STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
DAVE'S MOTOR TRANSPORTATION, INC.	:	DECISION
for Redetermination of a Deficiency or for Refund of Franchise Tax on Transportation and Transmission Corporations under Article 9 of the Tax Law for the Years 1981 through 1984.	:	

Petitioner, Dave's Motor Transportation, Inc., c/o David Porcaro, One Salem Street, No. 9, Swampscott, Massachusetts 01907, filed an exception to the determination of the Administrative Law Judge issued on March 2, 1989 concerning a petition for redetermination of a deficiency or for refund of franchise tax on transportation and transmission corporations under Article 9 of the Tax Law for the years 1981 through 1984 (File No. 803264). Petitioner appeared by Weston, Patrick, Willard & Redding (Paul F. Ryan, Esq. of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq. of counsel).

Both parties submitted briefs on exception. No oral argument was held.

After reviewing the entire record in this matter the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner's activities constitute the conduct of a trucking or transportation business in the State of New York within the meaning of Tax Law sections 184 and 184-a and, if so, whether the imposition of taxes pursuant to said sections is prohibited by section 1113 of the Federal Aviation Act (49 USC § 1513).

FINDINGS OF FACT

We find the facts as stated by the Administrative Law Judge and such facts are restated below.

On February 20, 1986 the Division of Taxation issued notices of deficiency and statements of audit adjustment to petitioner, Dave's Motor Transportation, Inc., asserting deficiencies of tax under Tax Law sections 183, 184 and 184-a as follows:

(a) Section 183

Year	Tax	Interest	Penalty	Total
1981	$75.00	$47.02	$18.75	$140.77
1982	75.00	30.26	18.75	124.01
1983	75.00	18.53	18.75	112.28
1984	75.00	8.77	18.75	102.52

(b) Section 184

Year	Tax	Interest	Penalty	Total
1981	$2,012.00	$1,261.03	$503.00	$3,776.03
1982	1,863.00	751.64	465.75	3,080.39
1983	783.00	193.51	195.75	1,172.26
1984	1,302.00	152.18	325.50	1,779.68

(c) Section 184-a

Year	Tax	Interest	Penalty	Total
1982	$316.00	$127.50	$79.00	$522.50
1983	133.00	32.87	33.25	199.12
1984	221.00	25.83	55.25	302.08

During the years in issue, petitioner maintained its offices at Logan International Airport ("Logan") in East Boston, Massachusetts. It was primarily engaged in the pickup and delivery of air cargo transported by airlines. In this capacity, petitioner picked up freight from various locations in New England and delivered the same to Logan. Thereafter, the freight was loaded onto airplanes and flown to various locations throughout the world. Alternatively, petitioner delivered, to locations in New England, freight which arrived at Logan.

The asserted deficiencies of tax at issue herein arose from petitioner's activity of providing "substitute service trucking". This service began on or about May 1, 1981 pursuant to a contract executed April 22, 1981 in Massachusetts between petitioner and Air Cargo, Inc. as agent for American Airlines, Inc. ("AA"). Petitioner's service consisted of providing AA with tractor-trailers and drivers in accordance with a schedule established by AA.

During the period in issue, freight was brought to Logan for transportation to other locations. The freight was described on an airway bill of lading and placed in large containers. The airway bill of lading, which governed the shipment, indicated that AA freight was being transported in AA containers. Personnel employed by AA loaded the containers onto the trailers which were then dispatched by AA personnel to AA facilities at John F. Kennedy Airport ("J.F.K.") in New York. Upon arrival at J.F.K., the containers were off-loaded from the trailers and placed on waiting aircraft for transportation to their final destination. At this juncture, personnel at J.F.K. dispatched the drivers back to Boston with empty containers or held the drivers at J.F.K. for return with containers containing freight, depending upon AA's needs at the time. The foregoing transportation was provided on a round-trip exclusive use basis. Petitioner was paid an agreed upon fee for each trip, plus an additional fee if a delay beyond a certain period of time occurred as a result of airline handling or instruction.

The containers which were transported to J.F.K. were owned by AA and bore the AA insignia. The trucks also bore the AA insignia and were numbered on AA records to correspond to a particular flight.

Air Cargo, Inc. was a corporation owned by certain airlines operating in the United States. Its function was to coordinate the pickup and delivery of air cargo throughout the United States.

It was AA's practice to use Air Cargo, Inc. documentation for its manifest of substitute trucking services. The manifest named petitioner as the contractor and listed, among other things, the airline trip number, the number of containers and the origin and destination of each container.

Petitioner received its revenues for the service in issue from the American Airlines Freight Department which, in turn, received revenues for providing air freight.

OPINION

The Administrative Law Judge determined (1) that petitioner was engaged in the business of providing transportation services in New York State within the meaning of sections 184 and 184-a, (2) that imposition of the taxes prescribed by those sections was not preempted by section

1113 of the Federal Aviation Act since the receipts in question were solely for providing ground transportation and were not derived from "the sale of air transportation or on the gross receipts derived therefrom" (49 USC § 1513) and (3) that imposition of the tax was not precluded by 49 USC section 1526(a)(8)(B) which exempts certain transportation of property from the jurisdiction of the Interstate Commerce Commission.

On exception petitioner asserts (1) that it was not conducting a trucking business or doing business in New York State and is not subject to New York State tax under sections 184 and 184-a and (2) that the receipts in question were derived from the sale of air transportation or on the gross receipts derived therefrom and thus are exempt from tax pursuant to section 1113 of the Federal Aviation Act. In support of these assertions petitioner reiterates its position at hearing: that its contract with American Airlines was negotiated and signed in Massachusetts; that its drivers and vehicles acted under AA's control concerning the ground transportation of AA's airfreight; that the airfreight which petitioner's vehicles and drivers serviced moved under a single airway bill of lading for a single charge which covered the entire ground-air movement from origin to final destination; that AA collected gross receipts for its transportation of airfreight in a continuous ground-air movement and that these receipts were for the entire movement including receipts for petitioner's service in the process; that the imposition of the tax on petitioner's receipts was therefore a tax on gross receipts derived from air transportation under the Federal Aviation Act.

The Division asserts that the determination of the Administrative Law Judge is correct.

We affirm the determination of the Administrative Law Judge.

We deal first with petitioner's assertion that it was not conducting a trucking business or doing business in New York State.

Tax Law sections 184 and 184-a impose a franchise tax on every corporation engaged in the conduct of a trucking business, and every other corporation principally engaged in the conduct of a transportation business for, among other things, the privilege of exercising a corporate franchise or doing business in the state. The tax is commonly referred to as a gross

receipts tax and is imposed upon the corporation's gross earnings from all sources within the state.[1]

The term "transportation" means "any real carrying about or from one place to another" (Matter of Joseph A. Pitts Trucking, State Tax Commn., July 18, 1984; see, Matter of RVA Trucking v. State Tax Commn., 135 AD2d 938, 522 NYS2d 689, 690). The term "trucking" involves "the process or business of carting goods on trucks" (Matter of Joseph A. Pitts Trucking, supra). The leasing of vehicles with drivers has been held to be the conduct of a transportation business subject to tax under sections 183 and 184 of the Tax Law (People ex rel Peter J. Curran Funeral Serv. Co. v. Graves, [1939] 257 App Div 888, 12 NYS2d 153). Petitioner's activities, i.e., the pickup and delivery of air cargo transported by airlines, are within these definitions. Thus, it is clear that petitioner is engaged in the trucking business. It is also clear that petitioner's vehicles and drivers carried out trucking activities in New York State and that petitioner derived revenues from such activities, i.e., the receipts at issue here. Accordingly, we conclude that petitioner was engaged in the trucking business in New York State for purposes of sections 184 and 184-a and in the absence of some other constraint, petitioner is liable for the franchise taxes imposed pursuant to such sections on an allocated portion of its gross receipts (Matter of American Trucking Assns. v. State Tax Commn., 120 Misc 2d 191, 467 NYS2d 744, affd 60 NY2d 745, 469 NYS2d 662).

We deal next with petitioner's other assertion that the receipts were derived from the sale of air transportation or on the gross receipts derived therefrom and thus exempt from tax pursuant to section 1113 of the Federal Aviation Act.

Petitioner relies on Air Transport Assn. of Am. v. New York State Dept. of Taxation & Fin. (91 AD2d 169, 458 NYS2d 709, affd 59 NY2d 917, 466 NYS2d 319, cert denied 464 US 960) and Airborne Freight Corp. v. New York State Dept. of Taxation & Fin. (134 Misc 2d 602, 511 NYS2d 993, affd 137 AD2d 30, 527 NYS2d 107) for its assertion that the imposition of the

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[1]For years beginning after 1988, corporations engaged in aviation, including air freight forwarders, will be subject to tax as general business corporations under Article 9-A of the Tax Law and not as transportation corporations under Article 9 (see generally, L 1989, ch 61).

tax is preempted by section 1113 because the receipts are derived "directly or indirectly" from the sale of air transportation.

We cannot agree. The facts here are significantly different from the cases relied upon by petitioner. In Air Transport Assn. the tax was levied on the gross earnings of airlines operating within the state. Consequently, the Court concluded that "section 184 (subd. 1) of the Tax Law is pre-empted by the subject Federal statute [section 1113] insofar as gross earnings are measured by gross receipts from air carriage" (Air Transport Assn. of Am. v. New York State Dept. of Taxation & Fin., supra, 458 NYS2d 709, 711). In Airborne the taxpayer provided complete ground/air transportation services. The receipts sought to be taxed represented payments to the taxpayer for the combined service.[2] Faced with these facts, the Appellate Division concluded:

> "It seems patently clear that the tax defendants have sought to impose herein on the allocable New York shares of plaintiffs' gross receipts for interstate transportation, in fact, is levied upon receipts at least a portion of which are for air transportation of packages and freight of plaintiffs' customers. Therefore, the Federal exemption as to such taxation 'directly or indirectly' clearly applies, irrespective of whether plaintiffs either do not directly furnish the air transportation or that they incidentally also furnish nonair transportation as part of the offered services for which they receive gross receipts (see, Air Transp. Assn. of Am. v. New York State Dept. of Taxation & Fin., 91 AD2d 169, 170-171, 458 NYS2d 709, affd 59 NY2d 917, 466 NYS2d 319, 453 N.E.2d 548, cert denied 464 US 960, 104 S.Ct. 392, 78 L.Ed.2d 336)." (Airborne Freight Corp. v. New York State Dept. of Taxation & Fin., supra, 527 NYS2d 107, 108 [emphasis added]).

In the case at hand petitioner is in the trucking business. The receipts at issue represent only payments from American Airlines to petitioner for the providing of tractor-trailers and drivers to accomplish only the ground portion of the transportation. There is no attempt to directly or indirectly tax American Airlines on the basis of the receipts received by it for air transportation of packages and freight of its customers or any other basis. The logical extension of petitioner's argument would be to preclude from taxation any payments by American to any person or

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[2]The Appellate Division refused to deal with the taxability of receipts from the ground portion of the transportation because the issue was not properly raised before it (Airborne Freight Corp. v. New York State Dept. of Taxation & Fin., supra, 527 NYS2d 107, 109).

persons for any purpose solely because the moneys for such payments were derived from American's receipts from its air freight business. Our review indicates the purpose of section 1113 is to prevent multiple taxation on air transportation by the imposition of state and local taxes (Aloha Airlines v. Director of Taxation, 464 US 7, 78 L Ed 2d 10, 15). Further, section 1113 was intended to include only air transportation and air commerce by aircraft and not other forms of service or transportation which may affect air transportation or air commerce by aircraft (Airline Car Rental v. Shreveport Airport Auth., 667 F Supp 293; [WD La 1986]; Salem Transp. Co. of New Jersey v. Port Auth. of New York & New Jersey, 611 F Supp 254 [SD NY 1985]).

More particularly, we find nothing in the statute or its legislative history to indicate that Congress intended to exempt trucking companies from state taxes on their gross receipts from the delivery of freight to and from airlines at the request of shippers (Salem Transp. Co. of New Jersey v. Port Auth. of New York & New Jersey, supra.)

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner, Dave's Motor Transportation, Inc., is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Dave's Motor Transportation, Inc. is denied; and

4. The notices of deficiency dated February 20, 1986 are sustained.

DATED: Troy, New York
March 22, 1990

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner