

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DUANE A. HART IA Part 18
Justice

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JFK INTERNATIONAL AIR TERMINAL LLC		Number <u>25816</u> 2002
- against -		Motion
		Date <u>January 8,</u> 2003
NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, et al.		Motion
		Cal. Number <u>26</u>
	x	

The following papers numbered 1 to 14 were read on this motion, pursuant to CPLR 3211[a][2], [3] and [7], to dismiss the complaint for failure to exhaust administrative remedies; and, cross motion, pursuant to CPLR 3211[c] and 3212, for summary judgment on the complaint and a declaration that the imposition of sales tax pursuant to section 1105[b] of the Tax Law, on payments made by plaintiff to its landlord pursuant to a lease, for the supply of hot and chilled water for heating or cooling the plaintiff's premises violates the holding of Debevoise & Plimpton v New York State Dep't of Taxation & Finance, 80 NY2d 657, and Tax Law section 1116[a][1].

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-3
Notice of Cross Motion - Affidavits - Exhibits ...	4-8
Answering Affidavits - Exhibits	9-14

Upon the foregoing papers it is ordered that the motion is denied; and, the cross motion is denied, without prejudice and subject to renewal within ninety (90) days following service upon the respondents of a copy of this order, with notice of entry, to permit the respondents to serve and file an answer and conduct limited discovery and investigation whereupon, at the conclusion of the 90-day period, the plaintiff shall renew the cross motion upon notice to the respondents.

The complaint alleges that the plaintiff, JFK International Air Terminal LLC ("JFK Terminal"), operates Terminal 4 at

JFK International Airport in Queens pursuant to its lease with the Port Authority of New York and New Jersey ("Port Authority"), dated May 13, 1997 ("the lease"). Pursuant to section 52 of the lease, a portion of which is annexed to the complaint, JFK Terminal pays Port Authority for the hot and chilled water used in the heating, ventilating and air-conditioning ("HVAC") systems at Terminal 4.

According to the complaint, the respondent New York State Department of Taxation and Finance ("Tax Department") insists that Port Authority collect sales tax on the portion of the rent paid for that hot and cold water, claiming it is a taxable transaction subject to section 1105[b] of the New York State Sales and Compensating Use Tax Law. The Tax Department obtains the tax from the Port Authority, and JFK Terminal reimburses Port Authority pursuant to Tax Law section 1133[a], and section 52[b][I][1] of the lease.

JFK commenced this action seeking a declaratory judgment that the imposition of such tax violates settled case law (see, Debevoise & Plimpton v New York State Dep't of Taxation & Finance, 80 NY2d 657), and Tax Law section 1116[a][1], which exempts the Port Authority from charging such sales tax.

The complaint alleges that based upon the Debevoise decision and Tax Law section 1116[a][1], in 1999, JFK Terminal sought a refund of payments totaling \$874,559.47 for the period January 1, 1997 through September 30, 1998, and the Tax Department granted its claim. Thereafter, JFK Terminal did not pay the sales tax, believing the matter to be settled. Upon inquiries from other tenants, the Port Authority itself requested clarification of the issue from the Tax Department. By letter dated March 3, 2000, a copy of which is annexed to the complaint, the Tax Department, through its Sales Tax Audit Bureau, stated that such payments were taxable, and the Port Authority as vendor, was responsible for continuing to charge, collect and remit sales tax on the payments. Following its own inquiry, upon receiving a separate memorandum dated October 23, 2001 to the same effect, JFK Terminal commenced this action.

In response to the complaint, the respondents have moved to dismiss, in effect, for failure to exhaust administrative remedies, contending that there is a consolidated administrative proceeding pending before the Division of Tax Appeals, commenced by two different terminal operators which raises the same issues. JFK Terminal opposes the motion to dismiss, contending that any administrative determination concerning other parties will not effect it, the respondents already ruled in its favor when they refunded the sales tax in 1999, it has no pending administrative

proceeding before the respondents, and the respondents' policy reversal should be adjudicated by a court.

JFK Terminal also cross-moves for summary judgment, contending that the Debevoise case disposes of the matter, there are no administrative remedies available to it as there has been no tax assessment or adverse determination against it, and a declaratory judgment issued in Debevoise, notwithstanding the fact that there was an administrative proceeding pending in that action.

The respondents contend that this court must give them notice pursuant to CPLR 3211[c] before it reaches the issues made upon the cross motion for summary judgment. Assuming the court grants such notice, they request ninety (90) days to conduct a limited discovery and investigation in order to prepare their opposition. JFK Terminal does not object to a reasonable extension for the preparation of a response, but asserts there is no justification for a 90-day delay.¹

The respondents' motion is denied as moot, as a determination has been rendered in the administrative forum. In any event, JFK Terminal asserts that the tax at issue is wholly beyond the agency's grant of power, so the doctrine of exhaustion of administrative remedies is inapplicable (see, Debevoise & Plimpton v New York State Dep't of Taxation & Finance, 149 Misc 2d 572, affd 183 AD2d 521, affd 80 NY2d, at 657, supra).

A determination of the cross motion is denied without prejudice and subject to renewal to afford the respondents time to interpose their answer and the requisite notice of the court's intent to address the renewed cross motion by JFK Terminal (see, Mihlovan v Grozavu, 72 NY2d 506, 508; CPLR 3211[c]). The respondents will have ninety (90) days from the date of entry and service of a copy of this order upon them, to conduct the limited discovery and investigation they deem necessary in order to submit their opposition to the cross motion.

Dated: March 3, 2003

¹

Following the submission of the motion and cross motion, by determination dated February 6, 2003, the New York State Division of Tax Appeals ruled on the consolidated appeals before it and submitted the determination to this court (Matter of British Airways, P.L.C. and Matter of Terminal One Group Associates [Nos. 818259, 828429]).

J.S.C.