NEW YORK CITY TAX APPEALS TRIBUNAL
ADMINISTRATIVE LAW JUDGE DIVISION

In the Matter of the Petition	:	**DETERMINATION**
of	:	**TAT(H)08-82(CR)**
CIRCLE LINE STATUE OF LIBERTY FERRY, INC.	:	

Schwartz, A.L.J.:

The Commissioner of Finance ("Respondent" or "Commissioner") brought a motion, dated May 19, 2009, pursuant to 20 RCNY §1-05(d)(1) for an order granting summary determination to Respondent and dismissing the Petition of Circle Line Statue of Liberty Ferry, Inc. ("Petitioner") concerning the tax periods June 1, 2004 through May 31, 2007 (the "Tax Years") with respect to the portion of the proposed deficiency in New York City ("City") Commercial Rent Tax ("CRT") under Chapter 7 of Title 11 of the City Administrative Code ("Code") insofar as it concerns Landing Slips 4 and 5 in Battery Park. Respondent's motion was supported by an affirmation of his representative, Joshua M. Wolf, Esq., Assistant Corporation Counsel, and by various documents.

Petitioner filed a Cross Motion for Summary Determination, which was supported by an affirmation of its representative, Kenneth I. Moore, Esq., and by various documents including the affidavit of Neil Von Knoblauch, Petitioner's Chief Operating Officer. Each party filed a Reply Affirmation supported by various documents and Petitioner's counsel's reply affirmation was also supported by the affidavit of JB Meyer, Petitioner's President.

Respondent's counsel filed a sur-reply affirmation. All submissions were received by November 18, 2009.

After due consideration of the moving papers and supporting documents, Respondent's motion is granted and Petitioner's cross motion is denied except to the extent of the subtenant deduction for rent paid for Landing Slip 3.

ISSUE

Is Petitioner entitled to deduct from Base Rent the amount of rent it paid for its own use of the premises as piers insofar as such premises were used in interstate commerce?

FINDINGS OF FACT

On or about December 8, 1992, Petitioner and the City Department of Parks and Recreation ("Parks Department") entered into a twelve year license agreement ("License") for certain premises ("Licensed Premises") described in Article 2.0(b) of the License as "the area denoted on Exhibit B [of the License], that is, Landing Slips numbered 3, 4, and 5, and adjacent walkways located in Battery Park." In 2004, the License was extended until March 31, 2007.

Under Article 1.0(a) of the License, Petitioner was to:

> Maintain, repair and operate the Licensed Premises, which is comprised of landing and docking facilities, . . . for the purpose of embarking and discharging passengers in the operation of passenger ferries on a regular schedule between Battery Park, Liberty Island and Ellis Island, [which used Landing Slips 4 and 5] and for [various other sightseeing and charter operations which used Landing Slip 3

and which are no longer at issue in these proceedings.[1]]

Exhibit B to the License is a drawing of the Licensed Premises. It indicates that the Licensed Premises are 15 feet wide parallel to the shoreline. Both parties also submitted photographs of the Licensed Premises as exhibits to their motion papers.

The bulk of the Licensed Premises is a part of the land area that constitutes Battery Park. It consists, in part, of a paved pedestrian walkway with benches at intervals. The walkway runs along part of the perimeter of the park. A series of metal gates separates this pedestrian walkway from a second, narrower paved area, a few feet wide, adjacent to the water's edge. Passengers board the ferries from this paved area. These paved areas form part of the shore line. They do not extend from the shore line out over the water. In the water abutting this paved area are a series of three groups of vertical wooden piles which differentiate the three docking points for each of three vessels, one in front of the other along the shore line. Petitioner's ferries docked adjacent to the shore line such that the sides of each boat were parallel to the shore line and the bow of one boat was behind the stern of the boat in front of it. The Landing Slip for each boat is separated from the one in front of it by one of the groups of vertical wooden piles.

For CRT purposes, Petitioner did not report the aggregate of $3,649,061.33 in rent it paid to the Parks Department for the Tax Years. Following an audit, Respondent issued a Notice of Determination, dated August 29, 2008, asserting proposed CRT

[1] The Commissioner has conceded that Petitioner is entitled to a subtenant deduction pursuant to Code §11-701.7 with respect to the rent paid to Petitioner by its subsidiary for Landing Slip 3.

deficiencies including interest[2] and penalties[3] aggregating $332,022.16 as follows:

Tax Periods	Principal	Interest	Penalty	Total
6/1/04-5/31/05	$ 64,804.17	$21,514.67	$ 6,480.42	$ 92,799.26
6/1/05-5/31/06	77,110.93	17,261.40	29,594.36	123,966.69
6/1/06-5/31/07	77,028,58	8,296.39	29,931.24	115,256,21
Total	$ 218,943.68	$47,072.46	$66,006.02	$332,022.16

Petitioner filed a Petition dated November 5, 2008 contesting the proposed deficiencies. Petitioner contends that its rent for its use of Landing Slips 4 and 5 is not subject to tax pursuant to Code §11-704.c.3 "as rent for . . . . the taxpayer's own use of the premises . . . as piers insofar as such premises are used in interstate . . . commerce."

Petitioner also contends, and Respondent no longer disputes, that Landing Slip 3 was maintained and operated by Petitioner's subsidiary which filed CRT returns and paid tax on the following amounts of rent for this slip:

Period	Gross Rent
6/1/04-5/31/05	$95,391
6/1/05-5/31/06	96,471
6/1/06-5/31/07	99,410

[2] Through September 19, 2008.

[3] Penalties consisted of a 10% Substantial Underpayment Penalty for all Tax Years and an Underpayment of Interest Penalty and a 25% Failure to File Penalty for the Tax Years ended 5/31/06 and 5/31/07.

Respondent concedes that Petitioner is entitled to a subtenant deduction with respect to this portion of the rent and the deficiency should be adjusted accordingly.

POSITIONS OF PARTIES

Respondent contends that Landing Slips 4 and 5 are not "piers" within the meaning of Code §11-704(c)(3) because they do not include a structure that extends from the shore line with water on both sides. As a result, in Respondent's view, Petitioner is not entitled to reduce base rent by any amounts that may be attributable to its use of the Licensed Premises in interstate commerce. Petitioner claims that Landing Slips 4 and 5 are "piers" within the meaning of Code §11-704(c)(3) because the term "piers" in this provision would include any berthing place for vessels. Alternatively, Petitioner asserts that the Licensed Premises do not have to be "piers" but merely must be "used as piers;" that is, used as a berthing place for vessels.

CONCLUSIONS OF LAW

A motion for summary determination "shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party." 20 RCNY §1-05(d)(1).

To prevail on this motion, Respondent must "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York University Medical Center, 64 NY2d

851, 853 (1985). Nevertheless Petitioner retains the burden of proof on the underlying issue. *See* Code §11-703(a).

Code §11-702 imposes the CRT on the base rent paid by a tenant to a landlord for taxable premises. Code §11-704(c)(3) provides that "[b]ase rent shall be reduced by the amount of the taxpayer's rent for, or reasonably ascribable to, the taxpayer's own use of the premises: . . . [a]s piers insofar as such premises are used in interstate or foreign commerce." Petitioner asserts that it is entitled to this deduction from base rent for the rent paid for Landing Slips 4 and 5 because they are used as piers in interstate commerce. Respondent contends that the deduction is not available because Landing Slips 4 and 5 are not "piers."

There is no factual dispute regarding the physical properties of the Licensed Premises. Both parties submitted similar photographs showing the Landing Slips and adjacent walkways and Exhibit B to the License contains a diagram of the Licensed Premises. Accordingly, this matter is appropriate for summary determination since the threshold question is the pure legal issue of whether the deduction in Code §11-704(c)(3) for the "taxpayer's own use of the premises: . . . [a]s piers . . ." could apply to these premises whose physical characteristics are undisputed.

The CRT does not expressly define the word "pier;" nor is it specifically defined elsewhere in the Code. However, the word "pier" is defined elsewhere in the law. The New York State ("State") Navigation Law governs the proper characterization of any structure located in or alongside navigable waters, such as the Licensed Premises, which are located in New York Harbor. *See* People v. Anton, 105 Misc. 2d 124, 126 (N.Y. Dist. Ct. 1980) ("[a]s a general rule the regulation of the construction and reconstruction

of docks and piers on the navigable waters of the State of New York rests with the State." The State Navigation Law clearly delineates and distinguishes between those structures denominated as "piers" and other structures used to berth vessels such as docks, wharves and slips.[4]

State Navigation Law §2(22) defines a "pier" as "a wharf or a portion of a wharf extending from the shore line with water on both sides." (Emphasis supplied.) A "wharf," in turn, is defined as "any structure built or maintained for the purpose of providing a berthing place for vessels." N.Y. Nav. Law §2(20). Therefore, by the meaning accorded the term "pier" under the State Navigation Law, for Petitioner to avail itself of the deduction provided by Code §11-704(c)(3), the Licensed Premises must include a structure built (or maintained) for the purpose of providing a berthing place for vessels, which extends from the shore line with water on both sides. However, that is not the nature of the structure at issue.

The Navigation Law is just one of many State statutes in which the statute differentiates between "piers" and various other berthing places for vessels; a wholly unnecessary distinction if the term "pier" was the general term for all such berthing places.[5] For example, Navigation Law §32(8) provides an exemption from the provisions of that law for certain structures used in interstate and foreign commerce. *See* N.Y. Nav. Law §32(8). However, Navigation

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[4] N.Y. Nav. Law §§2(20), (21) and (22).

[5] *See, e.g.*, N.Y. Canal Law §2(3); N.Y. Envtl. Conserv. Law §§ 13-0334(2), 15-0503(3)(a), 34-0103(11); N.Y. Exec. Law §922(1); N.Y. Gen. Bus. Law §306; N.Y. Gen. City Law §20(8); N.Y. Gen. Mun. Law §401(a); N.Y. Ins. Law §1113(a)(20)(D); N.Y. Mil. Law §176(1); N.Y. Nav. Law §§32(1), and (8), 45(2); N.Y. Pub. Auth. Law §§1200(16), 1261(8), N.Y. Pub. Lands Law §75(7)(b); N.Y. Rapid Trans. Law §2(22); N.Y. Town Law §§29(13), 140, 141; N.Y. Unconsol. Law Ch. 151, §1, Art. XXII; N.Y. Unconsol. Law Ch. 155, §1(1); N.Y. Unconsol. Laws Ch. 169, §3; N.Y. Unconsol. Laws Ch. 170, §1(1).

Law §32(8) broadly exempts from its application "marine terminals including piers, wharves, docks, bulkheads, slips, basins and other structures or facilities used in the transportation of waterborne cargo or passengers in interstate or foreign commerce" [emphasis added]; whereas the CRT deduction, by its terms, applies to only "piers." Code §11-704(c)(3). Generally speaking, if the words "piers," "docks" and "slips" were interchangeable, the words "docks" and "slips" as used in the State Navigation Law would have to be treated as superfluous, a result which is contrary to the normal rules of statutory construction. *See* Capital Cities Commc'ns v. State Tax Comm'n, 65 AD2d 25, 27-8 (3rd Dept. 1978) (citing McKinney's Statutes §231, "[w]ords used in a statute may not be rejected as superfluous or meaningless where it is possible to give each a separate and distinct meaning.")

Petitioner contends that contrary to Respondent's interpretation, the terms "wharves," "piers," "docks" and other marine facilities used to load and unload cargo or passengers from ships are used interchangeably. For this proposition, Petitioner cites the definition of the word "pier" in the compact entered between the States of New York and New Jersey creating the New York Harbor Waterfront and Airport Commission.[6] In that provision, and for purposes of that compact, the term "pier" is specifically defined to include "any wharf, pier, dock or quay." McKinneys N.Y. Unconsol. Laws §9806.

However, the Waterfront and Airport Commission Act ("Act"), by specific legislative enactment, gave the word "pier" a much broader meaning than its ordinary sense and was not restricted to the ordinary meaning that would be limited to "structures bounded on

[6] Ch. 882 L. 1953; N.Y. Unconsol. Laws §9801, *et. seq.*

three sides by water." *See* Continental Terminals, Inc. v. Waterfront Com. of New York Harbor, 486 F. Supp. 1110, 1114 (S.D.N.Y. 1980). While the Act, by its terms, changed the definition of "pier" to include other structures, that definition was specifically for purposes of that Act and did not purport to broadly define "pier" for any other purpose. The court noted that "the Act is designed as a remedial measure to combat waterfront crime in New York harbor." *Id.* at 1115. Accordingly, it was appropriate to broadly define the structures to which that Act applied. However, this broad definition is limited to the specific Act to which it applies and does not change the narrow definition of "pier" in N.Y. Nav. Law §2(22)(*i.e.*, "a wharf or portion of a wharf extending from the shoreline with water on both sides") which applies generally for State law purposes.

Because the City Council ("Council") did not provide a special definition of the term "pier" to be used when interpreting the scope of Code §11-704(c)(3), and there is no specific definition of the term "pier" elsewhere in the Code, one must determine how the Council understood and used the word "pier" throughout the Code to understand if the broad definition suggested by Petitioner (*i.e.*, any berthing place for vessels) or the narrow definition proposed by Respondent (*i.e.*, a wharf or portion of a wharf extending from the shore line with water on both sides) was intended by the Council when it drafted Code §11-704(c)(3).

The Code differentiates "piers" from "docks" and other marine structures in a wide array of circumstances.[7] In fact, the Code

[7] *See, e.g.*, Code §§1-112(17) and (19) (Rules of Construction), 6-201 (Franchises), 10-101 (Public Safety), 15-125 (Fire Prevention and Control), 16-101 (Sanitation), 19-306(2) and (6) (Transportation; Ferries), 19-703(k) (Transportation: Accessible Water Borne Commuter Services Facilities Transportation Act), 20-360(c) (Consumer Affairs), 22-103(a) and (b) (Economic

provision that sets forth general rules of construction to be applied in interpreting various terms contained throughout the Code, expressly indicates that there is a difference between "piers," "docks," and "slips." *See* Code §1-112(17) (defining "[w]harf property" as "[w]harves, piers, docks and bulkheads and structures thereon and slips and basins . .." (emphasis added.) This inclusion and exclusion of specific maritime terms demonstrates the Council's understanding that these words hold very particular meanings. *See* Eaton v. New York City Conciliation & Appeals Bd., 56 NY2d 340, 345 (1982) ("[w]here as here, the statute describes the particular situations to which it is to apply 'an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded'")(citing McKinney's Statutes §240.) With respect to the CRT deduction in Code §11-704(c)(3), the Council referenced the term "piers" and only "piers."

The Council easily could have broadened the deduction's application by using the term "wharf property" as defined in Code §1-112(17), which encompasses piers, docks, slips and various other berthing places for vessels, since Code §1-112(17), by its terms, applies to the entire Code unless expressly otherwise provided. Alternatively, the Council could have expressly included docks and slips in the language of the deduction. *See, e.g.*, Code §10-158.2 (referencing "piers and other shoreline structures"); *see, also*, Code §19-306(6) (defining "[w]ater-borne commercial services facility" as "any dock, slip, pier or terminal located within the city of New York . . .") Yet, the Council chose not to include the words "slips" or "docks" in the CRT deduction at issue.

Affairs; Waterfront Property), 22-118(a) and (b) (Economic Affairs: Waterfront Property); 22-119(a) (Economic Affairs; Waterfront Property); 22-120(a)(Economic Affairs, Waterfront Property); 27-4280, 27-4281(a) (Construction and Maintenance).

While the Council used various broader terms for different types of waterfront property in a variety of circumstances,[8] when the Council used only the word "piers" elsewhere in the Code it is clear that the Council intended only a structure that projects out into the water. For example, Code §16-125: "[d]umping snow and ice from piers" provides that: "[t]he commissioner [of the Department of Sanitation] may cause or authorize snow and ice to be dumped into the waters of the port of New York, between the piers near the inshore ends." [Emphasis added.] Sanitation trucks could not dump snow "near the inshore ends" of a structure that did not extend out over the water.

In Bankers Trust Corporation (f/k/a Bankers Trust New York Corporation and its Affiliated Entities, TAT(E) 04-36(BT) (April 8, 2010) the City Tax Appeals Tribunal stated that "[t]he New York Court of Appeals has held that 'where . . . the Legislature uses different terms in various parts of a statute, courts may reasonably infer that different concepts are intended.'" (Citations omitted.) The only proper conclusion to be drawn here is that the Council knew the difference between a "pier" and a "slip" or a "dock" and chose to narrowly apply the deduction at issue only to premises that are "piers" (a structure that extends out over the water) and not to other wharf property such as "slips" or "docks."

It is also a general rule of statutory construction that "words of ordinary import used in a statute are to be given their usual and commonly understood meaning, unless it is plain from the statute that a different meaning is intended." *See* McKinney's Statutes §232. But, even the colloquial sense of the term "piers" does not conjure images of the Landing Slips at issue. Rather, the ordinary

[8] *See* n.7, *supra*.

perception of the word brings to mind long structures jutting out from the shore line into the water. *See* The American Heritage College Dictionary (4th ed. 2010) ("1.a. A platform extending from a shore over water and supported by piles or pillars, used to secure, protect, and provide access to ships or boats. b. Such a platform used esp. for entertainment . . ."); The Oxford American College Dictionary (2002) ("1. A structure leading out from the shore into a body of water, in particular: a platform supported on pillars or girders, used as a landing stage for boats . . . [A] similar structure leading out to sea and used as an entertainment area . . ." Therefore, the common meaning of the term "pier" is a structure that projects out from the shore line that can be used either for water craft or for places of amusement.

In the maritime field also, a "pier" is "a projecting quay or wharf running at an angle with the shoreline and providing a landing place on each side for vessels to receive and discharge cargo or land passengers." Kerchove, International Maritime Dictionary (2nd ed. 1961.) This definition is consistent with the discrete meaning afforded the term "pier" under State law and elsewhere in the Code and is equally well supported by federal maritime law. Stretching back to at least 1899, federal courts have interpreted the word "pier" in its most common usage:

> The Century Dictionary defines a pier to be "a projecting quay, wharf, or other landing place"; and, without some qualifying adjective, this is the ordinary meaning of the word. It may be a solid stone structure, or an outer shell of stone or wood filled in with earth; or it may be a framework formed by fastening a platform of planks upon piles driven into the soil at the bottom of the water. In either event, it is a projection of the land . . .. The Haxby, 94 F. 1016 (E.D. Pa. 1899) (emphasis supplied.)

Accordingly, since the Licensed Premises do not include a wharf or portion of a wharf that extends from the shore line with water on both sides, the Licensed Premises are not piers as that term is understood in common parlance, in State and federal law, in maritime law and in Code §11-704(c)(3).

Petitioner also asserts that, for the deduction to apply, the Licensed Premises do not have to be a "pier" but merely "used as a pier;" *i.e.*, as a berthing place for vessels. The statutory language at issue is "the taxpayer's own use of the premises: . . . [a]s piers insofar as such premises are used in interstate or foreign commerce." Code §11-704(c)(3). Petitioner, relying on the rule of statutory construction that provides that "meaning and effect are to be given to each separate word and phrase,"[9] concludes that the word "as" in the phrase "taxpayer's own use of the premises: . . . as piers insofar as such premises are used in interstate . . commerce" (emphasis added) means that the Licensed Premises merely must be used as piers, that is as a berthing place for vessels and do not actually have to be piers.

Respondent counters that "piers" have distinctive physical characteristics which are not present in this case since a pier "extends from the shore line with water on both sides." Thus, a "pier" that fits this definition is capable of loading or unloading more than one vessel simultaneously from any of its sides that protrude out over the water. Therefore, in Respondent's view, the only structure capable of being "used as a pier" is a pier.[10]

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[9] McKinney's Statutes §231.

[10] Each party suggests a reason that the Council might have for adopting the phrase "use . . . as a pier . . . used in interstate . . . commerce" which supports that party's interpretation. However, neither party has cited any legislative history to support that party's hypothesis and research has uncovered no legislative history on point. Therefore, these theories are merely speculation about legislative intent that carry no weight and will not be considered here.

The applicable legal analysis is subject to the maxim that exemption and deduction provisions are strictly construed in favor of the taxing authority. *See* Royal Indemnity Co. v. Tax Appeals Tribunal, 75 NY2d 75,78 (1989). Petitioner must prove it is entitled to this deduction. Grace v. State Tax Comm'n, 37 NY2d 193, 196-97 (1985); Bankers Trust, *supra*.

Petitioner asserts that because the statute states that the premises must be "used as piers" rather than "are piers," this language must indicate that the Council was only concerned as to the nature of the use of the wharf and not the nature of the structure itself (*i.e.*, whether it extended out from the shore line and was technically a pier.) However, this language could also have been intended by the Council to deny the deduction where the premises are structurally a pier but the lessee does not "use the structure as a pier," (*i.e.*, as a berthing place for vessels) in interstate or foreign commerce. *See, e.g.*, NYC Finance Admin Bulletin, July 1982:

> The operator of a warehouse on a leased pier cannot claim the commercial rent tax exclusion for rents paid for piers used in interstate or foreign commerce because, although the stored goods move in interstate or foreign commerce, the warehouse operator's business is purely local in nature.

Both interpretations have some merit. However, Petitioner bears the heavy burden of establishing "not only that [its] interpretation of the statute is plausible, but that it is the only reasonable construction." Astoria Federal Sav. & Loan Ass'n v. State, 222 AD2d 36, 42 (2nd Dep't 1996) *app. den.* 89 NY2d 807 (1997), *cert. den.* 522 U.S. 808 (1997). Since Petitioner has not established that its reading of the provision is the only reasonable construction, Astoria Federal, *supra*, there is no basis in law for extending this deduction to wharf property that are not piers.

Petitioner's cross motion also addressed its use of the Licensed Premises in interstate commerce.[11] However, inasmuch as the Licensed Premises are not "piers" within the meaning of Code §11-704(c)(3), that issue is moot and will not be addressed here.

I have considered all other arguments and find them unpersuasive.

ACCORDINGLY, IT IS CONCLUDED THAT the deduction afforded by Code §704(c)(3) is limited to premises that are actually "piers;" that is, structures that extend from the shore line with water on both sides. Since Petitioner's Licensed Premises are not piers within the meaning of Code §704(c)(3), Petitioner is not entitled to this deduction even if it used the Licensed Premises in interstate commerce. Therefore, Respondent's motion is granted and Petitioner's cross motion is denied except to the extent of the subtenant deduction for rent paid for Landing Slip 3. The August 29, 2008 Notice of Determination is sustained except to the extent of the subtenant deduction for rent paid for Landing Slip 3.

DATED: April 27, 2010
New York, New York

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MARLENE F. SCHWARTZ
Administrative Law Judge

[11] A portion of Ellis Island including the ferry slip and landing area at which Petitioner's boats loaded and unloaded as well as some portions of the island where tourists are permitted to go are located in New Jersey. Respondent questioned the extent to which Petitioner used the Premises in interstate commerce.