PAUL, WEISS, RIFKIND, WHARTON & GARRISON
345 PARK AVENUE
NEW YORK, N.Y. 10022

TELEPHONE (212) 644-8000
TELECOPIER (212) 644-8202

CABLE: LONGSIGHT, N.Y.
TELEX 12-7831

RANDOLPH E. PAUL (1946-1956)
LOUIS S. WEISS (1927-1950)

JOHN F. WHARTON
LLOYD K. GARRISON
COUNSEL

SIMON H. RIFKIND
HOWARD A. SEITZ
ADRIAN W. DeWIND
MORRIS B. ABRAM
MORDECAI ROCHLIN
PAUL J. NEWLON
JOSEPH S. ISEMAN
JAMES B. LEWIS
THEODORE C. SORENSEN
MARTIN KLEINBARD
RICHARD H. PAUL
NORMAN ZELENKO
JOHN E. MASSENGALE
JAY TOPKIS
EDWARD N. COSTIKYAN
ROBERT H. MONTGOMERY, JR.
JOHN C. TAYLOR, 3rd
BERNARD H. GREENE
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DAVID T. WASHBURN
BERNARD FINKELSTEIN
ARTHUR L. LIMAN
SEYMOUR HERTZ
WALTER F. LEINHARDT
GERALD D. STERN
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ALFRED D. YOUNGWOOD
DONALD F. MOORE
JOSEPH E. BROWDY
SIDNEY S. ROSDEITCHER
ROBERT L. LAUFER
ALLEN L. THOMAS
PETER C. FELCHER
MARK H. ALCOTT
JOHN P. McENROE
PETER J. ROTHENBERG
JUDITH R. THOYER
RICHARD A. ENGELMAN
GEORGE P. FELLEMAN
STEVEN B. ROSENFELD
ALBERT P. HAND
ROBERT S. SMITH
MAX GITTER

WRITER'S DIRECT DIAL NUMBER

(212) 644-8712

February 1, 1978

Marilyn F. Friedman, Esq.
Municipal Assistance Corporation
Two World Trade Center
New York, New York 10047

Dear Marilyn:

I enclose a copy of a memorandum from Mike Lampert to me discussing the consequences of the entry of a final judgment in the Boston Stock Exchange case.

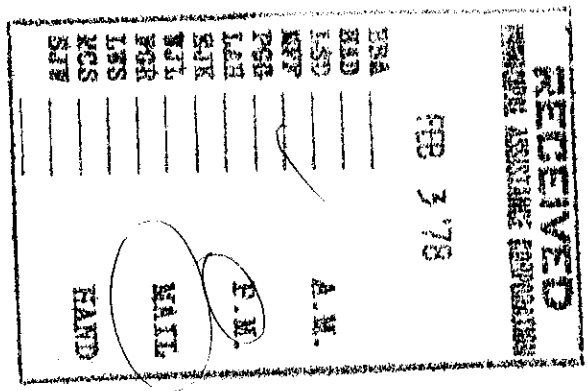
There is nothing for us to do at this point I guess, except to watch out for developments that might affect MAC.

Best personal regards.

Sincerely,

Allen L. Thomas

ALT:dv
Enclosure



Diary No. 09266-001

Initialed By _____ LAWYER

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

OFFICE MEMORANDUM

Date January 30, 19 78

Memo of Fact ☐ Memo of Law ☐

To Allen L. Thomas ✓ Subject BSE Final Judgment

From Michael A. Lampert

CC:

We have received from Don Robinson of Hawkins, Delafield & Wood a copy of the final judgment entered in the BSE case pursuant to motion. The judgment seems to say clearly and concisely what the appellate courts have held in this case and does not seem to be, in its own right, a cause for concern.

There is, however, some reason to worry about how the State Tax Commission will respond to the judgment. As you recall, the judgment invalidates two forms of relief from the stock transfer tax that were provided for in the statute. If the Tax Commission attempts to collect retroactively amounts which were not paid in reliance on the old forms of relief that were voided in this case, the investment community will be up in arms. Even that retroactive assessment, however, would not seem to create problems for the Municipal Assistance Corporation.

However, any attempt (either by administrative inaction or new legislation) not to collect the amount of

Hawkins, Delafield & Wood
67 Wall Street, New York 10005

(Area Code 212) 952-4700
Cable Address: "Hawkdel New York"

Writer's Direct Dial Number
212-952-4713

January 19, 1978

COPY

Mr. Stephen J. Weinstein
Executive Deputy Director
Municipal Assistance Corporation
For The City of New York
Two World Trade Center
New York, New York 10048

Re: Boston Stock Exchange v. State Tax Commission

Dear Steve:

I enclose a copy of the Final Judgment filed in the New York County Clerk's Office on January 4, 1978. We were completely unaware that any motion had been made for the entry of the Order and had not received any notice of such motion.

Very truly yours,

Donald J. Robinson

DJR:md
Enclosure (1)

cc: Marilyn Friedman with enclosure
Robert L. Laufer with enclosure

1974, dismissing the complaint herein, and an order of the United States Supreme Court having been made on January 12, 1977 reversing the order of the New York Court of Appeals, awarding plaintiffs costs in the sum of $974.00 and remanding this case to the New York Court of Appeals for further proceedings, and a further order of the New York Court of Appeals having been made on September 13, 1977 reversing its order of October 21, 1975 with costs to plaintiffs and remitting this case to the Supreme Court, New York County, for the entry of judgment in favor of plaintiffs, and a copy of the order of reversal of the Court of Appeals having been duly filed, together with the record, in the office of the Clerk of the County of New York,

Now, on motion of Kramer, Lowenstein, Nessen, Kamin & Soll, attorneys for plaintiffs, it is:

ADJUDGED, that defendants' motion to dismiss be and it hereby is denied, and it is further

ADJUDGED, that the order of the Court of Appeals entered on September 13, 1977 be and it hereby is made the order of this Court, and it is further

ADJUDGED, and declared that, in distinguishing between interstate and intrastate transactions, the rates of tax imposed by Tax Law § 270-a, as added to the Tax Law by Chapter 827 of the Laws of 1968, are repugnant to and invalid under the Constitution of the United States; and it is further

D

ADJUDGED, that pursuant to the savings clause of § 11, chapter 827 of the Laws of 1968, the rates of tax provided in § 270 shall be deemed applicable for all purposes; and it is further

ADJUDGED, that the ~~defendants~~ PLAINTIFF shall recover their costs on appeal to the United States Supreme Court in the sum of $974.00, costs on appeal to the New York Court of Appeals in the sum of $125.00 and costs on appeal to the Appellate Division in the sum of $75.00, making a total of $1174.00 in costs, and shall have execution therefor.

JSC

NOT TO BE DOCKETED UNTIL FURTHER NOTICE

except as against the State Tax Commission

Kramer, Lowenstein, Nessen, Kamin & Soll attorneys for Plaintiffs

FILED
JAN 11 1978
NEW YORK
CO. CLERK'S OFFICE

ENTER,

J.S.C.

Norman Broadway Clerk

Boston Stock Exchange	53 State Street Boston, Massachusetts 02109
Cincinnati Stock Exchange	209 Dixie Terminal Building Cincinnati, Ohio 45202
Detroit Stock Exchange	2321 Penobscot Building Detroit, Michigan 48226
Midwest Stock Exchange, Incorporated	120 South La Salle Street Chicago, Illinois 60603
Pacific Coast Stock Exchange	618 South Spring Street Los Angeles, California 90014
PBW Stock Exchange, Inc.	17th and Stock Exchange Place Philadelphia, Pennsylvania 19103

FILM NO 1 PAGE 1805

STATE TAX COMMISSION, — TWO WORLD TRADE CENTER NEW YORK, NEW YORK 10048

SUPREME COURT OF THE STATE OF NEW YORK, SPECIAL TERM PART I, NEW YORK COUNTY

at the Courthouse thereof, 60 Centre Street, New York, New York, on 1977.

Present: HYMAN KORN

HON. _____ Justice.

Boston Stock Exchange

— against —

State TAX Commission

The following papers numbered 1 to ____ read on this motion, Dec. 14-1977

No. 134 on Calendar of Dec. 14-1977

	Papers Numbered
Notice of Motion - Order to Show Cause - and Affidavits Annexed	1-3
Answering Affidavit	
Replying Affidavit	
____ Affidavit	
____ Affidavit	
Pleadings — Exhibit	
Stipulation — Referee's Report — Minutes	
Filed Papers. Remittitur Court of Appeals	4

Upon the foregoing papers this plaintiffs move to have the memorandum decision of the New York Court of Appeals, dated September 13, 1977, made an order of this Court pursuant to CPLR 5524 and to settle a final judgment, a copy of which is annexed to the moving papers, for entry pursuant to the Court of Appeals decision herein. This application is unopposed.

This motion is granted and the Clerk of this Court is directed to enter the proposed judgment, annexed to the moving papers.

Judgment signed.

Dated: JANUARY 4, 1977.

Motion: Plaintiff's ____ Defendant's ____ Petitioner's ____ Respondent's ____ Relator's ____

Date ____

County Clerk's No. 12417

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

----------x

BOSTON STOCK EXCHANGE, et. al., :

Plaintiffs, :

-against- :

STATE TAX COMMISSION, et al., :

Defendants. :

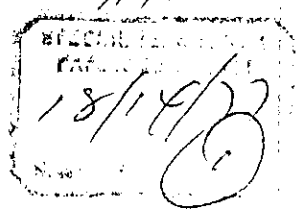
----------x

Index No. 19417/72

Notice of motion to enter order and settle judgment pursuant to Court of Appeals decision

Please take notice that upon the annexed affirmation of Robert M. Heller, Esq., dated December 1, 1977, the summons and complaint, the opinion and decision of the United States Supreme Court, dated January 12, 1977, the mandate of the United States Supreme Court, dated February 9, 1977, the memorandum decision of the New York Court of Appeals, dated September 13, 1977, and upon all the prior papers and proceedings herein, plaintiffs will (i) move at a Special Term, Part I of this Court to be held at the Courthouse, 60 Centre Street, New York, New York, on the 14th day of December, 1977, at 9:30 A.M., or as soon thereafter as counsel can be heard to have the memorandum decision of the New York Court of Appeals, dated September 13, 1977 made the Order of this Court pursuant to CPLR 5524 and (ii) will present for settlement at the same time and place a final judgment, of which the within is a true copy, for entry pursuant to the Court of Appeals decision.

#135



Please take further notice that, pursuant to CPLR 2214(c), answering papers, if any must be served upon the undersigned at least five days before the return date of this motion.

Dated: New York, New York
December 1, 1977

Kramer, Lowenstein, Nessen,
Kamin & Soll
Attorneys for Plaintiffs
919 Third Avenue
New York, New York 10022
(212) 688-1100

To: Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Defendants
The Capitol
Albany, New York 12224

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

BOSTON STOCK EXCHANGE, et. al.,	:	
Plaintiffs,	:	Index No. 19417/72
-against-	:	Affirmation
STATE TAX COMMISSION, et. al.,	:	
Defendants.	:	

Robert M. Heller, an attorney admitted to practice in the courts of this State, affirms that the following statements are true under the penalties of perjury:

1. I am a member of Kramer, Lowenstein, Nessen, Kamin & Soll, local counsel for plaintiffs in this action.* I make this affirmation in support of plaintiffs' motion, pursuant to CPLR 5524, for an order making the order entered by the New York Court of Appeals on September 13, 1977 the order of this Court and for entry of the final judgment presented for settlement as part of this motion.

2. This action was commenced in Supreme Court, New York County, by an ad hoc coalition of the nation's regional stock exchanges, all located outside of New York State, challenging the tax rate provisions of Section 270-a of the Tax Law,

* Our firm has been substituted as local counsel, replacing Paul, Weiss, Rifkind, Wharton & Garrison. The Chicago law firm of Schiff Hardin & Waite has served as counsel for plaintiffs throughout this litigation.

2

added to the Tax Law by Chapter 827 of the Laws of 1968. That statute imposed a lower rate of tax on stock transactions conducted on the New York Stock Exchange or the American Stock Exchange, both located within New York State, than on transactions conducted through the plaintiff exchanges. Plaintiffs contended that the differential rate of tax in section 270-a placed a significant economic disadvantage on their operations and as such was a burden on interstate commerce prohibited by the United States Constitution.

3. On October 31, 1972, defendants moved before Justice George Carney, sitting in Special Term Part I, to dismiss the complaint on the merits. On December 20, 1973, Special Term denied the motion to dismiss and defendants appealed to the Appellate Division, First Department. The Appellate Division, on July 9, 1974, reversed Special Term, held Chapter 827 to be valid and constitutional and dismissed the complaint on the merits. Plaintiffs appealed first to the New York Court of Appeals, which affirmed the Appellate Division's decision on October 21, 1975, and ultimately to the United States Supreme Court. On January 12, 1977, the Supreme Court reversed the Court of Appeals and declared the challenged portions of Chapter 827 unconstitutional. The Supreme Court awarded plaintiffs costs of $974.00 and remanded the case to the Court of Appeals for further proceedings. A copy of the Supreme Court mandate to the Court of Appeals is annexed as Exhibit A. On September 13, 1977, the Court of Appeals reversed its order of October 21, 1975

with costs to plaintiffs and remitted the case to the Supreme Court, New York County, for entry of judgment in plaintiffs' favor. A copy of the Court of Appeals decision of September 13, 1977 is annexed as Exhibit B.

4. Plaintiffs now move to have the Court of Appeals decision of September 13, 1977 adopted as the order of this Court and to have a judgment entered in accordance with the Supreme Court's disposition of this case. The proposed judgment, submitted herewith, reflects the finding by the United States Supreme Court that Chapter 827 is unconstitutional. In addition, the judgment reflects the award of $974.00 costs granted to plaintiffs by the Supreme Court, $125.00 costs provided by CPLR 8204 in the Court of Appeals and $75.00 costs provided by CPLR 4203 in the Appellate Division.

5. This motion seeks essentially a ministerial action in accordance with the Supreme Court's decision of January 12, 1977 and the Court of Appeals' order of September 13, 1977 to effect a prompt, final disposition of this case. Accordingly, plaintiffs ask that their motion be granted in all respects and that the Clerk be directed to enter their proposed judgment forthwith.

Dated: New York, New York
December 1, 1977

Robert M. Heller

United States of America, ss:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable the Judges of
Court of Appeals of the State
of New York,

GREETINGS:

WHEREAS, lately in the Court of Appeals of the State of New York, there came before you a cause between Boston Stock Exchange et al., appellants, and State Tax Commission et al., respondents, wherein the judgment of the said Court of Appeals was duly entered on the twenty-first day of October A. D. 1975, as appears by an inspection of the transcript of the record from the said Court of Appeals which was brought into the SUPREME COURT OF THE UNITED STATES as provided by act of Congress.

AND WHEREAS, in the 1976 Term, the said cause came on to be heard before the SUPREME COURT OF THE UNITED STATES on the said transcript of record, and was argued by counsel:

ON CONSIDERATION WHEREOF, it was ordered and adjudged on January 12, 1977, by this Court that the judgment of the said Court of Appeals in this cause be reversed with costs, and that this cause be remanded to the Court of Appeals of the State of New York for further proceedings not inconsistent with the opinion of this Court.

IT WAS FURTHER ORDERED that Boston Stock Exchange et al. recover from the State Tax Commission et al. Nine Hundred and Seventy-four Dollars ($974.00) for their costs herein expended.

NOW, THEREFORE, THE CAUSE IS REMANDED to you in order that such proceedings may be had in the said cause, in conformity with the judgment of this Court above stated, as accord with right and justice, and the Constitution and laws of the United States, the said appeal notwithstanding.

3

Witness the Honorable WARREN E. BURGER, Chief Justice of the United States, the ninth ----- day of February in the year of our Lord one thousand nine hundred and seventy-seven.

Costs of Boston Stock Exchange et al.:

Clerk's costs	$ 150.00
Printing of record ...	824.00
	$ 974.00

Michael Rodak Jr
Clerk of the Supreme Court of the United States

No. 75-1019

Boston Stock Exchange et al.,

v

State Tax Commission et al.

State of New York

Court of Appeals

Decisions

SEPTEMBER 13, 1977

CASE

No. 481
Boston Stock Exchange, et al.,
Appellants,
vs.
State Tax Commission, Norman Gallman &ors., as members of the State Tax Commission of the State of New York,
Respondents.

Upon reargument, order reversed, with costs, and the case remitted to the Supreme Court, New York County, for the entry of judgment in favor of the plaintiffs in accordance with the following memorandum: The Supreme Court of the United States has held that the rates of tax imposed by Tax Law §270-a, in distinguishing between interstate and intrastate transactions, are unconstitutional. In implementing that determination, we now hold that the savings clause set forth in § 11, c. 827 of the Laws of 1968, is applicable and that, pursuant thereto, the rates of tax provided in §270 shall be deemed applicable for all purposes. All concur.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOSEPHINE ENGLE, being duly sworn, deposes and says:

I am not a party to this action, I am over 18 years of age and I reside at 21-18 79th Street, Jackson Heights, New York. On the 1st day of December, 1977, I served the within Notice of Motion and Final Judgment upon Louis J. Lefkowitz, Attorney General of the State of New York, attorney for defendants in this action, at The State Capitol, Albany, New York 12224, the address designated by such attorney for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office within the State of New York.

Josephine Engle
Josephine Engle

Sworn to before me this
1st day of December, 1977.

Susan A Mulligan
Notary Public

SUSAN A. MULLIGAN
Notary Public, State of New York
No. 30-4603437
Qualified in Nassau County
Commission Expires March 30, 1979

5

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

BOSTON STOCK EXCHANGE, et. al.,	:	
Plaintiffs,	:	Index No. 19417/72
-against-	:	Consent To Change Of Attorney
STATE TAX COMMISSION, et al.,	:	
Defendants.	:	

The undersigned hereby consent and agree that Kramer, Lowenstein, Nessen, Kamin & Soll, with offices located at 919 Third Avenue, New York, New York 10022, be substituted as local counsel for plaintiffs herein, in the place and stead of Paul, Weiss, Rifkind, Wharton & Garrison, 345 Park Avenue, New York, New York 10022.

Dated: New York, New York
November 17, 1977

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

By _____

Dated: Chicago, Illinois
November 25, 1977

BOSTON STOCK EXCHANGE
CINCINNATI STOCK EXCHANGE
DETROIT STOCK EXCHANGE
MIDWEST STOCK EXCHANGE, INCORPORATED
PACIFIC COAST STOCK EXCHANGE
PBW STOCK EXCHANGE, INC.

By _____
Midwest Stock Exchange, Incorporated,
as Attorney-in-Fact for all
plaintiffs.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
345 PARK AVENUE NEW YORK, N.Y. 10022
TELEPHONE (212) 644-8000 CABLE: LONGSIGHT, N.Y.
TELECOPIER (212) 644-8202 TELEX 12-7831

RANDOLPH E. PAUL (1946-1956)
LOUIS S. WEISS (1927-1950)
JOHN F. WHARTON (1927-1977)

LLOYD K. GARRISON
COUNSEL

SIMON H. RIFKIND
HOWARD A. SEITZ
ADRIAN W. DeWIND
MORRIS B. ABRAM
MORDECAI ROCHLIN
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STEVEN B. ROSENFELD
ALBERT P. HAND
ROBERT S. SMITH
MAX GITTER
JOHN J. O'NEIL
CAMERON CLARK
LEWIS A. KAPLAN

WRITER'S DIRECT DIAL NUMBER

(212) 644-8749

March 9, 1978

Marilyn Friedman, Esq.
General Counsel
Municipal Assistance Corporation for
The City of New York
Two World Trade Center
New York, New York 10048

Dear Marilyn:

Enclosed is a copy of a revised memorandum on the final judgment entered in the Boston Stock Exchange case. There is a paragraph on page 2 which I hope deals with the concerns we discussed on the telephone the other day. Allen has reviewed this and finds it acceptable.

At your convenience, call me and let me have your reaction to this memorandum.

Best regards.

Sincerely,

Michael A. Lampert

MAL:ssk
Enclosure
CC: Allen L. Thomas, Esq.

Diary No. 09266 -- 001

Initialed By _____ LAWYER

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

OFFICE MEMORANDUM

Date March 6, 19 78

Memo of Fact [ ] Memo of Law [ ]

To Allen L. Thomas Subject BSE Final Judgment

From Michael A. Lampert

CC:

We have received from Don Robinson of Hawkins, Delafield & Wood a copy of the final judgment entered in the BSE case pursuant to motion. The judgment seems to say clearly and concisely what the appellate courts have held in this case and does not seem to be, in its own right, a cause for concern.

There is, however, some reason to worry about how the State Tax Commission will respond to the judgment. As you recall, the judgment invalidates two forms of relief from the stock transfer tax that were provided for in the statute. If the Tax Commission attempts to collect retroactively amounts which were not paid in reliance on the old forms of relief that were voided in this case, the investment community will be up in arms. Even that retroactive assessment, however, would not seem to create problems for the Municipal Assistance Corporation.

However, any attempt (either by administrative inaction or new legislation) not to collect the amount of

tax which was not required when the forms of relief in the statute were constitutional may run afoul of New York v. Cathedral Academy, 98 S. Ct. 340 (1977). In that case, the Supreme Court held that a New York statue authorizing payment to parochial schools, which had already expended money in reliance on an earlier aid statute which had been declared unconstitutional in the Supreme Court, was as unconstitutional as the original statute. While the State's forgiveness of the tax to out-of-staters is not exactly like the payment of aid to parochial schools, it would be nicer if this case had not been decided.

Indeed, at least two distinctions between our case and Cathedral Academy suggest themselves. First, Gene Harper at Hawkins had considered the question and concluded that the courts in New York were not obliged to apply retroactively the Supreme Court's decision in BSE; in Cathedral Academy the Supreme Court impliedly concluded its decision was retroactive. Second, the final judgment entered in the BSE case provides that the unrelieved "rates of tax provided in § 270 shall be deemed applicable for all purposes" (emphasis added). It is thus possible to argue that the final judgment in the BSE case itself does not speak retroactively; it if did it might have said "shall be deemed to have been applicable." Thus, it may be that neither the Constitution nor any reason relating to the MAC bond resolutions (discussed in the next paragraph) requires that the [redacted] Commission do anything.

Additionally, there may be consequences of action or inaction under the MAC bond resolutions. For example, Hawkins' "void ab initio" doctrine might lead one to conclude that the unrelieved rates were in effect on the date of the first bond resolution and a failure to collect retroactively is a diminution in rate. (I think this analysis is wrong for several reasons, but it exemplifies the problem.) Further, if the Tax Commission does attempt to collect retroactively, certain legislative solutions (such as shortening of the statute of limitations) might be more acceptable than others.

For these and other reasons, we may wish to watch subsequent proceedings, if any, between the State Tax Commission, the investment community, the Attorney General's office, and The City of New York, as some possible resolutions of the conflict between the investment community's needs and those of the State Tax Commission bear the potential to create financial (by driving the investment community from New York) or legal (under the bond resolutions' covenants covering the stock transfer tax) effects harmful to MAC.

M.A.L.

:ssk

At a Special Term, Part I, of the Supreme Court, held in and for the County of New York, at the Courthouse, 60 Centre Street, New York, New York, on the 4 day of December, 1977.

P R E S E N T :

Hon. Hyman Koerner Justice.

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

Plaintiffs,

-against-

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

Defendants.

Index No. 19417/72

Final Judgment

Plaintiffs having appealed from the order of the New York Court of Appeals entered October 21, 1975 affirming the order of the Appellate Division, First Department entered July 9,

1974, dismissing the complaint herein, and an order of the United States Supreme Court having been made on January 12, 1977 reversing the order of the New York Court of Appeals, awarding plaintiffs costs in the sum of $974.00 and remanding this case to the New York Court of Appeals for further proceedings, and a further order of the New York Court of Appeals having been made on September 13, 1977 reversing its order of October 21, 1975 with costs to plaintiffs and remitting this case to the Supreme Court, New York County, for the entry of judgment in favor of plaintiffs, and a copy of the order of reversal of the Court of Appeals having been duly filed, together with the record, in the office of the Clerk of the County of New York,

Now, on motion of Kramer, Lowenstein, Nessen, Kamin & Soll, attorneys for plaintiffs, it is:

ADJUDGED, that defendants' motion to dismiss be and it hereby is denied, and it is further

ADJUDGED, that the order of the Court of Appeals entered on September 13, 1977 be and it hereby is made the order of this Court, and it is further

ADJUDGED, and declared that, in distinguishing between interstate and intrastate transactions, the rates of tax imposed by Tax Law § 270-a, as added to the Tax Law by Chapter 827 of the Laws of 1968, are repugnant to and invalid under the Constitution of the United States; and it is further

D

ADJUDGED, that pursuant to the savings clause of § 11, chapter 827 of the Laws of 1968, the rates of tax provided in § 270 shall be deemed applicable for all purposes; and it is further

ADJUDGED, that the ~~defendants~~ Plaintiff shall recover their costs on appeal to the United States Supreme Court in the sum of $974.00, costs on appeal to the New York Court of Appeals in the sum of $125.00 and costs on appeal to the Appellate Division in the sum of $75.00, making a total of $1174.00 in costs, and shall have execution therefor.

JSC

NOT TO BE DOCKETED UNTIL FURTHER NOTICE except as against the State Tax Commission Kramer, Lowenstein, Nessen, Kamin & Soll attorneys for Plaintiffs

FILED
JAN 11 1978
NEW YORK
CO. CLERK'S OFFICE

ENTER,

J.S.C.

Norman Goodman Clerk

Boston Stock Exchange	53 State Street Boston, Massachusetts 02109
Cincinnati Stock Exchange	209 Dixie Terminal Building Cincinnati, Ohio 45202
Detroit Stock Exchange	2321 Penobscot Building Detroit, Michigan 48226
Midwest Stock Exchange, Incorporated	120 South La Salle Street Chicago, Illinois 60603
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PBW Stock Exchange, Inc.	17th and Stock Exchange Place Philadelphia, Pennsylvania 19103

STATE TAX COMMISSION, — TWO WORLD TRADE CENTER
NEW YORK, NEW YORK 10048

FILED 1 PAGE 1805

SUPREME COURT OF THE STATE OF NEW YORK, SPECIAL TERM PART I, NEW YORK COUNTY

at the Courthouse thereof, 60 Centre Street, New York, New York, 10007.

Present:

HON. HYMAN KORN

Justice.

Boston Stock Exchange

— against —

State TAX Commission

The following papers numbered 1 to ...... read on this motion, Default

No. 135 on Calendar of Dec. 14 - 1977

	PAPERS NUMBERED
Notice of Motion - ~~Order to Show Cause~~ - and Affidavits Annexed	1 - 5
Answering Affidavit	
Replying Affidavit	
...... Affidavit	
...... Affidavit	
Pleadings — Exhibit	
Stipulation — Referee's Report — Minutes	
Filed Papers Remittitur Court of Appeals	6

Upon the foregoing papers this plaintiffs move to have the memorandum decision of the New York Court of Appeals, dated September 13, 1977, made an order of this Court pursuant to CPLR 5524 and to settle a final judgment, a copy of which is annexed to the moving papers, for entry pursuant to the Court of Appeals decision herein. This application is unopposed.

This motion is granted and the Clerk of this Court is directed to enter the proposed judgment, annexed to the moving papers.

Judgment signed.

Dated: JANUARY 24, 1977.

[signature] J.S.C.

Check: Plaintiff's ...... Defendant's ...... Petitioner's ...... Respondent's ...... Relator's ......

Order ......

County Clerk's No. 19417 - 1977

Cal. No. [illegible]

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

BOSTON STOCK EXCHANGE, et. al.,

Plaintiffs,

-against-

STATE TAX COMMISSION, et al.,

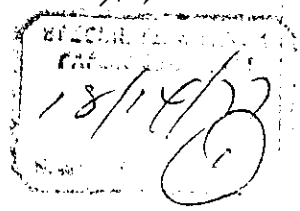
Defendants.

Index No. 19417/72

Notice of motion to enter order and settle judgment pursuant to Court of Appeals decision

Please take notice that upon the annexed affirmation of Robert M. Heller, Esq., dated December 1, 1977, the summons and complaint, the opinion and decision of the United States Supreme Court, dated January 12, 1977, the mandate of the United States Supreme Court, dated February 9, 1977, the memorandum decision of the New York Court of Appeals, dated September 13, 1977, and upon all the prior papers and proceedings herein, plaintiffs will (i) move at a Special Term, Part I of this Court to be held at the Courthouse, 60 Centre Street, New York, New York, on the 14th day of December, 1977, at 9:30 A.M., or as soon thereafter as counsel can be heard to have the memorandum decision of the New York Court of Appeals, dated September 13, 1977 made the Order of this Court pursuant to CPLR 5524 and (ii) will present for settlement at the same time and place a final judgment, of which the within is a true copy, for entry pursuant to the Court of Appeals decision.

#138



Please take further notice that, pursuant to CPLR 2214(c), answering papers, if any must be served upon the undersigned at least five days before the return date of this motion.

Dated: New York, New York
December 1, 1977

Kramer, Lowenstein, Nessen,
Kamin & Soll
Attorneys for Plaintiffs
919 Third Avenue
New York, New York 10022
(212) 688-1100

To: Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Defendants
The Capitol
Albany, New York 12224

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

BOSTON STOCK EXCHANGE, et. al.,	:	
Plaintiffs,	:	Index No. 19417/72
-against-	:	
STATE TAX COMMISSION, et. al.,	:	Affirmation
Defendants.	:	

Robert M. Heller, an attorney admitted to practice in the courts of this State, affirms that the following statements are true under the penalties of perjury:

1. I am a member of Kramer, Lowenstein, Nessen, Kamin & Soll, local counsel for plaintiffs in this action.* I make this affirmation in support of plaintiffs' motion, pursuant to CPLR 5524, for an order making the order entered by the New York Court of Appeals on September 13, 1977 the order of this Court and for entry of the final judgment presented for settlement as part of this motion.

2. This action was commenced in Supreme Court, New York County, by an ad hoc coalition of the nation's regional stock exchanges, all located outside of New York State, challenging the tax rate provisions of Section 270-a of the Tax Law,

* Our firm has been substituted as local counsel, replacing Paul, Weiss, Rifkind, Wharton & Garrison. The Chicago law firm of Schiff Hardin & Waite has served as counsel for plaintiffs throughout this litigation.

2

added to the Tax Law by Chapter 827 of the Laws of 1968. That statute imposed a lower rate of tax on stock transactions conducted on the New York Stock Exchange or the American Stock Exchange, both located within New York State, than on transactions conducted through the plaintiff exchanges. Plaintiffs contended that the differential rate of tax in section 270-a placed a significant economic disadvantage on their operations and as such was a burden on interstate commerce prohibited by the United States Constitution.

3. On October 31, 1972, defendants moved before Justice George Carney, sitting in Special Term Part I, to dismiss the complaint on the merits. On December 20, 1973, Special Term denied the motion to dismiss and defendants appealed to the Appellate Division, First Department. The Appellate Division, on July 9, 1974, reversed Special Term, held Chapter 827 to be valid and constitutional and dismissed the complaint on the merits. Plaintiffs appealed first to the New York Court of Appeals, which affirmed the Appellate Division's decision on October 21, 1975, and ultimately to the United States Supreme Court. On January 12, 1977, the Supreme Court reversed the Court of Appeals and declared the challenged portions of Chapter 827 unconstitutional. The Supreme Court awarded plaintiffs costs of $974.00 and remanded the case to the Court of Appeals for further proceedings. A copy of the Supreme Court mandate to the Court of Appeals is annexed as Exhibit A. On September 13, 1977, the Court of Appeals reversed its order of October 21, 1975

with costs to plaintiffs and remitted the case to the Supreme Court, New York County, for entry of judgment in plaintiffs' favor. A copy of the Court of Appeals decision of September 13, 1977 is annexed as Exhibit B.

4. Plaintiffs now move to have the Court of Appeals decision of September 13, 1977 adopted as the order of this Court and to have a judgment entered in accordance with the Supreme Court's disposition of this case. The proposed judgment, submitted herewith, reflects the finding by the United States Supreme Court that Chapter 827 is unconstitutional. In addition, the judgment reflects the award of $974.00 costs granted to plaintiffs by the Supreme Court, $125.00 costs provided by CPLR 8204 in the Court of Appeals and $75.00 costs provided by CPLR 4203 in the Appellate Division.

5. This motion seeks essentially a ministerial action in accordance with the Supreme Court's decision of January 12, 1977 and the Court of Appeals' order of September 13, 1977 to effect a prompt, final disposition of this case. Accordingly, plaintiffs ask that their motion be granted in all respects and that the Clerk be directed to enter their proposed judgment forthwith.

Dated: New York, New York
December 1, 1977

Robert M. Heller

United States of America, ss:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable the Judges of
Court of Appeals of the State
of New York,

GREETINGS:

WHEREAS, lately in the Court of Appeals of the State of New York, there came before you a cause between Boston Stock Exchange et al., appellants, and State Tax Commission et al., respondents, wherein the judgment of the said Court of Appeals was duly entered on the twenty-first day of October A. D. 1975, as appears by an inspection of the transcript of the record from the said Court of Appeals which was brought into the SUPREME COURT OF THE UNITED STATES as provided by act of Congress.

AND WHEREAS, in the 1976 Term, the said cause came on to be heard before the SUPREME COURT OF THE UNITED STATES on the said transcript of record, and was argued by counsel:

ON CONSIDERATION WHEREOF, it was ordered and adjudged on January 12, 1977, by this Court that the judgment of the said Court of Appeals in this cause be reversed with costs, and that this cause be remanded to the Court of Appeals of the State of New York for further proceedings not inconsistent with the opinion of this Court.

IT WAS FURTHER ORDERED that Boston Stock Exchange et al. recover from the State Tax Commission et al. Nine Hundred and Seventy-four Dollars ($974.00) for their costs herein expended.

NOW, THEREFORE, THE CAUSE IS REMANDED to you in order that such proceedings may be had in the said cause, in conformity with the judgment of this Court above stated, as accord with right and justice, and the Constitution and laws of the United States, the said appeal notwithstanding.

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Witness the Honorable WARREN E. BURGER, Chief Justice of the United States, the ninth ----- day of February in the year of our Lord one thousand nine hundred and seventy-seven.

Costs of Boston Stock Exchange et al.:

Clerk's costs	$ 150.00
Printing of record ...	824.00
	$ 974.00

Michael Rodak Jr
Clerk of the Supreme Court of the United States

No. 75-1019

Boston Stock Exchange et al.,

v

State Tax Commission et al.

Municipal Assistance Corporation
For The City of New York

MEMORANDUM

Date : 29 September 1977

To : FILES

From: Marilyn F. Friedman

Re : Stock Transfer Tax Decision

At approximately 4:00 P.M. on September 14, 1977, John Compani of the State Tax Commission called to advise me that the State Court of Appeals had rendered a decision in the Boston Stock Exchange case. The Court held that pursuant to Section 11 of Chapter 827 of the Laws of 1968, the rates of tax provided in Section 270 of the Tax Law shall be deemed applicable for all purposes. John advised me that the Tax Commission had received a copy of the slip opinion on September 13, 1977.

I promptly called Allen Thomas at Paul, Weiss and Donald Robinson at Hawkins, Delafield to advise them that the decision had come down and to discuss (1) whether the decision had any disclosure implication, and (2) the practical ramifications of the decision. That afternoon and the following day, September 15, 1977, discussions took place with respect to these two issues. With respect to the practical ramifications, it was agreed among the lawyers that: (a) prospectively, the decision will probably affect only the non-resident rate reduction, as the maximum tax has been extended to cover in-state and out-of-state sales pursuant to the recently enacted stock transfer tax legislation. Under such legislation, the non-resident rate reduction is not to be repealed until October 1, 1977, to be replaced at that time by a rebate mechanism which, again, will not distinguish in-state and out-of-state sales. Therefore, if an order is entered prior to October 1, 1977, with respect to this matter, non-residents will be required to pay full stock transfer tax rates for the period between the entry of the order and October 1, 1977, (b) retrospectively, the State Tax Commission could be required to retroactively assess persons who benefited either from the non-resident rate reduction or the maximum tax for all or any portion of the period between the enactment of Section 270-a in 1968 and the effective date of the order.

Both Allen Thomas and Don Robinson agreed that the decision requires no amendatory disclosure. Among the points discussed in this regard were the following:

1. The possibility of this decision was disclosed in the Official Statement.

2. This decision would not appear to result in decreased revenues to MAC in the foreseeable future. In fact, if the Tax Commission makes some retroactive assessment the direct result of the decision would be to increase stock transfer tax revenues by the amount of non-resident and maximum tax benefits which accrued to stock transferors under Section 270-a while it was in effect. The Legislature could act to waive such retrospective assessment. The possibility of such legislative action, and the consequences thereof, were also disclosed in the Official Statement.

Following my conversations with Allen Thomas and Don Robinson, I spoke with David Blair of White & Case to inform him of the decision and advise him that we would be keeping him informed of future developments with respect to the decision, in the event that it appeared that such developments would affect the bonds purchased in the September 14 closing. David raised the issue of disclosure, but indicated that his analysis was similar to ours, that is, that no additional disclosure would be required. I suggested that if he had any further questions with respect to the matter, he should contact Allen Thomas.

Ruling by State Court of Appeals

Nonresidents of State Lose Stock-Transfer Tax Benefit

The New York Court of Appeals yesterday ruled that nonresidents must pay the same, higher stock transfer tax paid by residents instead of the estimated $100 million the former had saved since they were allowed a lower rate in 1968.

However, no decision has been made on whether the state will attempt to collect the back taxes, according to Peter Crotty, counsel and deputy commissioner of the State Tax Commission.

Future Effect Minimal

Mr. Crotty said the impact of the decision on future stock sales "is minimal" because of a law signed by Governor Carey in August that, effective Oct. 1, makes the same rate apply to all sellers, regardless of where they live and sets a tax rate that is expected to be closer to the lower rate formerly charged nonresidents.

Section 270-a of the Tax Law, which provided the lower rate, was declared unconstitutional by the U.S. Supreme Court of the United States Jan. 12 in *Boston Stock Exchange v. State Tax Commission.* The case, which reversed a 1975 Court of Appeals ruling, was remanded to the Court of Appeals.

Robert W. Bush, a state assistant Attorney General, who argued the case before the Court of Appeals, estimated that as much as $100 million in reduced tax revenues was involved. Revenue from the stock transfer tax is earmarked to secure bonds of the Municipal Assistance Corporation.

Sales Stimulus

Section 270-a was enacted to encourage nonresidents to sell securities on the New York and American Stock Exchanges, which are in New York City. However, in a lawsuit filed by six out-of-state stock exchanges, the Supreme Court ultimately decreed the statute was an unconstitutional violation of the Commerce Clause of the U.S. Constitution because it discriminated on the basis of whether a taxable transaction involved an in-state or out-of-state sale.

In remanding, the Supreme Court left open the issue as to whether the lower rate for nonresidents under Section 270-a could be applied to sales by residents. The Court of Appeals, however, ruled that the tax rate in Section 270 should apply for "all purposes." Section 270 sets up a higher rate for residents.

Mr. Crotty said the reduced rate for non-residents will still be collected until either Oct. 1 or until the state is served with notice of entry of judgment in the case. The Court of Appeals remitted the case to State Supreme Court, New York County, for entry of judgment.

Upon reargument, order reversed with cost, and the case remitted to the Supreme Court, New York County for the entry of judgment for plaintiffs in accordance with the FFG memorandum.

The Supreme Court of the United States has held that the rates of tax imposed by Tax Law 270-a, in distinguishing between interstate and intrastate transactions are unconstitutional. In implementing that determination, we now hold that the savings clause set forth in § 11, c 827 Laws 1968, is applicable and that pursuant thereto the rates of tax provided in § 27 for all purposes shall be deemed applicable.

From the Desk of DATE

Marilyn F. Friedman

518 459 7157

Upon reargument, order reversed w/cost, and the case remitted to the Supreme Court NY Co for the entry of judgment for plaintiffs in accordance w/ the ffg memorandum

The SC of US has held that the rates of tax imposed by Tax Law 270-a, in distinguishing between interstate and intrastate transactions are unconst. In implementing that determ, we now hold that the saving clause set forth in §11, ch 827 Laws 1962, is applicable and that pursuant thereto the rates of tax prov in §284 shall be deemed applicable for 332 purposes

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
345 PARK AVENUE NEW YORK, NEW YORK 10022

Litigation/BSE

DATE September 9, 1977

MEMORANDUM

To E. Harper
R. Laufer
D. Robinson
A. Thomas
S. Weinstein

From Michael A. Lampert

Subject BSE Argument

On Thursday, September 8, 1977 at 2:00 P.M. Don Robinson, Gene Harper and I attended the argument of the Boston Stock Exchange case on remand to the New York State Court of Appeals. This memorandum summarizes that argument.

I begin by noting that all seven judges of the Court sat during the argument.

After the Court granted Pascal's preliminary application to have the argument advanced on the calendar because he had to catch a plane, Pascal began his main argument.

Chief Judge Breitel quickly interrupted Pascal's recitation of the history of the case to tell Pascal he could assume that the Court had read the original and the more recent briefs.

Pascal said the Supreme Court had remanded to the Court of Appeals one thing -- the effect of the savings clauses on Section 270-a.

Judge Jones interrupted to ask Pascal how any "open" transactions between the date of enactment of the statute and the effective date of the law should be treated.

Pascal responded that they should be taxed at the old rate.

Jones said he was concerned about "open" transactions, not those executed in that period. Pascal still believed the old rate applied.

Jones asked if there were any possibility of refund suits. Pascal said the State's proposed order created that possibility.

Jones then asked how the case could be moot: if the Attorney-General's remittitur were adopted, the refund question would be real and the case not moot. Isn't it necessary to decide against the Attorney-General before reaching mootness? Isn't the whole problem circular?

Pascal responded indirectly, talking about how precedent held that repeal of a challenged statute mooted the challenge. This obviated the need to reach the Attorney-General's remittitur in Pascal's view.

Chief Judge Breitel then urged Pascal to get on to the merits and leave mootness aside.

Pascal said he and counsel for MAC had talked and he was authorized to represent to the Court that he and MAC's counsel were agreed that the Court's order should not be any of the orders urged to date, but should have three parts:

1. Vacating the prior orders of the Court of Appeals and the lower Courts;

2. Dismissing the case as moot;

3. Awarding plaintiffs' costs.

Pascal then turned to the merits. He reiterated his view that the first time this case was before the Court of Appeals it had held, and the Attorney-General in the Court of Appeals and Supreme Court had argued, that only Section 11 would apply if the challenge were sustained. The State, he said, was asking the Court to do a legislative job of drafting. The very complexity of Chapter 878 illustrated what a complex problem this is and why the Court should not rewrite the old statute. That Pascal said, brought him back to mootness; Chapter 878's repeal of the old law makes the case moot.

Breitel then asked how much money was at stake. Despite persistent questioning by Breitel ($10 million? $20 million?), Pascal insisted he had no idea, except that it ran in the millions.

Breitel asked if all of the tax proceeds were allocable to MAC. Pascal said yes. Breitel asked why, if that were so, and the State's order would diminish income by calling for refunds, MAC had advocated the State's remittitur. Pascal said because MAC must have viewed the remittitur as having prospective effect only.

Pascal said that the reason his clients, the out of state exchanges, were suggesting mootness was they were worried that they in the first instance would be the defendants in any refund suits and only later would the State be sued.

Pascal argued that FTB v. Goodman, 300 N.Y. 140 conclusively proved there should be no judicial remodeling in the case at bar.

Pascal concluded by reiterating that he and MAC wanted an order with three parts: vacating prior orders; dismissing as moot; and awarding costs.

Bob Bush began by saying he disagreed on mootness. The most, he said, MAC and Pascal contended is that the case is moot after October 1, and it is still early September. There are open years, assessments and refunds still outstanding to be covered by the pre-Chapter 878 law.

Breitel asked how much was at issue. Bush referred to the Redling affidavit which he said had been prepared in connection with an injunction motion but never filed. Based on that affidavit, he said, hundreds of millions of dollars are at issue, although the tax commission won't know how much until refunds are requested from the tax department. Take judicial notice of the recent MAC Official Statement for some estimates, Bush said.

Breitel asked how much the State's revenue will increase if the judicial surgery for which the State asks is performed. Bush said by several million dollars. And if the other remittitur is adopted, Breitel asked. The State would lose many hundreds of millions of dollars, Bush said.

Breitel asked how Bush explained MAC's position in light of this. Bush said MAC was an "interloper" with no real interest - it is the State tax commission which really matters, Bush said.

Jones asked if there would be any practical problems with administering refunds, or making assessments. Bush said there would be significant problems.

Jones asked what the difference between the new legislation (Chapter 878) and the proposal submitted by the foreign exchanges was - would Section 11 of the old law produce the same result as the new statute?

Bush said since the legislation was prospective only it was a sign from the legislature they wanted the Court to resolve this problem.

Jones wondered whether the legislature could constitutionally resolve the retroactive problem. He doubted the legislature had the right to do so.

Bush said the Equal Protection issue was still alive. Breitel asked if a disposition of this case might not create new cases. Bush said yes and added that although the out of state exchanges had pleaded a class action on behalf of all taxpayers, it was the state which was now representing the taxpayers.

* * *

After the argument the MAC group, Pascal, Bush, Terry Boyle and John Compani (both from the Tax Commission) had a chat in the lobby. I think the following were the key new points raised (most of the time was spent unsuccessfully trying to show Bush et al. the errors of their ways).

1. Boyle and Compani believe the one thing which is expressly forbidden to them by the Supreme Court's mandate is to enforce the old Section 270a, as written, from 1968 to October 1, 1977. Although Gene Harper tried to explain that this case is ripe, under the applicable four part test, for only prospective application of the constitutional question, Boyle and Compani were unconvinced. Either 270-a must fall, and they must assess extra tax for the last five years, or 270-a must be extended and they must honor any claims for refunds from the last three years in their view.

2. Pascal points out that the market maker credit is limited to market makers in the State. He said his exchanges are starting to get complaints from their market making members that they are losing business because of this.

3. Compani said that any refunds paid because of remittitur would be deducted from that quarter's stock transfer tax revenue before it was made available to MAC. I asked him what his authority for this was and he said in addition to deducting administrative expenses before forwarding stock transfer tax revenues to MAC the Commissioner was authorized to deduct a "reasonable allowance for refunds" in the statute (although he didn't remember which one).

Michael A. Lampert

C O U R T O F A P P E A L S

S T A T E O F N E W Y O R K

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

Plaintiffs-Appellants,

- against -

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

Defendants-Respondents.

MEMORANDUM ON BEHALF OF THE MUNICIPAL ASSISTANCE CORPORATION FOR THE CITY OF NEW YORK, AMICUS CURIAE

HAWKINS, DELAFIELD & WOOD
ATTORNEYS AND COUNSELLORS AT LAW
67 WALL STREET, NEW YORK 10005

C O U R T O F A P P E A L S

S T A T E O F N E W Y O R K

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

Plaintiffs-Appellants,

-against-

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

Defendants-Respondents.

MEMORANDUM ON BEHALF OF THE MUNICIPAL ASSISTANCE CORPORATION FOR THE CITY OF NEW YORK, AMICUS CURIAE

The Municipal Assistance Corporation For The City of New York ("MAC") submits this memorandum in support of plaintiffs' suggestion of mootness contained in its statement filed with the Court. MAC also submits a proposed order annexed hereto which MAC suggests is more consistent with a determination that the issue before the Court on remand from the Supreme Court is moot than plaintiffs' proposed order.

MAC agrees with the plaintiffs' statements that the "new legislation signed by the Governor of the State of New York on August 11, 1977 moots defendants' motion for reargument" (Plaintiffs' statement at 1) and that "[I]n light of this new legislation the issue before this Court on remand is moot after October 1, 1977" (Plaintiffs' statement at 3). The legislation referred to in

plaintiffs' statement is Chapter 878 of the Laws of 1977.

Chapter 878

The basic effects of Chapter 878 are (1) to repeal one of the two forms of relief from the stock transfer tax which were at issue in this litigation (the special rate for non-residents) effective October 1, 1977 (§2 of Chapter 878); (2) to make the second form of relief from the stock transfer tax involved in this case (the maximum limit on the tax) applicable to all qualifying sales regardless of the place of sale effective immediately (§§3 and 5 of Chapter 878); and (3) to create a system of rebates of the tax in order to eliminate the negative economic effect of the stock transfer tax (chiefly §6 of Chapter 878).

The Effect of Chapter 878 on the Instant Litigation

The supervention of new legislation may be judicially noticed by this Court. Matter of Buffalo Creek R.R. Co. v. City of Buffalo, 301 N.Y. 595 (1959); Bordo Corp. v. Witty, 301 N.Y. 346, 369; Iscovitz v. Paletta, 301 N.Y. 346, 370 (1950). Where, as in the instant litigation, the supervening legislation repeals the legislation challenged in the action, the case is rendered moot and the complaint is dismissed. Kremens v. Barley, 431 U.S. , 97 S.Ct. 1909 (1977); Town of Greenburg v. Board of Supervisors of Westchester County, 23 N.Y. 2d 732 (1969); cf. Stringer v. Gould, 237 A.D. 2d 673 (3rd Dept. 1971) (same rule for administrative regulation). The Supreme Court mandate in this case offers no

obstacle to a determination of mootness. Ramirez v. Brown, 12 Cal. 3d 912, 528 P. 2d 378 (1974).

In the United States Supreme Court, plaintiffs sought a declaration that the two forms of relief from the stock transfer tax discussed earlier "unconstitutionally [discriminate] against interstate commerce by imposing a greater tax burden on securities transactions involving out-of-state sales than on transactions of the same magnitude involving in-state sales" U.S. 97 S.Ct. 599, 602 (1977). They also sought an injunction against the operation of that discrimination. That is, they sought to stop the prospective application of the two forms of relief.

As a result of Chapter 878 there will be no future application of the two forms of relief - they are repealed. Instead a new maximum tax is made applicable to all taxable transactions regardless of the place of sale. Similarly, the new rebate system (including the special, temporary non-resident rebate) is made applicable to all taxable transactions regardless of the place of sale. Since Chapter 878 does not distinguish between in-state and out-of-state sales, it is not an unconstitutional discrimination against interstate commerce. It gives the plaintiffs all the relief which they sought in the United States Supreme Court.*

* We note that Chapter 878 has substantially the same effect as defendants' proposed remittitur. It is thus one more piece of evidence that the legislature would prefer some form of relief from the stock transfer tax (albeit broader than the original Tax Law §270-a) to none at all. See Brief of Municipal Assistance Corporation For The City of New York, Amicus Curiae, filed March 31, 1977, at 7.

We do not concur with the plaintiffs' view that the Court should order that §270-a of the Tax Law be declared unconstitutional because as the plaintiffs agree the issue is moot. If, as agreed, a controversy is moot because of changing circumstances, no substantive determination should be made. Adironack League Club v. Black River Regulating District, 301 N.Y. 219 (1950); see e.g., R. Stern & E. Gressman, Supreme Court Practice p. 587. A controversy may become moot if the statute which is the basis for the action or for the conduct complained of is repealed or modified. United States v. Alaska, S.S.Co., 253 U.S. 113 (1920); Berry v. Davis, 242 U.S. 468 (1917); National Milk Producers v. San Francisco, 317 U.S. 423 (1943); Amalgamated Assoc. of Employees v. Wisconsin Board, 340 U.S. 416 (1951).

Based on these factors, the Municipal Assistance Corporation For The City of New York respectfully submits that this Court should declare that the issue before this Court on remand is moot and should enter an order in the form annexed hereto. We further respectfully request that we be granted 15 minutes to argue orally before the Court at the rehearing.

Dated: New York, New York
September 2, 1977

Yours, etc.

HAWKINS, DELAFIELD & WOOD
Attorneys for the Municipal
Assistance Corporation For
The City of New York
67 Wall Street
New York, New York 10005
(212) 952-4700

Of Counsel:

Donald J. Robinson
Chas. L. Kades

TO:

MILTON H. COHEN, ESQ.
ROGER PASCAL, ESQ.
Attorneys for Plaintiff
7200 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606

HON. LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant
The Capitol
Albany, New York 12224

APPENDIX

C O U R T O F A P P E A L S

S T A T E O F N E W Y O R K

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

Plaintiffs-Appellants,

-against-

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

Defendants-Appellees.

JUDGMENT AND ORDER

An appeal having been taken by the appellants to the Supreme Court of the United States from a judgment of this Court, and such Court having rendered its decision and opinion on January 12, 1977, in which that Court concluded that §270-a of the Tax Law discriminates against interstate commerce in violation of the Commerce Clause of the United States, and the order of that Court having been entered in the office of the Clerk thereof on February 9, 1977, reversing the judgment of this Court and remanding the cause to this Court, and this Court taking notice that chapter 878 of the Laws of New York of 1977, repeals §270-a of the Tax Law

IT IS ORDERED, ADJUGED AND DECREED, that this appeal is dismissed as moot by reason of said repeal; and it is

FURTHER ORDERED, ADJUDGED AND DECREED, that the plaintiffs shall recover their costs of $974.00 from defendants as provided in the mandate of the United States Supreme Court and shall recover their costs in this Court.

C O U R T O F A P P E A L S

S T A T E O F N E W Y O R K

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

Plaintiffs-Appellants,

-against-

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

Defendants-Respondents.

NOTICE OF SUGGESTION OF MOOTNESS
AND MOTION FOR ENTRY OF AN ORDER UPON
REMAND FROM THE UNITED STATES SUPREME COURT

To: Robert W. Bush
Office of the Attorney General
of the State of New York
The Capitol
Albany, New York 12224

Hawkins, Delafield & Wood
67 Wall Street
New York, New York 10005

PLEASE TAKE NOTICE that upon the mandate of the Supreme Court of the United States dated February 9, 1977, and the original record on appeal and briefs, and in light of new legislation enacted by the New York State Legislature and signed by the Governor of the State of New York on August 11, 1977, the under-signed will present a suggestion of mootness and a motion to the

Court of Appeals of the State of New York to be heard on the date scheduled for oral argument, to wit, September 8, 1977, at the appointed time, for entry of an order:

1. Declaring Tax Law §270-a unconstitutional and void,

2. Taxing costs in favor of plaintiff against defendants in the sum of Nine Hundred Seventy-Four Dollars ($974.00) pursuant to the aforesaid mandate of the United States Supreme Court,

3. Granting such other and further relief as may be just and proper.

MILTON H. COHEN
ROGER PASCAL
ANN RAE HEITLAND
Attorneys for Plaintiffs-Appellants

Schiff Hardin & Waite
7200 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
(312) 876-1000

COURT OF APPEALS

STATE OF NEW YORK

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

Plaintiffs-Appellants,

-against-

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

Defendants-Respondents.

STATEMENT IN SUPPORT OF SUGGESTION OF MOOTNESS AND MOTION

Plaintiffs submit this motion in lieu of their earlier motion and brief for reargument and entry of an order on remand because new legislation signed by the Governor of the State of New York on August 11, 1977, moots defendants' motion for reargument. Laws of 1977, ch. 878.

This case was filed in the Supreme Court of the State of New York on August 31, 1972. In their complaint, plaintiffs challenged the constitutionality of §270-a of the Tax Law. On December 19, 1973 defendants' motion to dismiss was denied. On

July 9, 1974, the Appellate Division reversed and declared §270-a valid and constitutional. On October 21, 1975, this Court affirmed the decision of the Appellate Division.

On January 12, 1977 the United States Supreme Court reversed and remanded for proceedings consistent with its opinion, holding unanimously "... that §270-a discriminates against interstate commerce in violation of the commerce clause." Boston Stock Exchange v. State Tax Commission, 97 S.Ct. 606 (1977). In so holding the Supreme Court left for decision of this Court on remand the question of "... whether the legislature intended that the distinction [in 270-a] between residents and nonresidents should survive the invalidation of the discrimination between in-state and out-of-state sales."

The issue remanded to this Court has been mooted by chapter 878 of the Laws of 1977. Effective immediately upon the Governor's signature on August 11, 1977, subdivision 2 of §270-a of the Tax Law (the "maximum tax") was repealed. Effective October 1, 1977 subdivisions 1 and 3 of §270-a of the Tax Law (the "nonresident discount") will be repealed. Consequently, all of §270-a will have been repealed by October 1, 1977. At that point, the operation of the two savings clauses enacted with §270-a is moot because §270-a no longer exists. Laws of

1968, ch. 827, §§10-11. In light of this new legislation the issue before this Court on remand is moot after October 1, 1977.

Plaintiff's only remaining interest is that the mandate of the United States Supreme Court be enforced by entry of a judgment declaring §270-a unconstitutional for violation of the commerce clause and ordering payment of plaintiffs' cost on appeal to the United States Supreme Court and in this Court. Therefore, plaintiffs submit the proposed order attached hereto as Appendix A.

Respectfully submitted,

MILTON H. COHEN
ROGER PASCAL
ANN RAE HEITLAND

Schiff Hardin & Waite
7200 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
(312) 876-1000

APPENDIX A

C O U R T O F A P P E A L S

S T A T E O F N E W Y O R K

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

Plaintiffs-Appellants,

-against-

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

Defendants-Appellees.

JUDGMENT ORDER

An appeal having been taken by the appellants to the Supreme Court of the United States from a judgment of this Court, and such appeal having been granted and the cause having been set down for argument in that Court on November 2, 1976, and the parties having argued said cause on said date and such Court having rendered its decision and opinion on January 12, 1977, in which that Court concluded that §270-a of the Tax Law discriminates against interstate commerce in violation of the Commerce Clause of the United States, and the order of that Court having been entered in the office of the Clerk thereof on February 9, 1977, reversing the judgment of this Court and remanding the cause to

this Court, and this Court taking notice of the provisions of chapter 878 of the New York Laws of 1977, repealing §270-a of the Tax Law

IT IS ORDERED, ADJUDGED AND DECREED, that §270-a of the Tax Law is hereby declared to be unconstitutional and invalid, and it is

FURTHER ORDERED, ADJUDGED AND DECREED, that the plaintiffs shall recover their costs of $974.00 from defendants as provided in the mandate of the United States Supreme Court and shall recover their costs in this Court.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
345 PARK AVENUE
NEW YORK, N.Y. 10022
TELEPHONE (212) 644-8000
TELECOPIER (212) 644-8202
CABLE LONGSIGHT, N.Y.
TELEX 12-7831

RANDOLPH E. ... (1946-1956)
LOUIS S. WEISS (1927-1950)

JOHN F. WHARTON
LLOYD K. GARRISON
COUNSEL

SIMON H. RIFKIND
HOWARD A. SEITZ
ADRIAN W. DEWIND
MORRIS B. ABRAM
MORDECAI ROCHLIN
PAUL J. NEWLON
JOSEPH S. ISEMAN
JAMES B. LEWIS
THEODORE C. SORENSEN
MARTIN KLEINBARD
RICHARD H. PAUL
NORMAN ZELENKO
JOHN E. MASSENGALE
JAY TOPKIS
EDWARD N. COHTKYAN
ROBERT H. MONTGOMERY, JR.
JOHN C. TAYLOR, 3d
BERNARD H. GREENE
ERNEST RUBENSTEIN
STUART ROBINOWITZ
JAMES L. PURCELL
ARTHUR KALISH
DAVID T. WASHBURN
BERNARD FINKELSTEIN
ARTHUR L. LIMAN
SEYMOUR HERTZ
WALTER F. LEINHARDT
GERALD D. STERN
ANTHONY B. KUKLIN
MARTIN LONDON
DAVID C. BRODHEAD
PETER R. HAJE
LEONARD V. QUIGLEY
ALLAN BLUMSTEIN
NEALE M. ALBERT
JAY GREENFIELD
KEVIN J. O'BRIEN
ALFRED D. YOUNGWOOD
DONALD F. MOORE
JOSEPH E. BROWDY
SIDNEY S. ROSDEITCHER
ROBERT L. LAUFER
ALLEN L. THOMAS
PETER L. FELCHER
MARK H. ALCOTT
JOHN P. McENROE
PETER J. ROTHENBERG
JUDITH R. THOYER
RICHARD A. ENGELMAN
GEORGE D. FELLEMAN
STEVEN B. ROSENFELD
ALBERT P. HAND
ROBERT S. SMITH
MAX GITTER

WRITER'S DIRECT DIAL NUMBER

(212) 644-8215

May 26, 1977

BY HAND

Donald Robinson, Esq.
Hawkins, Delafield & Wood
67 Wall Street
New York, New York

Boston Stock Exchange v. State Tax Commission

Dear Donald:

By now, you should have received the State's affidavit in opposition to Pascal's letter. It does not address the preference question.

I am taking the liberty of sending to you a draft of a letter which we have prepared -- rather hastily, I admit -- for your consideration for possible submission, in the same or different form, to the Court on the preference issue. You and I, along with the MAC people, can discuss the wisdom of such a letter after you and they review it. Our inclination at the moment is to say something on the preference issue, although the Court will probably do exactly what it wants anyway.

As to the State's affidavit, I have put in a call to John Compani to tell him that we think the affidavit is unnecessary, that it addresses the stay issue which the Clerk has already told me the Court won't consider, that the affidavit is, for the most part, either incomprehensible or unfortunate, or both, and that they should refrain from putting it in. We are particularly concerned about paragraph 8 of the affidavit. I am not sure we will be successful in this venture.

Please give me a call when you get a moment.

Sincerely,

Robert L. Laufer

Enclosure
cc: Stephen J. Weinstein

DRAFT 5/26/77

[Hawkins Letterhead]

Mr. Joseph P. Bellacosa, Clerk
Court of Appeals
State of New York
Court of Appeals Hall
Albany, New York 12207

Boston Stock Exchange, et al. v.
State Tax Commission, et al.

Dear Mr. Bellacosa:

We are writing on behalf of the Muncicpal Assistance Corporation For The City of New York ("MAC"), amicus curiae in the above-captioned matter. By letter dated May 18, 1977 to you from Esq. Roger Pascal of Schiff, Hardin & Waite, plaintiffs have asked the Court to grant this matter a calendar preference, pursuant to Rule 500.6(b).

Although MAC stands ready to comply with whatever schedule the Court deems proper, we believe that Mr. Pascal's letter sets forth no facts which were not before the Court when it established the present briefing and argument schedule. He thus states no reason why this Court should alter its original determination.

To the extent that Mr. Pascal claims that matters are "indisputable" and clear, we disagree. The Supreme Court remanded this case to this Court precisely because the effect of the "savings" clauses is far from clear. This Court is entitled to briefs and arguments which have had the benefit of time to mature. It is entitled

not to be rushed in its deliberation of the issues which the Supreme Court directed it to consider. While we are prepared, as this Court's amicus, to try to assist the Court whenever it wishes, we believe the Court's original scheduling order reflects a wise balance between the need for this litigation to be finally resolved and the need for it to be resolved correctly.

We do not address in detail the question of the letter's request for temporary injunctive relief. Such relief, under Rule 500.9 of this Court, may only be sought on motion with adequate notice to all sides. Further, plaintiff's ipse dixit that money damages are not available is unsupported; no one has yet addressed the question of the availability of refunds to stock transfer taxpayers who might, depending on this Court's remittitur, have overpaid the stock transfer tax.

Respectfully, ~~Sincerely,~~

HAWKINS, DELAFIELD & WOOD

By _____
Donald J. Robinson

to: Bob Lauf, Esq.
from: Dept. of Tax + Finance

COURT OF APPEALS

STATE OF NEW YORK

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

Plaintiffs-Appellants,

-against-

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

Defendants-Respondents.

AFFIDAVIT

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants-
Respondents
The Capitol
Albany, New York 12224
Telephone (518) 474-7145

ROBERT W. BUSH
Assistant Attorney General

of Counsel

C O U R T O F A P P E A L S

S T A T E O F N E W Y O R K

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

Plaintiffs-Appellants,

-against-

AFFIDAVIT

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

Defendants-Respondents.

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

VICTOR A. REDLING, being duly sworn deposes and says:

(1) That he is an Associate Tax Examiner in charge of the Stock Transfer Tax Section, Miscellaneous Tax Bureau of the New York State Department of Taxation and Finance, and is familiar with the motion papers and supporting documents submitted by the plaintiffs and defendants upon their respective motions for reargument on remand in the present cause and has read the order of this Court granting such motions for reargument, and makes this affidavit in opposition to any injunctive relief sought by the plaintiffs;

(2) That the purpose of this affidavit is to protect the revenue sources of this State until final disposition by this Court of the status and applicability of section 270-a of the Tax Law, in light of the savings clause contained in section 10 of the enabling legislation which enacted section 270-a, is rendered by this court, oral argument thereon having been set down during the October 1977 session of this court;

(3) That, in addition, at this particular time any injunctive relief requested by the plaintiffs would not be appropriate since the Supreme Court of the United States remanded this cause to this Court upon the grounds that the construction of such savings clause was strictly a question of state law appropriately to be decided by this Court. Accordingly, the status quo of the present stock transfer tax structure should not be disturbed before this Court has had ample time to construe such savings clause in light of the legislative intendment when such section 270-a was enacted.

(4) That, at the commencement of the instant action in August, 1972, the plaintiffs made application for a stay of enforcement of such section 270-a (Record on Appeal in this Court, p. 32) which motion was denied by special term. Since that time, plaintiffs have not renewed such application, and it would not appear proper to grant the requested relief at this time due to the fact that this Court having set the instant cause down for oral argument during October, 1977,

plaintiffs will not have suffered any irreparable harm within the relatively short period (as compared to the period which has elapsed since the commencement of this action) for final disposition of this cause;

(5) That, among the duties of your deponent is the compilation of an annual revenue estimate of New York State stock transfer tax collections;

(6) That he anticipates stock transfer tax receipts for the fiscal year ending March 31, 1978 in the amount of $260 million, of which approximately 10% or $25 million represents payments by nonresidents which are collected and remitted by brokers and dealers who are chiefly members of stock clearing corporations affiliated with the five (5) non-New York State stock exchanges comprising the plaintiffs in the instant action, which exchanges unlike those in this State include institutional membership (of substantial size), e.g., mutual funds that trade in large share blocks.

(7) That the $260 million total stock transfer tax collection yearly is computed as follows: first, it is predicated on 26 million shares traded daily on all of the Securities Exchange Commission's approved stock exchanges operating in New York State, requiring an average total daily stock transfer tax of slightly more than $1 million, so that with such stock exchanges operating for 250 trading days annually about $260 million represents the total stock transfer tax collection from said exchanges per year;

second, in addition to the foregoing, the securities industry calculates that about $1 million weekly stock transfer tax payments flow into New York from out-of-state sources as referred to herein;

(8) That if the reduced rate of tax paid on a single taxable sale and nonresident sale transactions were not applicable and the full rate of tax were imposed upon such transactions, a temporary, immediate gain would be realized. However, the true revenue effect would be a revenue loss of possibly a substantial portion of $25 million of estimated stock transfer tax remittances and collections from out-of-state channels;

(9) That such annual surety bonds are necessary, since (a) the Department of Taxation and Finance has no extra territorial jurisdiction over out-of-state exchanges or stockbrokers to insure tax collection, and (b) such out-of-state stock exchanges and brokers are not required to keep copies of their stock transactions within the State of New York and personnel of the Department of Taxation and Finance are not permitted to travel outside the State even if such jurisdiction should exist for such inspection, and any injunctive relief obtained by the plaintiffs would make it administratively impossible to determine daily transfer tax liability during the period covered by the injunction, and such injunction would prevent ultimate recovery of taxes due and owing to the State of New York should the statute be saved by judicial exscinding or otherwise saved.

(10) That annual surety bonds be posted with the defendants to cover either one of the following eventualities:

(1) If the plaintiffs seek to enjoin the enforcement, collection and remittances of tax at the rate which is presently payable on transactions which comprise tax events subject to the provisions of subdivisions one and two of section 270-a of the Tax Law, that an annual bond in the sum of $25 million should be posted in the event that this Court grants such injunctive relief, and/or

(2) If the plaintiffs seek, however to restrain the enforcement, collection and remittances of Article 12 of the Tax Law in its entirety, that an annual bond in the sum of $260 million should be posted in the event that this Court grants such ultimate injunctive relief.

Dated: May 25, 1977

Victor A. Redling

Sworn to before me this
25th day of May, 1977.

PHILIP M. TRIMBLE
Notary Public 9310005
Albany County
Commission Expires March 30, 1978

SCHIFF HARDIN & WAITE
7200 Sears Tower, 233 South Wacker Drive, Chicago, Illinois 60606
Telephone (312) 876-1000

May 18, 1977

Mr. Joseph P. Bellacosa, Clerk
Court of Appeals
Of the State of New York
Court of Appeals Hall
Albany, New York 12207

Re: Boston Stock Exchange, et al.
v. State Tax Commission, et al.

Dear Mr. Bellacosa:

We are writing pursuant to Rule 500.6(b) of the Rules of the Court of Appeals to request expedited disposition of the motions pending before the Court upon remand from the United States Supreme Court. We respectfully request that this letter be distributed to the Court pursuant to the aforesaid rule.

1. Nature Of The Case. This is a declaratory judgment and injunction action which was commenced on August 31, 1972 in the Supreme Court, County of New York. Plaintiffs sought to have declared unconstitutional §270-a of the Tax Law on the grounds that it was repugnant to the Commerce Clause and other provisions of the United States Constitution. On January 12, 1977, after four and one half years of litigation, the United States Supreme Court unanimously declared §270-a unconstitutional for the reasons advanced by plaintiffs and remanded to this Court for a determination of the effect of the savings clauses which were enacted with §270-a. It is now indisputable that the present §270-a, which became effective on July 1, 1969 and under which the State of New York will continue to collect taxes until this Court disposes of this matter, has been declared unconstitutional and invalid by the United States Supreme Court. The only remaining issue is whether the savings clauses require a judicial revision of §270-a to expand the application of that section in such a way as to avoid the unconstitutional discrimination which it causes in its present form.

SCHIFF HARDIN & WAITE
7200 Sears Tower, 233 South Wacker Drive, Chicago, Illinois 60606
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Mr. Joseph P. Bellacosa, Clerk
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2. Jurisdiction. The original appeal by plaintiffs to this Court was pursuant to section 5601(b) of the Civil Practice Law and Rules. The present proceeding is before this Court pursuant to the mandate of the United States Supreme Court which was issued on February 9, 1977.

3. Readiness Of The Appeal. The present motions are a continuation of an appeal process which began in the Appellate Division on January 10, 1974. The present motions of plaintiffs and defendants for reargument have been fully briefed by the parties and Municipal Assistance Corporation of the City of New York. In addition to the extensive briefs which were part of the respective motions for reargument filed by the parties, Municipal Assistance Corporation has filed a brief as amicus curiae and plaintiffs have filed a response to defendants' motion and Municipal Assistance Corporation's brief.

4. Relevant Dates. Order and opinion denying defendants' motion to dismiss in Special Term--December 19, 1973; order of reversal of Appellate Division--July 9, 1974; plaintiffs' Notice of Appeal to this Court--August 23, 1974; opinion and order of this Court affirming the Appellate Division--October 21, 1975; opinion of the United States Supreme Court reversing and remanding to this Court--January 12, 1977; motions for reargument including affidavit of Mr. Bush and plaintiffs' response thereto, fully briefed--April 29, 1977.

5. Reasons For Calendar Preference. On January 12 of this year the United States Supreme Court unanimously held:

> "We hold that §270-a discriminates against interstate commerce in violation of the Commerce Clause." 97 S.Ct. 599, 606 (1977).

The discrimination effectuated by §270-a began on July 1, 1969. The structure of §270-a is such that the only remedy available to plaintiffs is the invalidation of §270-a and an injunction

against its enforcement. No money damages are available. The impact of §270-a on plaintiffs, which has now also been determined to be an unlawful one, continues at the time of this writing and will continue until this Court enters its final order in this matter. If this case is not argued until the October 1977 session of this Court, approximately another full year will have passed between the United States Supreme Court's decision in favor of these plaintiffs and the granting of the relief to which they are entitled and which is not in dispute on remand. At that time, this litigation will have been in progress for 5 1/2 years and the unconstitutional statute will have been in effect for almost nine years.

In the alternative, plaintiffs respectfully suggest that this Court enter an order temporarily enjoining the continued enforcement of §270-a pending final disposition of the question of whether part of §270-a may be "saved."

Very truly yours,

SCHIFF HARDIN & WAITE

BY
Roger Pascal

Attorneys for Plaintiffs

RP:mf
cc: Mr. Robert W. Bush
Hawkins Delafield & Wood

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

JAMES H. TULLY, JR.
COMMISSIONER OF TAXATION
AND FINANCE

LAW BUREAU
STATE CAMPUS
ALBANY, N.Y. 12227

TELEPHONE 457-6240

PETER CROTTY
DEPUTY COMMISSIONER
AND COUNSEL

ADDRESS YOUR REPLY TO
LAW BUREAU

May 10, 1977

Steven Weinstein, Assistant Director
Municipal Assistance Corporation of
the City of New York
Room 4510
Two World Trade Center
New York, New York

Re: Boston Stock Exchange

Dear Mr. Weinstein:

As requested, enclosed is Affidavit of Robert Bush, Assistant Attorney General, with respect to the above captioned case.

Very truly yours,

JOHN COMPANI
Senior Attorney

JFC:ee
Enc.

5/18/77 - Steve - Cont'd 2 appeals granted motion for reargument, argument set down for fall term —
JFC

C O U R T O F A P P E A L S

S T A T E O F N E W Y O R K

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DESTROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

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LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants-
Respondents
The Capitol
Albany, New York 12224
Telephone (518) 474-7145

ROBERT W. BUSH
Assistant Attorney General

of Counsel

C O U R T O F A P P E A L S

S T A T E O F N E W Y O R K

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

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AFFIDAVIT

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

Defendants-Respondents.

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

ROBERT W. BUSH, being duly sworn, deposes and says that he is an Assistant Attorney General of the State of New York to whom the captioned matter has been assigned since its inception, and that he has briefed and argued the matter in the courts of this State and in the Supreme Court of the United States, and makes this affidavit in opposition to plaintiffs' "Response" to defendants' motion for reargument heretofore filed with this Court, and respectfully alleges that:

(1) Plaintiffs' contentions set forth in such "Response" are asserted solely to reinstate and retain their economic superiority over the Stock Exchanges located within the State of New York which the Legislature sought to overcome by the enactment of chapter 827 of the Laws of 1968;

(2) As a result of these contentions, the plaintiffs have misconstrued both sections 10 and 11 of chapter 827, supra, which the United States Supreme Court remanded to this Court for statutory construction and which under section 10 the defendants' motion for reargument seeks to preserve the statutory viability of section 270-a of the Tax Law in order to effectuate the legislative intent embodied in chapter 827 in accordance with the said remand and which, as a consequence, such motion does not "expand" section 270-a as plaintiffs assert.

(3) There is no conflict between sections 10 and 11 of chapter 827, since both are in complete harmony with one another with each serving its own particular purpose and which are made quite clear by Exhibits A and B appended hereto.

(4) Exhibit A is a memorandum of the Department of Taxation and Finance which was submitted to the Governor on January 17, 1968 concerning the provisions of the bill which became chapter 827 and this memorandum sets forth the reason for section 11 thereof as follows (Exh. A, p. 5):

> "The constitutionality of imposing a higher tax on residents than on nonresidents is by no means free from doubt although substantial support for the validity of this provision may be found in Allied Stores v. Bowers, 358 U. S. 522. The bill recognizes the existence of this constitutional question, for section 4 provides that if this part of the bill shall be held unconstitutional, the higher rates of tax applicable to residents shall apply to nonresidents also. As a practical matter, collection of such higher taxes on sales of stock which might have been made long prior to the ultimate decision as to unconstitutionality would pose serious problems."

(5) Following passage of the bill when it was before the Governor for approval, Joseph H. Murphy, Commissioner of Taxation and Finance, by letter dated June 17, 1968, advised the Governor concerning section 11 that (Exhibit B, p. 2):

> "This difference in rate applicable to similar transactions entered into by residents and nonresidents poses serious constitutional questions arising under the fourteenth amendment to the Constitution of the United States and section eleven of article one of the Constitution of the State of New York, which provide that no person shall be denied equal protection of the laws (Smith v. Loughman, 245 N. Y. 486, certiorari denied 275 U. S. 560; Matter of Goodwin v. State Tax Commission, 1 N. Y. 2d Series 680).
>
> "The seriousness of this question has been recognized by the drafters of the amendments in section 11 of the proposed act."

(6) The foregoing clearly demonstrates that section 11 was intended to be invoked only if the distinction between the nonresidents and resident tax rates were found to be discriminatory in violation of the equal protection clauses of the State and Federal constitutions and that there was no legislative intent that there would be any conflict between sections 10 and 11, or any intent that section 11 would be operative in any other instance. Accordingly, under the normal and customary language of a severability clause, such as is contained in section 10, such a clause must be invoked, as we have heretofore asserted, in order to carry out the legislative intent embodied in chapter 827, supra, so as to preserve the viability of section 270-a.

(7) It is also clear from the opinion of this Court (37 N Y 2d 535, 540-541) that plaintiffs' objections under the equal protection clauses were rejected by this Court and, of course, were not passed upon by the Supreme Court of the United States, since these were abandoned by the plaintiffs in that Court as its opinion noted (Slip Opinion, p. 2).

(8) In view of the foregoing, there is no merit to plaintiffs' contentions, and the relief sought by defendants' motion for reargument should be granted.

Dated: April 22, 1977

Robert W. Bush

Sworn to before me this
22nd day of April, 1977.

Assistant Attorney General

TO: MILTON H. COHEN, ESQ.
ROGER PASCAL, ESQ.
Attorneys for Plaintiff
7200 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606

HAWKINS, DELAFIELD & WOOD
Attorneys for The Municipal
Assistance Corporation For
The City of New York
67 Wall Street
New York, New York 10005

MEMORANDUM

Re: Proposed amendments to the stock transfer tax (Tax Law Article 12)

General description of tax.--Before describing the amendments to be made by the bill submitted, it may be helpful to outline generally the provisions and application of the present law.

The tax applies not merely to sales of stock but to transfers generally, such as gifts, bequests, transfers by individuals to trusts which they create, transfers to voting trusts, transfers of stock owned by a merged corporation to the merging corporation, etc. Tax Law section 270-1.

In connection with any transfer there are in substance three taxable events (section 270-1). If any of these occurs in New York, the transfer is taxable:

(1) the sale, agreement to sell or memorandum of sale;

(2) delivery of the certificates;

(3) book transfer (that is, on the books of the corporation).

Under (1) every sale on a New York exchange is taxable regardless of where the certificates are delivered or where the book transfer is made. Under (3) book transfers made by a New York transfer agent are taxable regardless of where the sale or delivery was made.

However, many large corporations have co-transfer agents in other states (foreign corporations can establish these at will) so that the New York tax can be avoided if the sale and delivery are made on an exchange in another state. Such tax avoidance is possible regardless of whether the seller is a resident or a nonresident. Even in corporations whose sole transfer agent is in New York tax can be similarly avoided if no book transfer is made to complete a sale. This happens frequently in that certificates in "street name" are sold and resold many times before a book transfer is made to the last buyer.

The tax on sales is customarily paid by the seller, but under the law, the seller, buyer and the transfer agent are all liable. Consequently, New York transfer agents are watchdogs for the Tax Commission and insist on proof of tax payment (or

exemption--ordinarily by an exemption certificate of the broker or dealer) before making any transfer.

In sales (or other transfers) handled by exchange members or registered dealers, payment of the tax is ordinarily shown, not by actual tax stamps, but by a rubber-stamp endorsement (by the broker or dealer) on the certificates "Tax Paid Through Clearing Corporation" or "Tax Paid Directly to the Tax Commission" (permitted by section 281-a). The "tax paid" rubber-stamp certificates by a broker or dealer give a transfer agent no information as to the amount or rate paid. To get this information Tax Commission auditors must examine the blotters of the brokers or dealers submitting these certificates.

The tax is imposed on a per share basis. The rates in effect until June 30, 1968 (under one subdivision 2 of section 270) are:

No-sale transfer	$.02 1/2
Sales under $5 a share	.01 1/4
Sales from $5 to $9.99 per share	.02 1/2
Sales from $10 to $19.99 per share	.03 3/4
Sales for $20 or more	.05

The rates scheduled to go into effect under present law on July 1, 1968 (under another subdivision 2 of section 270) are:

No-sale transfer	$.02
Sales under $5 a share	.01
Sales from $5 to $9.99 per share	.02
Sales from $10 to $19.99 per share	.03
Sales for $20 or more	.04

Outline of proposed amendments. The bill submitted would continue permanently the rates now in effect until June 30, 1968, but would make two basic and permanent changes in the law. These are contained in subdivision 1(c) and 2 of a new section 270-a (in the bill, pages 4 and 9-11).

First, on "transactions by a nonresident individual" it would make the tax rates less than on any other transactions.

Second, on any single transaction, either by a resident or nonresident, there would be a maximum limitation on the amount of tax, regardless of the number of shares involved.

Both these changes would be progressive, over a 5-year period, beginning in the period from July 1968 through June 1969 and reaching their full effect after July 1, 1972. Thus, in the 1968-69 period the nonresident tax rates would be 95% of the regular rates, but after July 1972 they would be only 50% of the regular rates. Likewise, during the 1968-69 period the maximum tax on a single transaction would be $2,500.00, equal to tax at the regular rates on 50,000 shares sold for more than $20.00 per share. This maximum would decline, until after July 1972 it would be only $350.00, equal to tax at the regular rate on 7,000 shares sold for more than $20.00 per share, or at the reduced rate on 14,000 shares sold by a nonresident.

Nonresident individuals.--These are defined as individuals selling or trading on their own account, who are not residents of New York as defined in the bill.

First, limitation of the rate reduction to "individuals" seems to mean that sales by corporations, mutual funds, pension and other trusts would pay tax at the regular rates. This seems inconsistent with the purpose of the bill, since these non-individual investors or traders can shift their business to out-of-state exchanges just as easily as individuals.

As to individuals, the definition of "residents" includes the following regardless of their actual residence, and thereby excludes them from the benefit of the rate reduction even though they are trading for their own account (bill pages 5-6):

(i) members of a New York stock exchange;

(ii) dealers in securities doing business in New York;

(iii) dealers and brokers generally (those in other states);

(iv) members and managerial employees of any of the foregoing.

As to those not in the securities business, a "resident individual" is defined substantially as in the Personal Income Tax Law. That is, a resident includes (bill page 6):

(A) anyone domiciled in New York unless he maintains no permanent place of abode here, does maintain

one elsewhere, and spends not more than thirty days of the year in New York;

(B) anyone domiciled elsewhere who maintains a permanent place of abode in New York, unless this is only because of his service in the armed forces.

As to who is a resident, the bill submitted has some minor variations from the income tax rules. However, an important point to notice is that making the definition of "resident" and the tax rate reduction dependent on domicile and permanent place of abode in New York would distinguish between Westchester and New Jersey commuters, both of whom spend all their working time in New York City.

Proof of nonresidence.--Under subdivision (d) of new section 270-a (bill pages 8-9), it will be presumed that an individual is a resident, and subject to tax at the regular rates, unless either:

(1) he attaches to the stock certificates or accompanying papers a "declaration of nonresidence" or

(2) in transactions handled by an exchange member or a registered dealer, such broker or dealer affixes a "certificate" of nonresidence' based upon a declaration of nonresidence previously obtained by him from the individual for whom he is acting.

"Transactions by" nonresident individuals.--These are "transactions subject to tax under section 270" (bill page 4, lines 6-7) and thus include not only sales on exchanges or in the over-the-counter market but also private sales as well as taxable no-sale transfers such as those mentioned in the second paragraph on page 1 of this memorandum.

Maximum limitation for tax on a single transaction.--After July 1, 1959 this maximum will be applied. As illustrated above this equals the tax at the regular (resident) rate on 7,000 shares sold for more than $20.00 per share. In the case of a nonresident seller, whose rate then would be only 50% of the regular rate, his sale would have to amount to more than 14,000 shares at $20.00 or more before the maximum would apply.

It should also be noted that while the maximum applies to tax on a single transaction, the bill defines a single transaction to include (pages 9-10) all transactions executed on the same day by a broker or dealer for the same person and relating to the same stock, provided all the orders were placed with the broker or dealer in one day (not necessarily the date of execution).

in nature, and (2) saving clauses (peges 28-30) intended to protect and continue the tax at the regular rates in case the granting of lower rates to nonresidents should be held unconstitutional.

Comment.

(1) Under the bill submitted, the tax on transactions of a nonresident individual is fixed at a lower rate than on similar transactions of a resident individual. The rate differential gradually increases periodically until July 1, 1972, at which time the rate of tax on transactions of nonresident individuals will be 50% of the rate of tax on similar transactions of resident individuals.

This difference in rate applicable to similar transactions entered into by residents and nonresidents poses serious constitutional questions arising under the fourteenth amendment to the Constitution of the United States and section eleven of article one of the Constitution of the State of New York, which provide that no person shall be denied equal protection of the laws (Smith v. Loughman, 245 N. Y. 486, certiorari denied 275 U. S. 500; Matter of Goodwin v. State Tax Commission, 1 N. Y. 2d Series 600).

The seriousness of this question has been recognized by the drafters of the amendments in section 11 of the proposed act.

(2) The definitions of resident and nonresident have been taken in part from similar provisions in the income laws of the State. These definitions have created many administrative and legal problems for both taxpayers and the Tax Department in the administration of the income tax laws, and it can be anticipated that the administration of the Stock Transfer Tax Law will become more difficult by virtue of the differential tax treatment to be accorded residents and nonresidents.

(3) The proposed bill is designed to encourage nonresidents to use the facilities of the New York stock exchanges. However, section 270-a of the proposed bill provides that any person, a resident or nonresident individual, who knowingly makes a false statement concerning his place of residence would be guilty of a misdemeanor with a fine of not more than one thousand dollars or imprisonment for not more than one year. With the difficulties attending the determination of whether a person is a resident or nonresident, making this violation a crime would tend to discourage individuals from using the facilities of the New York exchanges.

(4) Section 276 of the Tax Law is amended to give both the State Tax Commission and the Director of Finance of the City

of New York equal authority to examine and audit the books of persons and business entities subject to the provisions of the Stock Transfer Tax Law. This dual authority would lead to many administrative problems, could prove costly and annoying to those subject to the tax, and would apparently permit the Director of Finance of the City of New York to make audits outside the City of New York. This could lead to a great deal of resentment.

(5) As noted above (page 4) the transactions for which a rate reduction would be allowed by this bill for nonresidents include private sales (through no broker or dealer) and also no-sale transfers. To accomplish the stated purpose of the bill it would seem entirely unnecessary to give any rate reduction on no-sale transfers, and probably unnecessary to give any reduction for sales handled otherwise than through exchange members or registered dealers.

(6) In referring to "transactions by" nonresident individuals the bill apparently intends to refer to transfers in which a nonresident is the seller or the transferor. However, this is not really clear from the language of the bill. It might possibly be construed to grant a rate reduction for a sale by a resident seller to a nonresident buyer on the theory that this was a "transaction by" the buyer, particularly since the buyer is equally liable for the tax under section 270 (3).

(7) As mentioned above (page 1) tax avoidance by using an out-of-state exchange and an out-of-state transfer agent can be accomplished as readily by a resident as by a nonresident. Accordingly, it seems illogical to allow to nonresidents a tax reduction which is not allowed to residents.

January 17, 1968

A-6394
PR

JOSEPH H. MURPHY
COMMISSIONER OF TAXATION AND FINANCE
PRESIDENT TAX COMMISSION

STATE OF NEW YORK
DEPARTMENT OF
TAXATION AND FINANCE
ALBANY, NEW YORK 12226

June 17, 1968

The Honorable Nelson A. Rockefeller
Governor of New York
State Capitol
Albany, New York 12224

Dear Governor Rockefeller:

Re: Senate Bill No. 7061

The above bill is before you for action; enclosed is a copy for convenient reference.

This bill amends section 270 of the Tax Law to continue in effect after June 30, 1968 the rates of stock transfer tax presently in effect, which otherwise would revert after that date to the lower rates in effect prior to July 1, 1966.

It also adds a new section 270-a, to become effective July 1, 1969, which would make two basic changes in the Stock Transfer Tax Law. First, on sales made in New York by a nonresident as defined in the bill (the definition excludes brokers, dealers and persons maintaining a place of business or employed in New York), it would make the tax rates less than on any other sales or transfers. Second, on any single sale, either by a resident or a nonresident, the bill would fix a maximum limitation on the amount of tax regardless of the number of shares sold.

Both these changes would be progressive, over a 5-year period, beginning in the period from July 1969 through June 1970 and reaching their full effect after July 1, 1973. Thus, in the 1969-70 period the nonresident tax rates would be 95% of the regular rates, but after July 1973 they would be only 50% of the regular rates. Likewise, during the 1969-70 period the maximum tax on a single sale would be $2500, equal to tax at the regular rates on 50,000 shares sold for more than $20 per share. [illegible]

July 1973 when it would be only $350, equal to tax at the regular rate on 7,000 shares sold for more than $20 per share, or at the reduced rate on 14,000 shares sold by a nonresident.

From an administrative point of view, the portions of the bill to become effective July 1, 1969 may and probably will cause various difficulties in enforcement and particularly in compliance. However, there have been eliminated from the present bill various administrative provisions of an earlier bill to the same general effect (Senate 5150) which would have been much more objectionable, and so far as the administrative duties of this Department are concerned, I believe we can "live with" the present bill.

The constitutionality of imposing a higher tax on residents than on nonresidents is by no means free from doubt although substantial support for the validity of this provision may be found in Allied Stores v. Bowers, 358 U. S. 522. The bill recognizes the existence of this constitutional question, for section 4 provides that if this part of the bill shall be held unconstitutional, the higher rates of tax applicable to residents shall apply to nonresidents also. As a practical matter, collection of such higher taxes on sales of stock which might have been made long prior to the ultimate decision as to unconstitutionality would pose serious problems.

Regardless of the administrative and constitutional questions mentioned above, I believe this bill should receive executive approval. All revenues from the stock transfer tax are payable to the City of New York, and unless this bill is approved, these revenues will be reduced by 20% beginning July 1, 1968. The bill was prepared and sponsored jointly by the City of New York and the New York Stock Exchange.

Sincerely,

JOSEPH H. MURPHY
Commissioner

Enc.

SCHIFF HARDIN & WAITE
7200 Sears Tower, 233 South Wacker Drive, Chicago, Illinois 60606
Telephone (312) 876-1000

MAC

April 29, 1977

Mr. Joseph W. Bellacosa, Clerk
Court of Appeals
Of the State of New York
Court of Appeals Hall
Albany, New York 12207

Re: Boston Stock Exchange, et al.
v. State Tax Commission, et al.

Dear Mr. Bellacosa:

We transmit to you herewith 26 copies of our response to the affidavit of Robert W. Bush. I would appreciate your acknowledgment of filing by the return to us of a receipted copy of the enclosed response. Also enclosed is an affidavit of service. Thank you.

Very truly yours,

Roger Pascal

RP:mf
Encl.
cc: Robert W. Bush, Esq.
Hawkins, Delafield & Wood

COURT OF APPEALS
STATE OF NEW YORK

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

Plaintiffs,

v.

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

Defendants.

AFFIDAVIT OF SERVICE

Ann Rae Heitland being duly sworn deposes and says that on April 29, 1977, she served three copies of Plaintiff's Response to Affidavit of Robert W. Bush upon Robert W. Bush, Assistant Attorney General of the State of New York and Hawkins, Delafield & Wood at the addresses designated by those attorneys for service in this lawsuit by causing the copies to be mailed to them first class postage prepaid.

Ann Rae Heitland

Sworn to before me this
29th Day of April, 1977.

Notary Public

C O U R T O F A P P E A L S

S T A T E O F N E W Y O R K

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

Plaintiffs-Appellants,

-against-

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

Defendants-Respondents.

PLAINTIFFS' RESPONSE TO AFFIDAVIT OF ROBERT W. BUSH

Milton H. Cohen
Roger Pascal
Ann Rae Heitland
7200 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
Attorneys for Plaintiffs-Appellants

SCHIFF HARDIN & WAITE

Of Counsel

C O U R T O F A P P E A L S

S T A T E O F N E W Y O R K

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

Plaintiffs-Appellants,

-against-

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

Defendants-Respondents.

PLAINTIFFS' RESPONSE TO AFFIDAVIT OF ROBERT W. BUSH

Plaintiffs respectfully request leave to file this response to the Affidavit of Robert W. Bush served in this cause on April 22, 1977. The Bush affidavit puts before this Court documents which have never been disclosed to plaintiffs' counsel in nearly five years of litigation. Accordingly, plaintiffs ask the opportunity to make this brief response to it.

ARGUMENT

The two documents attached to Mr. Bush's affidavit reveal that the nonresident discount which defendants are attempting to rescue by judicial legislation discriminates unconstitutionally against New York residents, in violation of the equal protection clause*. More importantly, the Bush affidavit errs in identifying the supposedly important passages from these two documents in such a way as to distort seriously whatever meaning they might have had.

The first document identified in Mr. Bush's affidavit is an anonymous memorandum dated January 17, 1968. Assuming that the document was submitted to the Governor (which is not apparent from the document itself), the following points emerge from it:

1. The memo was written five months before Chapter 827 became law.

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*Contrary to the implication of paragraph 7 of Mr. Bush's affidavit, these plaintiffs have never argued, nor would they have standing to argue, that §270-a discriminated against New York residents in violation of the equal protection clause. The only equal protection argument made in this case related to the "arbitrary classification dependent upon the place of sale." Boston Stock Exchange, et al. v. State Tax Commission, 37 N.Y.2d at 540, 337 N.E.2d at 760, 375 N.Y.S.2d at 312 (1975). See also Complaint, ¶15. If defendants have their way on this matter, however, the equal protection argument feared by defendant State Tax Commission is sure to be realized by a New York resident plaintiff.

2. There is no way to determine whether Mr. Bush's Exhibit A relates to the same proposed legislation as ultimately was passed in the form of §270-a.

3. The fact that Mr. Bush's Exhibit A does not even hint at the in-state/out-of-state distinction which caused §270-a to be declared unconstitutional--a distinction which was referred to five months later in Exhibit B--suggests that the statute which is the subject of Exhibit A is probably not the same statute as Chapter 827 in the form in which it was enacted.

4. The language attributed to Exhibit A in paragraph 4 of Mr. Bush's affidavit appears nowhere in Exhibit A but, rather, in Exhibit B.

5. The language circled on page 5 of Exhibit A proves too much for defendants. It proves that Section 11 was intended to require reversion to pre-section §270-a tax rates in the event that a portion of §270-a should be found unconstitutional. It destroys the justification for Section 11 proffered by the Municipal Assistance Corporation.

6. The January, 1968 memorandum from the Department of Taxation and Finance could not possibly preclude application of §11 to the in-state/out-of-state distinction since that memorandum fails even to identify that distinction. Either the in-state/out-of-state distinction did not exist in the legislation in its January, 1968 form, or the author of the January, 1968 memorandum failed to recognize the constitutional infirmity which led to the invalidation of §270-a. In neither case can one infer from the document that Section 11 is inapplicable under the circumstances now before the Court.

Mr. Bush's Exhibit B creates different problems for defendants' position. The following is an enumeration of some of these problems:

1. Exhibit B is dated June 17, 1968, the day <u>after</u> the day on which Governor Rockefeller approved Chapter 827. Record on Appeal to State of New York Court of Appeals at 47.

2. Commissioner Murphy's June 17, 1968 letter to Governor Rockefeller contains no reference to Section 11, Mr. Bush's statement in paragraph 5 of his affidavit to the contrary notwithstanding. To the extent that one may speculate

that a reference to Section 11 is implied, such a reference would again demonstrate only that the defendant State Tax Commission failed to anticipate the constitutional infirmity which was detected by the United States Supreme Court.

3. Defendants fail to explain why Section 11 should apply to the resident/nonresident distinction, the invalidity of which was anticipated by defendants, and not to the in-state/out-of-state distinction which they failed to anticipate.

4. Exhibit B to Mr. Bush's affidavit reemphasizes the "administrative and constitutional questions" inherent in the judicial legislation in which defendants are asking this Court to engage.

5. Mr. Bush's affidavit fails to explain how Exhibits A and B, which have been in the possession of defendants for nine years, can mean what defendants now say they mean, since defendants have ascribed an entirely different meaning to Section 11 since this litigation began in 1972.

The two documents attached to Mr. Bush's affidavit support plaintiffs', not defendants', reading of Section 11. Even if they supported defendants' position, they would have to be recognized as statements of defendants themselves, not the legislature.

CONCLUSION

The relief sought in plaintiffs' motion for reargument and in plaintiffs' response to defendants' motion for reargument should be granted.

Respectfully submitted,

Milton H. Cohen
Roger Pascal
Ann Rae Heitland
7200 Sear Tower
233 South Wacker Drive
Chicago, Illinois 60606

Attorneys for Plaintiffs-Appellants

Of Counsel:

SCHIFF HARDIN & WAITE

Boston St Exch

LAW DEPARTMENT
MUNICIPAL BUILDING
NEW YORK, N. Y. 10007

W. BERNARD RICHLAND
Corporation Counsel

April 14, 1977

Hon. Joseph W. Bellacosa
Clerk, Court of Appeals
20 Eagle Street
Albany, New York 12207

Re: Boston Stock Exchange, et al
v. State Tax Commission, et al

Dear Sir:

The City of New York, pursuant to the order of the Court of Appeals of October 11, 1974 granting it leave, filed its brief amicus curiae in the above action when it was originally before the Court of Appeals.

With respect to the motion of the defendants, returnable in the Court of Appeals on April 4, 1977, the City desires to state that it supports the position taken by the Attorney General of the State of New York in his brief dated March 28, 1977 and the similar position taken by the Municipal Assistance Corporation for the City of New York, amicus curiae in its brief submitted with respect to the above motion under date of March 31, 1977.

Very truly yours,

W. Bernard Richland
Corporation Counsel

C O U R T O F A P P E A L S

S T A T E O F N E W Y O R K

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

Plaintiffs-Appellants,

-against-

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

Defendants-Respondents.

RESPONSE OF PLAINTIFFS TO DEFENDANTS' MOTION FOR REARGUMENT AND BRIEF OF AMICUS CURIAE

Milton H. Cohen
Roger Pascal
7200 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
Attorneys for Plaintiffs-Appellants

Ann Rae Heitland
SCHIFF HARDIN & WAITE

Of Counsel

C O U R T O F A P P E A L S

S T A T E O F N E W Y O R K

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

Plaintiffs,

-against-

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

Defendants.

RESPONSE OF PLAINTIFFS TO DEFENDANTS' MOTION FOR REARGUMENT AND BRIEF OF AMICUS CURIAE

INTRODUCTION

These objections are filed in response to defendants' motion for reargument as well as the brief of the Municipal Assistance Corporation ("MAC") as amicus curiae. Plaintiffs have no objection to MAC's motion for leave to appear as amicus curiae since its interest is essentially the same as that of the City of New York which appeared as amicus curiae in the earlier phases of this litigation in the courts of this State.

ARGUMENT

I. DEFENDANTS HAVE IGNORED SECTION 11, LAWS OF 1968, CHAPTER 827, AND THE MUNICIPAL ASSISTANCE CORPORATION HAS ATTEMPTED TO REWRITE IT.

The mandatory language of Section 11 of the statute which enacted §270-a states that if all of §270-a or either of its subdivisions "shall be held to be invalid by reason of unconstitutionality," then the rates of tax provided by §270 "shall be deemed to have applied." This language is not advisory or precatory—it is mandatory. The United States Supreme Court, in a single, unanimous opinion "held [§270-a] to be invalid by reason of unconstitutionality" precisely as provided in Section 11, in words which could not have been more unequivocal:

> "We hold that §270-a discriminates against interstate commerce in violation of the Commerce Clause." Slip opinion 10; 50 L.Ed.2d at 523.

As shown in plaintiffs' Motion for Reargument, defendants, the City of New York and this Court have taken the position throughout this case that Section 11 would reinstate the rates of §270 in the event that §270-a should be declared unconstitutional. Defendants attempt to explain their surprisingly recent disenchantment with Section 11 by claiming that their earlier statements were made "in another context." (Def. Mot. 4)* That statement is in-

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* References to "Def. Mot." are to pages of defendants' brief, dated March 28, 1977, in support of their motion for reargument, dated March 25, 1977.

comprehensible. From the day this case was filed, 4-1/2 years ago, plaintiffs contended that §270-a was unconstitutional because it discriminated on the basis of whether a taxable transaction involved an in-state or out-of-state sale. It was in that very "context" that defendants, the City of New York and this Court agreed that if plaintiffs should prevail, Section 11 would reinstate the tax rates of §270. There has never been another "context."

On the other hand, while the interests of MAC are identical to those of the City of New York (MAC Motion, ¶6), MAC sees no need to explain how the City of New York, defendants and this Court could have erred in construing the impact of Section 11 on a successful attack on §270-a in this case by plaintiffs.

Both defendants and MAC have devised new and imaginative arguments to rewrite and expand the application of §270-a. What must be recognized at the outset is that defendants and MAC have no intention of merely "saving" §270-a. To accomplish the goal they seek — that of applying the nonresident discount and maximum tax without regard to the place of sale — requires the expansion of §270-a. In other words, rather than narrowing the scope of §270-a to "save" it, defendants and MAC's position requires that §270-a be expanded to extend tax relief to transactions not covered by §270-a as enacted by the legislature.

(See Plaintiffs' Motion for Reargument 6). Neither defendants nor MAC has cited a single precedent in which a court has rewritten a legislative enactment to expand its scope in order to "save" it. Moreover, as will be seen below, that process would be an inherently legislative one, particularly in the present case.

Defendants and MAC try to make much of the fact that the Supreme Court "only" struck down the in-state/out-of-state distinction created by §270-a and did not attack the concepts of a nonresident discount or a maximum tax. But plaintiffs have stated in every court of this State and in the United States Supreme Court that an enactment by the New York legislature creating a nonresident discount or a maximum tax would be constitutional so long as it did not depend on the in-state/out-of-state distinction. That "concession" adds no weight to the argument that this Court, rather than the legislature, should create a new, nondiscriminatory nonresident discount. It must also be emphasized that subdivision 2 of §270-a, the maximum tax, is not under consideration upon remand to this Court. Footnote 15 in the United States Supreme Court opinion on which defendants and MAC rely so heavily specifically identifies the question for this Court as "whether . . . the distinction between residents and nonresidents should survive. . . ." The specific mention of the nonresident discount and the

omission of any reference to the maximum tax mean simply that the impact of the "savings clause" on the maximum tax (subdivision 2) has not been remanded to this Court.

Defendants and MAC have evolved quite different approaches to explaining away the nagging presence of Section 11. Defendants suggest that ". . . the Supreme Court did not rule that §270-a was unconstitutional in its entirety, otherwise its remand to this Court would be wholly unnecessary and without purpose." (Def. Mot. 4) That argument is circular. Neither Section 11 nor the Supreme Court mentioned the concept of the "entirety" of §270-a. Section 11 contemplates the unconstitutionality of §270-a and the Supreme Court clearly declared the present §270-a unconstitutional. The Supreme Court did not decide whether any of §270-a could survive since that is the very question remanded to this Court insofar as the nonresident discount is concerned. That is also the very question which Section 11 addresses and answers in the negative. Although defendants eventually explain how they would reconstitute §270-a to "obviate any need to invoke the application of Section 11," they never explain how Section 11 can be ignored. (Def. Mot. 11) Rather, defendants attempt to finesse Section 11 by arguing that the application of that section ". . . would be inconsistent with and defeat the purpose of the enactment of §270-a, a result to be avoided if at

all possible." (Def. Mot. 11) But defendants lose sight of the obvious proposition that Section 11 itself is a crystal clear expression of legislative intent which contemplated a specific situation which is now upon us.

MAC, on the other hand, attempts to save Section 11 by pretending that "the Supreme Court's decision in this case did not declare . . . that either §270-a or subdivision 1 or 2 thereof is unconstitutional." (MAC Br. 14-15) Apparently, MAC, as well as defendants, refuse to accept the fact that the Supreme Court issued an 18-page opinion declaring §270-a unconstitutional, and a footnote which leaves to this Court, without any prejudgment, the narrow question of legislative intent with respect to Sections 10 and 11. MAC suggests, correctly, that the application of a savings or separability clause is a matter of state law. The Supreme Court also said as much in footnote 15 and, accordingly, would have remanded the case on a matter never raised in that Court, regardless of that Court's view of what the result should be.

MAC also argues that the real purpose of Section 11 was to make clear that if §270-a were declared unconstitutional, the §270 tax rates which would then become applicable would be those "as amended" by Section 3 of the same statute which enacted §270-a rather than the previous

rates. (MAC Br. 14) The argument is perplexing at best. MAC is arguing that the two words "as amended" are the justification for the entire 22 lines of Section 11. Even the most verbose draftsman would not have drafted a section which specifically articulates what is to happen to the nonresident discount and maximum tax if §270-a is declared unconstitutional, all for the sole purpose of preserving the viability of another section of the statute which has absolutely nothing to do with §270-a. If that were the purpose of Section 11, the section would simply have said:

> "If any section of this act is held unconstitutional, such holding shall not render any other section of this act invalid."

There are other serious flaws in MAC's argument. If the sole purpose of Section 11 were to preserve Section 3 in the event that §270-a should be declared unconstitutional, Section 11 would have been absolutely unnecessary since Section 10 would have accomplished the very same purpose. MAC suggests that all of the courts and parties involved in this litigation have failed to understand, for 4-1/2 years, that the intricate picture painted by Section 11 is, in truth, but an elaborate frame for the two words, "as amended." The argument is fanciful.

II. SECTION 270-a CANNOT BE "SAVED" EVEN IF SECTION 11 IS IGNORED.

MAC attempts to articulate historic rules of judicial inquiry regarding severability. In this connection,

it relies heavily on People ex rel. Alpha Portland Cement Co. v. Knapp, 230 N.Y. 48 (1920). Alpha Portland Cement has no application to an attempt, unprecedented in this Court, to "save" a statute by expanding its application to situations not covered by the legislature — i.e., a nonresident discount and maximum tax for transactions involving out-of-state sales. The suggestion that what defendants and MAC propose here would "leave the essence of the scheme intact" or that "all the world can see what sensible legislators in such a contingency would wish" in the present situation cannot be serious. What Judge Cardozo made clear is that the burden of "saving" the statute is that of demonstrating persuasively that the legislature would have passed a statute including only what is proposed to be "saved" without that which is invalid. MAC has stood this formulation on its head by suggesting that §270-a can be saved if the Court "can" reach the conclusion that the bad portion of the statute is "not essential" to the legislative purpose. (MAC Br. 8) MAC cites no authority for this proposition and this Court has held to the contrary in Alpha Portland Cement and other cases.

Perhaps the most instructive and pertinent case is F.T.B. Corporation v. Goodman, 300 N.Y. 148 (1949) which cites Alpha Portland Cement. In that case this Court considered whether it could "save" the rent fixing provision

of a New York City local law after having declared the eviction provisions of the same law invalid as improper exercises of the home rule power. In discussing the application of the separability clause, this Court held:

> "Whether subdivision c [the rent fixing provisions] can stand alone or must fall with subdivisions d and e [the eviction provisions] is a question to which we now turn in the light of the separability clause found in subdivision 0. This question is one of legislative purpose, namely: Would the city counsel have enacted the local law if it had been aware that the eviction provisions were invalid? The answer does not turn upon the division of the local law into sections or subdivision. . . . As we read the text, the restrictions upon the right to evict tenants and the restrictions upon rent increases were regarded by the city council as being equally essential to the declared purpose of the local law. Hence the one set of restrictions cannot be separated from the other except by a remodeling of the law on a scale which, as we believe, would be beyond the judicial power. [Citing Alpha Portland Cement.]" 300 N.Y. at 148.

This passage emphasizes at least two propositions which are applicable here. First, it is not enough, for a portion of an invalid statute to be saved, that the saved portion was equally important to the legislature as the invalid portion. The test is more stringent. Despite MAC's revision of the legislative history, it is absolutely clear from that history that the overriding purpose of §270-a was to "provide long-term relief from some of the competitive pressures from outside the State." (Governor Rockefeller's memorandum on approval of Chapter 827, R. 48.

See also 50 L.Ed. at 523, 529.) Relief from competitive pressure could only have been provided by that feature of §270-a which discriminated between in-state and out-of-state sales — i.e., the invalid portion of §270-a. It is equally clear that the enactment of a nonresident discount or a maximum tax, without regard to the place of sale, would not have relieved any competitive pressures since the transfer tax would still be in existence, would still favor out-of-state exchanges, and would still create a disincentive to sell securities in New York. 50 L.Ed. at 525, fn. 11. All that would have been accomplished by the program of lowering rates in these two areas, without any in-state/out-of-state differential, would be a reduction of revenue.

On the other hand, it is clear that the nonresident discount and maximum tax constituted an attempt by the legislature to limit the loss of revenue, which was the inevitable price of inducing the New York Stock Exchange to remain in New York, to the two areas where "competitive problems" were most acute — sales by nonresidents and large or "block" transactions. (See Statement of Robert W. Haack, President of the New York Stock Exchange, R. 51.) The dominant purpose of §270-a emerges very clearly from the rather ample legislative history in the record of this case.

Secondly, this Court has observed in F.T.B. Corporation that the "remodeling" of the statute involved in

that case would be "beyond the judicial power". 300 N.Y. at 148. By comparison, the present case requires a far more complex and policy-oriented remodeling than anything involved in F.T.B. Corporation. In that case it could be said that the legislature provided two separate forms of relief for apartment renters: rent fixing and eviction relief. Even though these separable mechanics were "equally essential", this Court found that they "cannot be separated." In the present case, for the reasons stated herein, the portion of the statute which defendants and MAC seek to "save" does not even approach equality with that which has been struck down and, in any event, creates mechanical separation problems unlike anything dealt with in F.T.B. Corporation. More importantly, however, defendants and MAC seek to "save" nothing but, rather, to create applications of §270-a not enacted by the legislature. That fact is another compelling indication that the legislature could not have intended what defendants and MAC seek to create.*

---

* Defendants' argument regarding the revenue needs of the State and the City of New York has never been articulated in any of the briefs filed in this case and is improper. When defendants made this argument for the first time in the United States Supreme Court, one Justice noted:

> "I mean, the fact that you need the money doesn't seem to me to help you protect you against the constitutional infirmity of a statute. If the statute is constitutionally infirm, the fact that you need the money won't help you." (Transcript 23)

Nor should this Court sanction defendants' "proposed administrative construction" of §270-a. (Def. Mot. 8) In

III. THE ORDER PROPOSED BY DEFENDANTS WOULD VIOLATE THE MANDATE AND OPINION OF THE UNITED STATES SUPREME COURT.

Whatever the disposition of this case on remand, the order proposed by defendants in Appendix B of their motion for reargument would violate the opinion and mandate of the United States Supreme Court in several respects, at least one of which appears not to have been intended by defendants.

The second to last paragraph of defendants' proposed order would "exscind" the words "made within the State" and "within the State" in subdivisions 1 and 2 of §270-a, respectively. (Def. Mot. 6-A) The problem created by this approach is that the word "sales" or "sale" remains. Thus, the "new" §270-a would still limit the nonresident discount and maximum tax to transactions in which the taxable event is a sale. By hypothesis, the taxable event always occurs in-state. Therefore, the "new" nonresident discount and maximum tax may still be limited to those transactions which include an in-state sale, the very requirement declared unconstitutional by the Supreme Court.*

(Footnote continued)
addition to the reasons contained herein, this Court has refused to give advisory opinions. In re Workmen's Compensation Fund, 224 N.Y. 13 (1918). Moreover, this case was remanded by the Supreme Court to this Court, not to an administrative agency which is also a defendant.

* Defendants have made it clear that they do not intend this result. (Def. Mot. A-5) Indeed, they might solve this particular problem by adding the words "or agreements to sell, or memoranda of sales and all deliveries and transfers" after the word "sale" or "sales." But the drafting error into which defendants have fallen emphasizes the inappropriateness of the judicial process for remodeling §270-a. (See Plaintiffs' Brief for Reargument, served on March 22, 1977, pp. 6-7)

Defendants' proposed order contains another defect which cannot be dealt with by minor adjustments in language. Defendants' order purports to perpetuate the maximum tax created in subdivision 2 of §270-a. But the United States Supreme Court did not leave that aspect of §270-a open for further construction. Rather, the Court remanded to this Court for a determination of whether ". . . the distinction between residents and nonresidents should survive . . . ." (Slip Opinion 18, 50 L.Ed.2d at 529) Thus, the Supreme Court's remand to this Court very explicitly refers to subdivision 1 of §270-a and not to subdivision 2. MAC urges, ex cathedra, that the Supreme Court drew no distinction between subdivisions 1 and 2, even though the distinction appears on the face of the very footnote on which they rely. (MAC Br. 15) The maximum tax provisions are not before this Court.

For these reasons, the order proposed by defendants would be inconsistent with the opinion and mandate of the United States Supreme Court.

CONCLUSION

Defendants' and MAC's attempts to explain away Section 11 are strained efforts to frustrate rather than to effectuate the intent of the New York legislature. The belated reversals of long-held positions with respect to Section 11 are apparently motivated by the very same "eco-

nomic self-interest" of which MAC accuses plaintiffs. (MAC Br. 17) Plaintiffs have no quarrel with this motivation; rather, we believe it should prompt defendants and MAC to present their new §270-a to the legislature to obtain a fresh reading of "intent." Indeed, the legislature would be the only proper forum to determine whether portions of §270-a ought to be "saved" even if Section 11 did not exist.

For the reasons stated herein and in plaintiffs' motion for reargument, defendants' motions for reargument and to enter the order proposed by them should be denied, and the order attached hereto as Appendix A should be entered.

Respectfully submitted,

Milton H. Cohen
Roger Pascal
7200 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606

Attorneys for Plaintiffs

Of Counsel:

SCHIFF HARDIN & WAITE
Alton B. Harris
Ann Rae Heitland

APPENDIX A

C O U R T O F A P P E A L S

S T A T E O F N E W Y O R K

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

Plaintiffs-Appellants,

-against-

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

Defendants-Appellees.

JUDGMENT ORDER

An appeal having been taken by the appellants to the Supreme Court of the United States from a judgment of this Court, and such appeal having been granted and the cause having been set down for argument in that Court on November 2, 1976, and the parties having argued said cause on said date and such Court having rendered its decision and opinion on January 12, 1977, in which that Court concluded that §270-a of the Tax Law discriminates against interstate commerce in violation of the Commerce Clause of the Constitution of the United States, and the order of that Court having been entered in the office of the Clerk

thereof on February 9, 1977, reversing the judgment of this Court and remanding the cause to this Court for further proceedings consistent with the opinion of that Court and taking into consideration the provisions of Laws of 1968, Ch. 827, §11,

IT IS ORDERED, ADJUDGED AND DECREED, that §270-a of the Tax Law is hereby declared to be unconstitutional and invalid in its entirety, including, without limitation, subdivisions 1 and 2 thereof, and it is

FURTHER ORDERED, ADJUDGED AND DECREED, that the rates of tax provided by section 270 of the Tax Law shall be deemed to have applied and shall apply to resident individuals and nonresident individuals alike, and shall apply to all transactions subject to the tax imposed by Article 12 of the Tax Law, without any limitations to the maximum amounts of tax due on any such transactions, and it is

FURTHER ORDERED, ADJUDGED AND DECREED, that the State Tax Commission shall administer Article 12 of the Tax Law and shall determine and collect the stock transfer tax at the rates prescribed in the said section 270 in accordance with this order and judgment.

Hawkins, Delafield & Wood
67 Wall Street, New York 10005

(Area Code 212) 952 4700
Cable Address: "Hawkdel New York"

Writer's Direct Dial Number
952-4870

April 1, 1977

Ms. Marilyn Friedman
225 East 73rd Street
New York, New York

Dear Marilyn:

Enclosed is a copy of the package delivered to Albany this evening.

Sincerely yours,

JAMES R. EUSTIS, JR.

I sorry about the cops, Lake

/bse

Enclosure

COURT OF APPEALS
STATE OF NEW YORK

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,	
Plaintiffs,	NOTICE OF MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE
-against-	
STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,	
Defendants.	

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affidavit of Eugene J. Keilin, sworn to March 31, 1977, the undersigned will move this Court, pursuant to Section 500.9(e) of its Rules of Practice, for leave to appear as amicus curiae in connection with the pending motions for reargument by the parties in the above-captioned action and to submit the annexed brief in that capacity. This motion shall be returnable on the next available return date or at such

other time as is set by the Court.

Dated: New York, New York
March 31, 1977

Yours, etc.

HAWKINS, DELAFIELD & WOOD
Attorneys for The Municipal
Assistance Corporation For
The City of New York
67 Wall Street
New York, New York 10005
(212) 952-4700

TO:

MILTON H. COHEN, ESQ.
ROGER PASCAL, ESQ.
Attorneys for Plaintiff
7200 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606

HON. LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant
The Capitol
Albany, New York 12224

COURT OF APPEALS
STATE OF NEW YORK

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,	
Plaintiffs,	AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE
-against-	
STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,	
Defendants.	

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

EUGENE J. KEILIN, being sworn, says:

1. I am executive director of the Municipal Assistance Corporation For The City of New York ("MAC"). I submit this affidavit in support of MAC's motion for leave to have the annexed brief amicus curiae considered by this Court in connection with the pending motions for reargument by the parties on this appeal.

2. The issue before this Court on the motions for reargument, following the remand of the case by the United

States Supreme Court, is whether § 270-a of the Tax Law should be declared unconstitutional in its entirety, or whether any portion of the statute can be "saved", as the Supreme Court suggested in its opinion (footnote 15).

3. Plaintiffs, on their motion for reargument, assert that this Court has no choice but to invalidate § 270-a in its entirety. MAC disagrees, based upon the opinion and mandate of the Supreme Court, for the reasons stated in its proposed brief amicus curiae (a copy of which is annexed hereto). MAC supports the adoption of the remittitur proposed by defendants.

4. Although the stock transfer tax at issue here is imposed by the Tax Law and administered by the State Tax Commission and its members, the defendants in this case, the proceeds of that tax (on deposit in the special account in the stock transfer tax fund) constitute a source of payment for the outstanding bonds of MAC, in accordance with the provisions of Section 92-b of the State Finance Law, as amended. The remittitur entered by this Court in this case will determine the nature and amount of the stock transfer tax hereafter levied and collected in this state, and thus will affect the revenues available for the payment of MAC bonds.*

---

* The possible effects which this Court's decision on the motions for reargument in this case might have on stock transfer tax collections and on MAC's bondholders are described in MAC's Official Statement dated March 22, 1977, pages 27 and 60-61. (The relevant portions of the Official Statement are annexed hereto as Exhibit 1.)

5. By reason of the foregoing, MAC has an interest in the outcome of the pending motions for reargument and wishes to be heard on the matter of the appropriate remittitur to be entered by this Court. I believe that the amicus curiae brief of MAC would be of special assistance to the Court.

6. When this case was previously before this Court on appeal from the order of the Appellate Division, First Department, this Court, by order dated October 11, 1974, granted a similar motion on the part of The City of New York for leave to file a brief amicus curiae. At that time, MAC was not in existence, and the proceeds of the stock transfer tax were paid to the City. Now, such proceeds are paid to the City subject to the rights of MAC's bondholders pursuant to § 92-b of the State Finance Law, as amended. MAC's interest in this case is substantially the same as the City's and, therefore, I submit, MAC should now likewise be granted leave to file a brief amicus curiae in this Court.

7. No prior request for the relief sought herein has been made.

Eugene J. Keilin

Sworn to before me this
31st day of March, 1977.

Violet Litner
Notary Public

VIOLET LITNER
NOTARY PUBLIC, State of New York
No. 31-7570420
Certificate filed in New York County
Commission Expires March 30, 1978

Stock Transfer Tax

* * *

In January 1977, the Supreme Court of the United States, in an action, to which the Corporation is not a party, brought by certain regional stock exchanges against the State Tax Commission, held that the maximum tax and the non-resident rate were unconstitutional to the extent that they distinguished between sales made in-State and sales made out-of-State. The Supreme Court remanded the case to the State Court of Appeals for proceedings in conformance with its opinion.

The Corporation has been informed by the office of the State Attorney General that it intends to propose to the Court of Appeals that, under a savings clause of the statute which provides for the maximum tax and non-resident rate, the maximum tax and the non-resident rate should be applied regardless of whether the sale is made within the State. Although it is not possible to forecast precisely the economic and revenue impacts of such a judicial directive, based upon information supplied by the State Department of Taxation and Finance and research and analysis conducted by consultants retained by the Corporation for this purpose, the Corporation believes that such directive by the Court of Appeals, if ordered, would be likely to result in only an immaterial loss in Stock Transfer Tax collections.

The Corporation has been informed by the attorney for the plaintiffs that the plaintiffs intend to propose to the Court of Appeals that, under a separate savings clause of the statute, the maximum tax and non-resident rate should be eliminated in their entirety. Although it is not possible to forecast precisely the economic and revenue impacts of such a judicial directive, if ordered, such action would probably result in a short-term increase in Stock Transfer Tax collections, but a long-term decrease in such collections if, as a result of increased tax liability, a substantial number of persons determined to make sales outside the State to avoid the Stock Transfer Tax altogether.

The Corporation cannot predict what action the Court of Appeals might take in this matter. If, however, the Court of Appeals ruled in favor of the plaintiff and eliminated the maximum tax and non-resident rate, it is possible that the State Legislature might, among other actions open to it, in order to avoid an adverse impact on the Stock Transfer Tax collections in the long-term as described above, re-enact the maximum tax and non-resident rate to apply regardless of whether the sale is made within the State. Depending on what action is taken, such action could give rise to certain rights of the Trustee and the Bondholders under the Resolution and the First General Bond Resolution. See "Summary of Certain Provisions of the Second General Bond Resolution — Events of Default." However, the Corporation does not believe those rights would be exercised if the Legislature re-enacted the maximum tax and non-resident rate as referred to above, because to do so would not, in the Corporation's opinion, be in the best interest of the Bondholders.

As previously announced by the State Department of Taxation and Finance, the Stock Transfer Tax is payable and is being collected at the existing rates until the Court of Appeals issues its order.

* * *

SUMMARY OF CERTAIN PROVISIONS OF THE SECOND GENERAL BOND RESOLUTION

Following is a summary of certain provisions of the Second General Bond Resolution. The Summary does not purport to be comprehensive or definitive and is subject to all of the terms and provisions of the Second General Bond Resolution, to which reference is hereby made and copies of which are available from the Corporation.

* * *

Events of Default

The Resolution provides that it shall constitute an "event of default" if:

* * *

(f) the State shall for any reason fail or refuse to continue the imposition of either the Sales Tax imposed by Section 1107 of Article 28 of the Tax Law as the same may be from time to time amended or the Stock Transfer Tax imposed by Sections 270 and 270-a of Article 12 of such Law as the same may be from time to time amended or if the rates of such taxes shall be reduced to rates less than those in effect on July 2, 1975; or

* * *

COURT OF APPEALS
STATE OF NEW YORK

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,	:
Plaintiffs,	:
-against-	:
STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,	:
Defendants.	:

BRIEF OF MUNICIPAL ASSISTANCE CORPORATION FOR THE CITY OF NEW YORK, AMICUS CURIAE

Introduction

The Municipal Assistance Corporation For The City of New York ("MAC") offers this brief as amicus curiae in support of the remittitur proposed to this Court by defendants.

This case involves the constitutionality of certain forms of relief from the stock transfer tax contained in Tax Law, § 270-a. The first form of relief established a tax rate

applicable to sales within the state by non-residents which was one-half of the normal rate, Tax Law § 270-a.1 (the "nonresident rate"). The second form of relief established a maximum tax of $350 on any single sale within the state, Tax Law § 270-a.2 (the "maximum tax").

This case is in this Court on remand from the United States Supreme Court. That Court, on January 12, 1977, reversed the judgment of this Court in this case, and concluded that, to the extent they favored in-state sales over out-of-state sales, the aforementioned forms of relief offended the Commerce Clause. The Supreme Court ordered "the case remanded for further proceedings consistent with its opinion." _____ U.S. _____, 97 S. Ct. 599, 610 (1977).

In footnote 15 of its opinion, the Supreme Court observed:

> "When it enacted § 270-a, the New York Legislature also enacted a savings provision such that the invalidity of any part of the amendment should not affect the enforcement of any other part. It is not clear from the savings provision whether the legislature intended that the distinction between residents and nonresidents should survive the invalidation of the discrimination between in-state and out-of-state sales. Compare New York laws of 1968, c. 827, § 10 with id., § 11. Construction of the savings clause is, of course, a question of state law appropriately decided by the state courts." (97 S. Ct. at 610 n. 15)

Plaintiffs' proposed remittitur ignores the import of the Supreme Court's decision and its express invitation to this Court to save as much of the statute as possible, which this Court may do by exscinding the constitutionally impermissible distinction between in-state and out-of-state sales while retaining the non-resident rate and the maximum tax. Rather, plaintiffs would have this Court, unnecessarily and improperly, sweep aside all of § 270-a as constitutionally defective.

For the reasons stated herein, MAC believes that defendants' proposed remittitur is the appropriate one. That remittitur would cure the constitutional infirmity of § 270-a while preserving so much of the statute as is constitutionally valid, in accordance with the mandate of the Supreme Court, the Legislature's intent and the applicable precedents of this Court.

Summary of Argument

Several principles of construction apply to constitutionally infirm statutes. One is that, whenever possible, portions of a statute are to be read as severable. Another is that constitutionally infirm portions of a statute are, whenever possible, to be read as non-essential and therefore exscindable.

These principles, together with the legislative intent of § 270-a, support the adoption by this Court of defendants' proposed remittitur, severing the statute and exscinding the words "within the state", thereby removing the constitutional impediment to the statute's continued applicability. Such action by this Court will be consistent with the Supreme Court's decision here.

Argument

I. The Decisional Law Favors Construction Saving The Statute

Historically, this Court has attempted to preserve as much of a statute as possible when a portion was declared constitutionally infirm. For example, as this Court stated in Skaneateles W.W. Co. v. Village of Skaneateles, 161 N.Y. 154, 170 (1899), aff'd, 184 U.S. 354 (1902):

> "It is, however, a well-settled principle of construction that where the void [i.e., unconstitutional] provisions are separable from those that are lawful, and those that remain are capable of being executed, the valid provisions will not be condemned because of the unconstitutionality of other provisions not absolutely essential to the main purpose of the act."

See also, Dollar Co. v. Canadian E&F Co., 220 N.Y. 270, 278 (1917).

Furthermore, as the Court said in People v. Mancusco, 255 N.Y. 463, 472 (1931):

> "To what extent a severance of good from bad is permissible with a view to the preservation of a statute is a question of construction as to which the courts of the State, and not the Federal Courts, must speak with ultimate authority."

See also, Boston Stock Exchange v. State Tax Commission, _____U.S. _____ n. 15, 97 S. Ct. 599, 610 n. 15 (1977).

The principle of saving so much of a statute as is possible has been applied in particular in tax matters. This Court has been willing to sever legislation involving taxes in order to bring that legislation into conformity with the Constitution. As Judge Cardozo aptly put it in People ex rel. Alpha Portland Cement Co. v. Knapp, 230 N.Y. 48, 62-63 (1920), cert. denied, 256 U.S. 702 (1921):

> "Thus viewing it, I cannot doubt that the exclusion of interest on intangibles will leave the essence of the scheme intact. I find it unbelievable that a legislature willing to impose a tax with those items in, would be unwilling that the tax should stand if those items were out. Undoubtedly it wished them in if it had the legal right to keep them. To say that does not mean that rather than lose them, it would throw the project to the winds. Laws are not to be sacrified by courts on the assumption that legislation is the play of whim and fancy. A doctrinaire emphasis on the possible rather than the probable would forbid severance at all times. No doubt it is easy, sheltering ourselves behind some implacable tenet of the separation of governmental powers, to insist upon a certainty impossible of attainment. We do small service to the state by so intransigent a pose. Our right to destroy is bounded by the limits of necessity. Our duty is to save unless

> in saving we pervert. When all the world can see what sensible legislators in such a contingency would wish that we should do, we are not to close our eyes as judges to what we must perceive as men."

In Alpha Portland, certain income which the Legislature had expressly taxed by the challenged statute (i.e., interest income of foreign corporations) was held by the Court not to be constitutionally taxable. In order to save the statute, and thus the tax on the remaining income intended by the Legislature to be taxed (i.e., all other income of foreign corporations), the Court had to sever the statute so as to exclude the tax on the constitutionally unreachable income.

Similarly, in the case at bar, certain sales of stock to which the Legislature had given relief in the challenged statute (i.e., sales within the state by nonresidents and block sales within the state) were held by the Supreme Court not to be constitutionally eligible for relief unless certain other transfers (i.e., sales outside the state by nonresidents and block sales outside the state) were also eligible for relief. The Supreme Court, in short, held only that New York could not discriminatorily tax sales in another state and, therefore, that the nonresident rate and maximum tax could not be limited in their application to sales within the state.

In order to save § 270-a, and thereby preserve the purpose of the Legislature -- which was to lessen the chilling effect of the stock transfer tax on stock transactions in New York -- this Court must sever the statute, as it did in Alpha Portland. It can do so by adopting defendants' proposed remittitur. That remittitur exscinds the words "within the state" from the statute in appropriate places. This allows sales outside the state to benefit from the stock transfer tax relief in § 270-a -- and, thus, constitutionally provides relief to a class of transactions (i.e., sales by nonresidents and all block sales) which includes the class of transactions to which the statute was directed (i.e., sales of stock in New York).

By adopting defendants' proposed remittitur exscinding the words "within the state" at various points in § 270-a, this Court will not disturb the determination of the Legislature to encourage stock transactions in New York, just as in Alpha Portland, supra, the removal by this Court of interest income from the coverage of the statute enabled this Court not to disturb the determination of the Legislature to tax income of foreign corporations. This Court, we submit, can presume, as it did in Alpha Portland, that the Legislature, having here developed a structure designed to keep stock transactions in New York, would alter

that structure in the manner proposed "rather than ... throw the project to the winds" (230 N.Y. at 63).

Thus, historically, the judicial inquiry regarding severability has involved the following two questions: One, can the Court discern a classification which distinguishes the valid application of the statute from the invalid? And, second, if so, can the Court conclude that the invalid application of the statute is not essential to the legislative purpose? If so -- that is, if it is possible to invalidate the statute as to the non-essential application -- then the remainder of the statute will be upheld.

A basic flaw of plaintiffs' position here is that they ignore this traditional inquiry. Instead, plaintiffs merely cite the language of the Legislature, and of this Court and defendants in the prior proceedings in this case, as to what will happen if § 270-a is invalidated in its entirety in order to argue why § 270-a should be invalidated in its entirety. This is not the proper approach.

The extent of the invalidation of § 270-a, as the Supreme Court itself recognized, is a question this Court must answer in light of the traditional rules of construction

and the Legislature's intent in enacting the relevant forms of relief from the stock transfer tax -- in other words, the kind of inquiry outlined above.

II. Exscinding the Words "Within This State" In Certain Places In Subdivisions 1 and 2 of § 270-a Would Achieve The Legislative Intent

As the Legislature recited in § 1 of Chapter 827, and as the Governor indicated in his memorandum of approval (L. 1968, at 2384), the aim of § 270-a was to assist the securities industry in New York because of the economic benefits that industry brings to the state.

Indeed, this Court so recognized in this very case:

> "In 1966 complaints reached the Legislature that the transfer tax was driving business from the State. Specifically the New York exchanges complained that although brokers in other States charged the same commissions, transactions on the New York exchanges were placed at a disadvantage because none of the States in which the competing exchanges were located imposed a tax on stock sales or transfers. After extensive investigation the Legislature found that 'the tax on transfers * * * is an important contributing element in the diversion of sales to other areas to the detriment of the economy of the state. Furthermore, in the case of transactions involving large blocks of stock, recognition must be given to the ease of completion of such sales outside the state of New York without the payment of any tax. In order to encourage the effecting by nonresidents of the state of

> New York of their sales within the state of New York and the retention within the state of New York of sales involving large blocks of stock, a separate classification of the tax on sales by nonresidents of the state of New York and a maximum tax for certain large block sales are desirable." (L 1968, ch. 827).
>
> * * *
>
> "Initially we note, as did the Appellate Division, that the place of sale is not always the determining factor under the statute in question. If a small sale is involved the full tax must be paid unless the seller is a nonresident. Thus the statute also distinguishes between residents and nonresidents in favor of the latter. The avowed purpose, as the legislative history indicates, was to encourage nonresidents to sell on the New York exchanges." (37 N.Y.2d at 539-40, 541)

As this Court expressly noted, the Legislature sought to accomplish its goal of assisting the securities industry in New York by encouraging sales here by lessening the burden the stock transfer tax imposed on such sales.

This Court's conclusion is buttressed by the available legislative history.

Thus, on June 10, 1968, Neal L. Moylan, then First Deputy Commissioner of Commerce, in a letter to then Governor Rockefeller encouraging him to sign the bill which embodied § 270-a, focused on the matter of attracting the business of nonresidents:

> "As set forth in the legislative findings, this bill will improve the business climate of this State by providing lower stock transfer rates for non-residents. The direct effect of this, of course, is that non-residents will transact their business in New York City instead of outside of the State."

Similarly, the Division of the Budget, in recommending its adoption, described § 270-a as

> "*** a new section ... to establish preferential stock transfer tax rates applicable to nonresidents of the State. It would reduce the stock transfer tax rates for nonresidents [and] also [to impose] a dollar ceiling on the amount of tax due on any single taxable transaction..."*

It is thus clear, as this Court found, that the essential goal of § 270-a was the promotion in the state of sales, and particularly block sales, by non-residents. That legislative purpose, we submit, will be defeated by plaintiffs' remittitur, but not by defendants' proposal.

Specifically, if this Court enters an order declaring § 270-a unconstitutional in its entirety, as plaintiffs suggest, then the higher rates of the prior statute (§ 270) will apply to all nonresidents and block sales, as plaintiffs themselves recognize (Pl. Bf. at 7).

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* Moylan's letter and the Division's memorandum are part of the "bill jacket" for Chapter 827, available at the State Library.

The result would be to drive out of New York exactly those transactions which the Legislature sought to encourage in New York by enacting § 270-a. This may be in plaintiffs' interests, but it is not in this state's interest, as the Legislature recognized.

On the other hand, if defendants' proposed remittitur is adopted, all nonresidents and sellers of blocks of stock subject to the stock transfer tax, whether they sell within or outside of New York,* will obtain the benefits of the relief provided by § 270-a. Thus, the chilling effect of the stock transfer tax would be mitigated and the legislative purpose achieved.

III. Sections 10 and 11 of Chapter 827 Do Not Require Invalidation of § 270(a) In Its Entirety.

Sections 10 and 11 of Chapter 827 of the Laws of 1968 provide:

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* Nonresidents and sellers of blocks of stock selling stock outside the state are only subject to the New York stock transfer tax in the first instance in the infrequent situation where there are "agreements to sell, or memoranda of sales, and deliveries or transfer of shares of certificates of stock" in New York. Tax Law, § 270(1). This small class is further diminished by the fact that some of these transactions are rendered non-taxable under Federal law. See 15 U.S.C. § 78bb(d) (limiting state authority to tax certain transfers by a "registered clearing agency" or a "registered transfer agent").

"§ 10. If any section of this act or the repeal, amendment, or change made by any such section to any item, clause, sentence, subparagraph, paragraph, subdivision, section or other part of article twelve of the tax law, or the application thereof to any person or circumstances, shall be held to be invalid, such holding shall not affect, impair or invalidate the remainder of this act or any other item, clause, sentence, subparagraph, paragraph, subdivision, section or other part of article twelve of the tax law repealed, amended or changed by this act, or the application of such section of this act or such section or part of a section of such article twelve of the tax law held invalid, to any other person or circumstances, but shall be confined in its operation to the section of this act or the item, clause, sentence, subparagraph, paragraph, subdivision, section or other part of article twelve of the tax law repealed, amended or changed by this act, directly involved in such holding, or to the person and circumstances therein involved.

"§ 11. In the event that section four of this act or subdivision one or two of section two hundred seventy-a of the tax law as added thereto by such section four, shall be held to be invalid by reason of unconstitutionality, whether federal or state, then in either of such events, in the case of such subdivision one, the rates of tax provided by section two hundred seventy of the tax law, as amended by this act, shall be deemed to have applied and shall apply to resident individuals and nonresident individuals alike, and in the case of such subdivision two, the rates of tax provided for by section two hundred seventy of the tax law as amended by this act shall be deemed to have applied and shall apply to all transactions subject to the tax imposed by article twelve of the tax law, without any limitations as to the maximum amounts of tax due on any such transactions."

Section 10 is a standard severability or "savings" clause which, in effect, directs the Court to hold as little of the law unconstitutional as possible. Courts in New York have traditionally honored this expression of legislative intent. See, e.g., People ex rel. Stafford v. Travis, 231 N.Y. 339 (1921).

Section 11, however, was intended to serve a special purpose. Section 3 of Chapter 827 amended § 270 of the Tax Law to prevent a previously scheduled diminution of the rates of the stock transfer tax. Section 4 enacted § 270-a, granting relief from those undiminished rates in the form of (1) the nonresident rate and (2) the maximum tax. If § 4 or either form of relief (§ 270-a.1 or § 270-a.2) were to be declared unconstitutional, the question would arise whether the diminished rates scheduled in § 270 would apply, or whether the undiminished rates in § 270, as amended by § 3 of Chapter 827, would apply. This was the question, we submit, which the Legislature anticipated and sought to answer in § 11, by declaring that § 270 "as amended" would apply in those situations.

Section 11 thus has no application here. As shown above, the Supreme Court's decision in this case did not declare, and does not compel a declaration by this Court, that either § 270-a or subdivision 1 or 2 thereof is uncon-

have shown, the maximum tax, no less than the nonresident

stitutional. Instead, the Supreme Court determined that the distinction between sales within and outside of the state discriminated unconstitutionally. And, in its opinion (see n. 15) and by its remand, the Supreme Court expressly left it to this Court to decide the question whether § 270-a could be saved. Given the legislative intent underlying § 270-a and the rules of construction traditionally applied by this Court, we submit, the question left open by the Supreme Court, as shown above, can and should be answered by this Court in the affirmative.

Therefore, this Court need not declare § 270-a or subdivision 1 or 2 thereof unconstitutional, and § 11 need not come into play.

IV. Defendants' Proposed Remittitur Is Consistent With the Supreme Court's Opinion

As discussed above, the Supreme Court mandated only "the invalidation of the discrimination between in-state and out-of-state sales" (97 S. Ct. at 601 n. 15). Neither the distinction in § 270-a between residents and nonresidents (favoring the latter), nor the statute's maximum tax,* was invalidated. Thus, if this Court can, con-

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* Plaintiffs' assertion to the contrary -- that "the maximum tax provisions of § 270-a have already been held unconstitutional" (Pl. Br. at 2 n.) -- finds no support in the Supreme Court's opinion. That Court expressly recognized that construction of savings provisions is a question of state law (97 S. Ct. at 601 n. 15). As we have shown, the maximum tax, no less than the nonresident rate, can be saved in § 270-a. There is no reason for this Court to save one, but not the other, and the Supreme Court did not require it to do so.

sonant with state law, "save" the Legislature's distinction between residents and nonresidents and its provision for a maximum tax, eliminating only the offensive distinction between places of sale -- as we say it can by adopting defendants' proposed remittitur -- then the statute, as excinded, would be "consistent with" the Supreme Court's opinion.

Conclusion

The exscinding of the words "within the state" at certain points in subdivisions 1 and 2 of § 270-a -- as suggested by defendants -- would serve the legislative intent, comply with traditional rules of construction, be consistent with the Supreme Court's opinion, and satisfy constitutional standards. Plaintiffs' position, on the other hand, attains none of these ends but only their own economic self-interest.

Therefore, we submit, this Court should adopt the remittitur proposed by defendants.

Respectfully submitted,

HAWKINS, DELAFIELD & WOOD
Attorneys for The Municipal
Assistance Corporation For
the City of New York
67 Wall Street
New York, New York 10005
(212) 952-4700

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