STATE OF NEW YORK

DIVISION OF TAX APPEALS

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.	:	DETERMINATION 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 petitions 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.

A consolidated hearing was held on July 30, 2021, in Albany, New York, with all briefs to be submitted by December 9, 2021, which date began the six-month period for issuance of this determination. Petitioners appeared by Barton, LLP (Alvan L. Bobrow, Esq.). The Division of Taxation appeared by Amanda Hiller, Esq. (Adam Roberts, Esq., of counsel). After due consideration of the documents and arguments submitted, Nicholas A. Behuniak, Administrative Law Judge, renders the following determination.

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

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 what the significance of that statement was.

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 his email address, appears to work for the New York State Department of Public Service. In Mr. Quackenbush's email he 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 Mr. Quackenbush's email address, there is no evidence regarding Mr. 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 which 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.

SUMMARY OF THE PARTIES' POSITIONS

15. In their post-hearing brief, petitioners argue that the 2009 State statute allowing New York City to collect sales tax on utility transportation and delivery services was "defective"; however, petitioners fail to specify in detail how the statute was defective. In their petitions, they assert that the relevant State statute at issue is in violation of the State Constitution and therefore void. Petitioners also assert that the GRT and New York City sales tax were applied by Con Ed two times against petitioners and such double taxation was not authorized under the Tax Law. Although specifically permitted to file a reply brief by the undersigned, petitioners failed to file such a brief in response to the Division's brief.

16. The Division contends that petitioners failed to adequately establish that they paid the GRT two times on utility transportation and delivery services on each bill. The Division also asserts that petitioners have failed to adequately establish that the New York City sales tax on utility transportation and delivery services could not legally be collected during the periods at issue.

CONCLUSIONS OF LAW

A. The petitioner bears the burden of proof in any case before the Division of Tax Appeals except where that burden has been specifically allocated to the Division (Tax Law §

1089 [e]; ***see Matter of Transcanada Facility USA, Inc.***, Tax Appeals Tribunal, May 1, 2020; ***see also Matter of BTG Pactual NY Corp.***, Tax Appeals Tribunal, March 24, 2020). A presumption of correctness attaches to a properly issued statutory notice issued by the Division, and petitioners bear the burden to prove by clear and convincing evidence that the denial of the sales tax refund claim was erroneous (20 NYCRR 3000.15 [d] [5]; ***see Matter of Aum Sidhdhy Vinayak, LLC***, Tax Appeals Tribunal, December 8, 2011; ***Matter of Land Trans. Corp***., Tax Appeals Tribunal, June 29, 2000; ***see also Matter of Gallagher***, Tax Appeals Tribunal, October 23, 2003; ***Matter of Kroll Bond Rating Agency, Inc.***, Tax Appeals Tribunal, October 1, 2018).

B. Tax Law § 186-a (b) (1) imposes a corporate GRT on the gross income companies derive from the transportation, transmission and distribution of gas and electricity. An earlier version of this law did not allow the taxed company to separately designate the GRT amount on customers' bills (***see Matter of Brooklyn Union Gas Comp.***, Tax Appeals Tribunal, October 30, 1997, ***affd Brooklyn Union Gas Co. v Commissioner of Taxation & Fin.***, 255 AD2d 80 [3d Dept 1999]). However, the former statute was amended in 2000 to allow the taxed company to separately designate and identify the GRT amount on customers' bills (***see*** Tax Law § 186-a [6]). Specifically, the amendment stated:

> "The tax imposed by this section shall be charged against and be paid by the utility and may be added as a separate item to bills rendered by the utility to customers. Upon request the utility shall furnish a statement of the amount of tax imposed by this section to its customers for bills rendered on or after January first, two thousand" (Tax Law § 186-a [6]).

Both the Division and petitioners appear to agree that the statute at issue does not allow corporations to bill customers two times for the GRT. Thus, the issue is whether Con Ed charged petitioners twice for the GRT. Petitioners fail to meet their burden in this regard.

Petitioners' one witness, Ms. Milsop, never established that she had any particular expertise in this, or any other area; as a result, little or no weight can be placed on her opinions.[2] Many of the documents placed into the record lack authentication and are merely portions of what petitioners claim are relevant documents; such an approach further diminishes any limited value such documents had. The document allegedly from the State Public Service Commission (***see*** finding of fact 12) is dated outside the period at issue. The email chain placed into the record (***see*** finding of fact 11) is not complete nor are the title or credentials of the author, Mr. Quackenbush, known; the representation made in the email is of limited value since it is not one made under oath and the party making the representation was not made available for questions and cross-examination. Even if the representations made in the email are accepted as accurate, contrary to Ms. Milsop's assertion, they do not establish support for the conclusion that Con Ed, or other utilities, charged customers twice for the GRT. Ms. Milsop's conclusions relating to the other documents petitioners placed into evidence are likewise too speculative; they do not establish that Con Ed or other utilities charged customers twice for the GRT.[3] Thus the Division correctly denied petitioners' refund requests with regard to the GRT.[4]

C. In their petitions, the petitioners claim the relevant enabling statute authorizing New York City sales tax on energy delivery services violates the New York State Constitution.

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[2] Petitioners also include in the record a copy of, or portions of, an additional advisory opinion and a public notice issued by the Division. Ms. Milsop's interpretations of such documents do not impact the conclusions reached herein.

[3] Although not advanced in their post-hearing brief, at points in these proceedings petitioners also advance that Con Ed also charged and collected the New York State sales tax two times on each bill in question. For the same reasons petitioners' GRT double collection claim fails, petitioners' New York City sales tax double collection claim is also deficient; petitioners fail to prove such double taxation took place.

[4] Furthermore, it is questionable whether petitioners even have standing for GRT claims; if Con Ed inappropriately charged the GRT two times, it appears petitioners' claim would be against Con Ed, the transmitter of the utility and transgressor, not the State. Petitioners' also fail to establish that even if Con Ed collected the GRT from petitioners two times, such collections were remitted to the State.

Petitioners' argument challenges the constitutionality of the applicable provisions of the Tax Law on its face, and not on an "as applied" basis. The Division of Tax Appeals lacks jurisdiction over such constitutional challenges, and statutes are presumed to be constitutional on their face (***see Matter of Eisenstein***, Tax Appeals Tribunal, March 27, 2003; ***see also Matter of Geneva Pennysaver***, Tax Appeals Tribunal, September 11, 1989; ***Matter of Fourth Day Enters.***, Tax Appeals Tribunal, October 27, 1988). Accordingly, the Division of Tax Appeals does not have jurisdiction to consider this particular argument advanced by petitioners. Furthermore, petitioners have failed to articulate with appropriate specificity why the statute at issue is allegedly unconstitutional.

D. 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, and BOP 245 Park, LLC are denied, and the Division's refund denial letters dated August 27, 2018, are sustained.

DATED: Albany, New York
June 9, 2022

/s/ Nicholas A. Behuniak
ADMINISTRATIVE LAW JUDGE