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September 30, 2010

To All Fund Members

It has come to the attention of the Executive Director of The Black Car Fund (the "Fund") that some tax exempt organizations which are customers of Fund members are claiming that they do not have to pay the surcharge authorized under Article 6-F of the New York Executive Law. In order to assist you in your discussions with these tax exempt customers, we have attached a memorandum dated August 10, 2001 from the late Donald C. Alexander, former Commissioner of the Internal Revenue Service and former tax counsel to the Fund, concluding that "**...the surcharges imposed by the Fund do not constitute a tax. Consequently, the tax exemptions granted by the State of New York are inapplicable and a customer is responsible for paying the surcharge regardless of its tax-exempt status.**"

We are aware of no changes in the law that would contravene the attached opinion.

Sincerely,

Wayne I. Baden

MEMORANDUM

TO: Wayne I. Baden, Esq.

FROM: Donald C. Alexander DA

DATE: August 10, 2000

RE: New York Black Car Operators' Injury Compensation Fund

You asked whether entities that are exempt from taxes imposed by the State of New York will be exempt from paying the surcharges imposed by the New York Black Car Operators' Injury Compensation Fund (the "Fund"). As discussed below, while the State of New York affords broad tax exemptions to organizations exempt from federal taxation pursuant to Section 501(a) of the Internal Revenue Code, the surcharges imposed by the Fund do not constitute a tax. Consequently, the tax exemptions granted by the State of New York are inapplicable and a customer is responsible for paying the surcharge regardless of its tax-exempt status.

I. FACTS

In May, 1999, the New York State legislature passed a law establishing the New York Black Car Operators' Injury Compensation Fund, Inc. ("the Fund"). The law dictates that the Fund "shall establish" a uniform percentage surcharge to be added to customer invoices and billing. N.Y. Exec. Law § 160-JJ(2). Members, however, are ultimately responsible for payment to the Fund. Each member must pay an amount equal to the percent of the surcharge, divided by one hundred, and multiplied by the total amount of customer payments. The member is liable for fund payments, "regardless of whether the surcharge was billed or charged."

Some of the Fund members' customers have objected to paying the surcharge, on the ground that their organizations are nonprofits and are therefore exempt from taxes.

II. LEGAL ANALYSIS

New York has granted broad tax exemptions to many tax-exempt entities. For example, nonprofit health service corporations are statutorily exempt from "every state, county, municipal

and school tax."[1] Thus, if the surcharge imposed by the Fund constitutes a tax, these entities would have a valid claim against the imposition of the surcharge. Nevertheless, the surcharge is not a tax, but, rather, is a fee which may be passed on to a customer without regard to that customer's tax exempt status.

A tax is defined as a forced contribution imposed upon citizens to pay the expenses of government.[2] As such, taxes are paid into the general fund of the taxing jurisdiction.[3] Conversely, a license or other fee is a payment for particular services rendered or rights granted and is applied for the benefit of those upon whom it is imposed.[4] Under these definitions, the surcharge imposed by the Fund clearly constitutes a fee, and not a tax. Pursuant to Section 160-JJ(2) of the legislation, the members of the Fund have the ultimate liability for paying the surcharge. Additionally, the amount of the surcharge is based upon the cost of operating the Fund, including the cost of the workers' compensation insurance or of paying workers' compensation benefits to the black car operators. Because the purpose of the Fund is to provide workers' compensation to the black car operators performing services for the members, the surcharge is clearly applied for the benefit of those upon whom it is imposed. Indeed, the Fund's by-laws expressly state that the purpose of the Fund "is to secure the payment of workers' compensation to black car operators injured while performing services for central dispatch facilities that are members of the Fund." Article VIII, Section 1. The legislative intent of imposing the surcharge is void of any revenue raising considerations. Consequently, the surcharge does not constitute a tax.

This conclusion is confirmed by the Supreme Court of New York's holding in *Kluczynski v. Hospital Service Corporation of Western New York*.[5] In that case, the court examined whether a similar contribution imposed by the New York's Workmen's Compensation Law constituted a tax or a fee. Noting that the contribution required under the law was not paid into the coffers of the State, county, or municipality, the court held that the contribution was a fee that was required

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[1] N.Y. Ins. Law. § 4310(j).
[2] *Central Savings Bank v. New York*, 279 N.Y. 266, 18 N.E.2d 151 (1938).
[3] *Joslin v. Regan*, 406 N.Y.S.2d 938, 63 A.D.2d 466 (1978).
[4] *Id.*
[5] 123 N.Y.S.2d 183, 282 A.D. 276 (1953).

to be paid by the appellant, notwithstanding that the appellant was a tax-exempt, nonprofit corporation.

Another factor prohibiting the characterization of the surcharge as a tax is that it is imposed by the Fund and the Fund has the authority to modify the rate. The power to tax is an attribute of sovereignty. Within the State of New York, the power to tax lies within the Legislature and may be delegated only to municipalities or political divisions.[6] Since private interests (the members) participate in and benefit from the Fund, it does not qualify as a municipality or political division. Accordingly, the Fund does not have the power to impose a tax, even if the surcharge would otherwise be considered to be a tax. *Cf.*, Rev. Rul. 90-94, 1990-2 C.B. 34.

* * * * *

For the reasons set forth above, the surcharge imposed by the Fund cannot be characterized as a tax. As such, a customer's obligation to pay the fund, which is passed through to the customer by the member, is not relieved by that customer's status as a tax-exempt organization.

[6] *Greater Poughkeepsie Library District v. Town of Poughkeepsie*, 81 N.Y.2d 574, 618 N.E.2d 127 (1993).