by a city of one million or more that imposes sales taxes authorized under Tax Law § 1210 (i) shall provide that Tax Law § 1105-C does not apply to such taxes and shall tax receipts from retail sales of, among other things, the transportation, transmission, or distribution of electricity. During the period at issue, Tax Law § 1105-C provided that the sales tax rate on sales of electricity and gas, including transportation and delivery thereof, was zero. The same legislation (L 2009, ch 200) also amended section 11-2001 (b) (8) of the New York City Administrative Code to provide that Tax Law § 1105-C is inapplicable and imposed sales tax on retail sales of the transportation, transmission, or distribution of electricity at the local 4.5% rate.

In our view, it appears clear from the foregoing that the New York City sales tax on the transportation, transmission or delivery of electricity and gas was duly authorized. We thus reject petitioners' argument to the contrary.

Finally, we agree with the Administrative Law Judge that petitioners' constitutional argument is a facial challenge to the relevant statutes and, as such, we lack jurisdiction to consider it (***Matter of Zheng***, Tax Appeals Tribunal, August 25, 2022).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of BOP One North End, LLC, et al. is denied;

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

3. The petitions of BOP One North End, LLC, et al. are denied; and

4. The refund denial letters, dated August 27, 2018, are sustained.

DATED: Albany, New York
October 5, 2023

/s/ Anthony Giardina
Anthony Giardina
President

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner

/s/ Kevin A. Cahill
Kevin A. Cahill
Commissioner