Mission Energy N.Y., Inc. v New York State Dept. of Taxation & Fin.

2007 NY Slip Op 31354(U)

May 16, 2007

Supreme Court, New York County

Docket Number: 0109673/2006

Judge: Martin Shulman

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SCANNED ON 5/29/2007

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARTIN SHULMAN J.S.C. PART 1

Index Number : 109673/2006
MISSION ENERGY OF NEW YORK
vs
DEPARTMENT OF TAXATION
Sequence Number : 001
DISMISS ACTION

INDEX NO. 109673/06

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order

FILED
MAY 29 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: May 16, 2007

MARTIN SHULMAN J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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MISSION ENERGY NEW YORK, INC.,

Plaintiffs,

Index No: 109673/2006

-against-

Decision and Order

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, AND ANDREW S. ERISTOFF, in his capacity as Commissioner of Taxation and Finance of the State of New York,

Defendants.

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FILED
MAY 29 2007
COUNTY CLERK'S OFFICE
NEW YORK

HON. MARTIN SHULMAN, J.S.C.:

This court grants the CPLR 3211(a)(2) motion of Defendant New York State Department of Taxation and Finance and its Commissioner, Andrew S. Eristoff (collectively, "DTF" or "defendant") to dismiss plaintiff, Mission Energy New York, Inc.'s ("MENY" or "plaintiff") complaint (Exhibit A to Motion), because the court lacks subject matter jurisdiction to hear this matter in the first instance in the context of a declaratory judgment action.

MENY's complaint essentially seeks a declaration that during the years1998 and 1999, it should not have been liable for certain franchise taxes it mistakenly paid pursuant to Tax Law §§ 186 and 186-b ("Article 9 taxes").[1] MENY contends that it was only liable for Article 9-A taxes (i.e., general corporate franchise taxes for doing business in New York), because it was not actively engaged in the business of

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[1] Article 9 taxes, which the Legislature has subsequently repealed (*see* Chapter 63, Laws of 2000), imposed certain franchise taxes on companies principally engaged in the business of producing water, steam, gas and/or electricity.

supplying water through mains or pipes, electricity, etc., but rather was a passive investor-partner in Brooklyn Navy Yard Cogeneration Partners, L.P. ("BNY"), without any involvement in its day-to-day management and operation. Because of plaintiff's purported status as a passive investor and holding company, MENY argues it was legally exempt from paying Article 9 taxes and rests its claim exclusively on *GTE Spacenet Corp. v. New York State Dept. of Taxation & Finance*, 224 A.D.2d 283, 638 N.Y.S.2d 29 (1st Dept., 1996), *lv. to app. den.* 88 N.Y.2d 814, 651 N.Y.S.2d 15 (1996) ("*GTE* case"). Thus, MENY seeks an order declaring DTF's issuance of its February 23, 2004 Notice of Deficiency (for unpaid Article 9 taxes, interest and penalties totaling $1,530,361.87) (complaint at ¶ 28 as Exhibit A to Motion) and DTF's issuance of its September 8, 2004 letter denying plaintiff's refund claim for mistakenly paid Article 9 taxes totaling $1,146,807.00 (complaint at ¶ 31 as Exhibit A to Motion) as being in excess of defendant's statutory authority.

Defendant has produced an irrefutable paper trail of plaintiff's active participation in DTF's conciliation program as well as the initial administrative process *vis-a-vis* this identical claim before the DTF (*see* documentation annexed to O'Connell Affirmation in support of Motion). Against this backdrop, DTF contends that MENY must first exhaust its administrative remedies (i.e., participate in a hearing before an Administrative Law Judge at the DTF's Division of Tax Appeals and receive a final adverse determination from that tribunal) before seeking relief from the courts via CPLR Article 78 review. DTF further claims the doctrine of primary jurisdiction bars this declaratory judgment action as well.

Discussion

As a general rule, "a declaratory judgment action is an inappropriate vehicle for challenging a tax assessment determination where the plaintiff has failed to exhaust its administrative remedies". *Allstate Ins. Co. v. Tax Comm'n of State of New York*, 115 A.D.2d 831, 832, *affd* 67 N.Y.2d 999, 502 N.Y.S.2d 1004 (1986). This rule need not be followed if DTF's action was either unconstitutional or "wholly beyond the [DTF's] grant of power. . ." (bracketed matter added). *Watergate II Apts. v. Buffalo Sewer Authority*, 46 N.Y.2d 52, 57, 412 N.Y.S.2d 821, 824 (1978); *Two Twenty East Ltd. Partnership v. New York State Dept. of Taxation & Finance*, 185 A.D.2d 202, 586 N.Y.S.2d 596 (1st Dept., 1992). Notably, MENY is neither challenging the constitutionality of now repealed Tax Law §§ 186 and 186-b nor DTF's statutory right to impose and collect Article 9 taxes *per se*. *Cf.*, *Empire State Bldg. Co. v. New York State Dept. of Taxation & Finance*, 150 Misc.2d 747, 749, 570 N.Y.S.2d 419 (Sup. Ct., N.Y. Co., 1990) *affd.*, 185 A.D.2d 201, 586 N.Y.S.2d 597 (1st Dept., 1992), *affd.*, 81 N.Y.2d 1002, 599 N.Y.S.2d 536 (1993).[2] Stated differently, MENY's complaint does not seek a "pure statutory analysis regarding whether the [Article 9] tax applies [which] can be decided as a matter of law . . ." (bracketed matter added),150 Misc.2d at 749, 570 N.Y.S.2d at 421. Here, plaintiff questions whether Article 9 taxes should have been assessed

[2] *Empire State Bldg. Co.*, *supra*, involved the interpretation of a tax law and led to the conclusion that DTF did not have the statutory authority to impose a sales tax on the redistribution of non-metered electricity by a landlord to its tenants who paid for same as additional rent.

against MENY given the alleged passive nature of its business activity, i.e., as a mere investor rather than an active participant in the management and operation of BNY.

There is no dispute that plaintiff initiated informal administrative proceedings before the DTF's Bureau of Conciliation and Mediation Services and received Conciliation Orders which affirmed defendant's right to seek an outstanding deficiency in the amount of Article 9 taxes MENY still owed for tax years 1998 and 1999 and DTF's denial of MENY's requested refund of previously paid Article 9 taxes for those years. To that end, DTF had evidently examined the nature of MENY's corporate activities and determined its classification and taxability to pay Article 9 taxes. MENY strenuously disagrees with DTF's administrative determinations and has filed petitions for administrative review (*see* Exhibits D and E to Motion) with defendant's Division of Tax Appeals challenging same. In administrative pleadings before the Division of Tax Appeals, DTF is clearly challenging plaintiff's factual characterization of its business relationship with BNY (*see* Exhibits G and H to Motion).

At this juncture, this court finds that there exists a sharp factual dispute between the parties which requires plaintiff to exhaust its administrative remedies before seeking judicial review. This court further concludes that MENY's reliance on the *GTE* case is misplaced because that case, unlike this case, did not involve a factual dispute as to the taxpayers' status as passive investors *inter alia* based upon DTF's own field audit records.

At a hearing before an administrative law judge at the Division of Tax Appeals, plaintiff will have a full and fair opportunity to present testimony and documentary

evidence to controvert DTF's classification of plaintiff as being principally engaged in BNY's utility business of which plaintiff receives more than 50% of its receipts.

Finally, "[d]eference to primary administrative review is particularly important where the matters under consideration are inherently technical and peculiarly within the expertise of the [DTF]. . ." (*Davis v. Waterside Housing Co., Inc.*, 274 A.D.2d 318, 319, 711 N.Y.S.2d 4, 5 [1st Dept., 2000], *lv. to app. den.* 95 N.Y.2d 770, 722 N.Y.S.2d 473 [2000]), such as determining the classification and taxability of companies doing business in New York State. Further, "whether. . . [plaintiff is ultimately required to pay any Article 9 tax deficiency] manifestly is an interpretive exercise, requiring, in the first instance, the . . . [DTF's] review of the . . . [petition], and, if reasonably determined, judicial deference to the . . . [DTF's] findings. . ." (bracketed matter added)(*Wong v. Gouverneur Gardens Housing Corp.*, 308 A.D.2d 301, 304, 764 N.Y.S.2d 53, 57 [1st Dept., 2003]). Thus, the doctrine of primary jurisdiction similarly bars this declaratory judgment action. *See also*, *Sohn v. Calderon*, 78 N.Y.2d 755, 579 N.Y.S.2d 940 (1991).

Accordingly, defendant's motion to dismiss this action is granted in its entirety. This constitutes this court's Decision and Order. Courtesy copies of same have been provided to counsel for the parties.

DATED: New York, New York
May 16, 2007

HON. MARTIN SHULMAN, J.S.C.

FILED
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