

**New York State Department of Taxation and Finance**  
**Office of Tax Policy Analysis**  
**Technical Services Division**

TSB-A-04(18)C  
Corporation Tax  
December 13, 2004

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C040722B

On July 22, 2004, a Petition for Advisory Opinion was received from Clarkstown Central School District, 62 Old Middletown Road, New City, New York 10956.

The issue raised by Petitioner, Clarkstown Central School District, is whether, as a tax-exempt organization, it is required to pay state taxes to an insurance carrier that is taxed under Article 33 of the Tax Law, as part of Petitioner's health insurance premium.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner is a governmental unit and is a tax-exempt organization. Petitioner states that in the calculation of its health insurance premiums by its insurer, an insurance corporation subject to Article 33 of the Tax Law, the premium includes a separately stated amount listed as "state tax."

**Applicable law**

Section 1502-a of Article 33 of the Tax Law imposes a tax on non-life insurance corporations, and provides, in part:

In lieu of the tax imposed by section fifteen hundred one of this article, every domestic insurance corporation, every foreign insurance corporation and every alien insurance corporation, other than such corporations transacting the business of life insurance, (1) authorized to transact business in this state under a certificate of authority from the superintendent of insurance ... shall, for the privilege of exercising corporate franchises or for carrying on business in a corporate or organized capacity within this state, and in addition to any other taxes imposed for such privilege, pay a tax on all gross direct premiums, less return premiums thereon, written on risks located or resident in this state. The tax imposed by this section shall be computed in the manner set forth in subdivision (a) of section fifteen hundred ten of this article as such subdivision applied to taxable years beginning before January first, two thousand three ... All the other provisions in section fifteen hundred ten of this article, other than subdivision (b) of such section, shall apply to the tax imposed by this section. In no event shall the tax imposed under this section be less than two hundred fifty dollars.

**Opinion**

In *New York Telephone Company v County of Nassau*, 122 AD2d 124, the defendant, Nassau County, did not pay that portion of its telephone bills attributable to three taxes imposed

upon the plaintiff, New York Telephone Company, by New York State and local governments, asserting that the policy of allowing the plaintiff to recover these tax payments from the consumer as an operating expense was impermissible since New York State municipalities are exempt from taxation unless otherwise stated. The Appellate Division held that the tax imposed under section 186-a of the Tax Law on a utility constitutes a part of the operating costs of the utility, and held that the “imposition of surcharges upon the defendant to recover these additional operating expenses is not the equivalent of directly taxing the municipality.”

In *Sempra Energy Trading Corp.*, Adv Op Comm T&F, December 18, 2002, TSB-A-02(23)C, it was held that receipts from the sale of natural gas to the Power Authority for consumption by the Power Authority were taxable receipts of Sempra under section 186-a of the Tax Law. Pursuant to the Public Authorities Law, the tax imposed under section 186-a may not be imposed on the Power Authority. However, it was determined that the tax was imposed on Sempra Energy as a sale for ultimate consumption or use by the Power Authority, and the tax was not directly imposed on the Power Authority even though the amount of tax imposed on Sempra was a separately stated item on the bill rendered to the Power Authority for its purchase of the gas.

Following *New York Telephone, supra*, and *Sempra, supra*, the tax imposed on an insurance corporation under section 1502-a of the Tax Law is an expense of the insurance corporation that may be included in the price that the insurance corporation charges as a premium for the health insurance coverage provided to its customers. However, the inclusion of such expense in the amount charged as the premium is not the equivalent of directly taxing the purchaser of the insurance.

In this case, when the insurance corporation computes the amount of the premium charged to Petitioner for its health insurance coverage, the insurance corporation includes amounts to recover its operating expenses, including an amount for the tax imposed on the insurer under section 1502-a of the Tax Law. However, the inclusion of an amount for franchise tax imposed on the insurer in the amount of the premium paid by Petitioner is not the equivalent of directly taxing Petitioner. The incidence of the tax imposed under section 1502-a of the Tax Law is on the insurance corporation, not the insured. The tax imposed under such section 1502-a is not being imposed on Petitioner through the insurance corporation.

DATED: December 13, 2004

/s/  
Jonathan Pessen  
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Technical Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.