STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
PROPANE TRANSPORTATION CORP.	:	DECISION DTA No. 807089
for Redetermination of a Deficiency or for Refund of Corporation Tax under Article 9 of the Tax Law for the Years 1981 through 1986.	:	

Petitioner Propane Transportation Corp., c/o Synergy Group, Inc., 175 Price Parkway, Farmingdale, New York 11735 filed an exception to the determination of the Administrative Law Judge issued on March 19, 1992 with respect to its petition for redetermination of a deficiency or for refund of corporation tax under Article 9 of the Tax Law for the years 1981 through 1986. Petitioner appeared by Samuel R. Dolgow, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Vera R. Johnson, Esq., of counsel).

Both parties filed briefs on exception. Oral argument was heard, at the request of petitioner, on September 10, 1992.

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

ISSUE

Whether petitioner was "doing business" as a transportation company within the meaning of Tax Law §§ 184 and 184-a and thereby subject to an additional franchise tax.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "3" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

Petitioner, Propane Transportation Corp. of New Jersey ("PTC-NJ"), is a New Jersey corporation that is a subsidiary of the parent corporation, Synergy Group, Inc., a multi-state

marketer of propane gas incorporated in the State of Delaware but headquartered at 175 Price Parkway, Farmingdale, New York.

PTC-NJ's sole business was to transport propane gas from third-party pipeline companies or refineries to five distribution companies owned by theparent company, Synergy Group, Inc. These companies were New Jersey Propane and Garden State Propane, incorporated and located in the State of New Jersey, and Synergy Gas-New York, New York Propane and Bottled Gas Service, incorporated and located in the State of New York.

We modify finding of fact "3" of the Administrative Law Judge's determination to read as follows:

> PTC-NJ neither purchased the propane gas it transported from the pipelines nor sold it to end-user customers. PTC-NJ delivered the propane gas in transport trucks to the affiliated distribution companies which, in turn, sold the gas and transported it by way of smaller trucks to manufacturers or end users. PTC-NJ did not have an Interstate Commerce Commission license.[1] [2]

PTC-NJ performed no activities or services for any entity other than the above-mentioned affiliates. It did not solicit business or engage in any advertising. PTC-NJ's only employees were truck drivers; it had no salespersons, no management and no personnel employees. New Jersey Propane Corp., one of the affiliated corporations, would manage and dispatch the truck drivers in return for a service charge. When not in use, the trucks were parked on the lots of New Jersey Propane Corp.

At hearing, Robert Hoffman, executive vice president of PTC-NJ and chief financial officer of the parent corporation, testified that Synergy Gas Corp.-Delaware[3] maintained the

---

[1]At hearing, Mr. Robert Hoffman, executive vice president of PTC-NJ, testified that he believed that petitioner did not have an ICC license because it did not deliver propane gas to "final consumers" (Tr. at 44).

[2]We modified the Administrative Law Judge's finding of fact "3" by deleting the word "owned bobtail" from between the words "smaller trucks" in the second sentence of the finding of fact.

[3]It is unclear from the record what the relationship is between Synergy Gas Corp.-Delaware and Synergy Group, Inc., however, it appears that Synergy Gas Corp.-Delaware is another affiliated subsidiary of the parent corporation, Synergy Group, Inc.

payroll records for PTC-NJ's truck drivers and that the payroll checks were issued from the offices at Farmingdale, New York. He further testified that PTC-NJ derived all its capital and financing (of the trucks) from the parent corporation and that the insurance on the trucks was paid "on a global basis by the whole company" on an "allocation of insurance expense" (Tr. at 79). When asked what company Mr. Hoffman was referring to by the phrase "whole company", he responded, "Synergy Corp. of Delaware" (Tr. at 79).

PTC-NJ did not receive cash payments for its transportation services to the affiliates but received an accounting credit that was subsequently offset by other accounting entries allocating certain operating costs of the affiliates serviced by PTC-NJ. PTC-NJ had no bank account. Mr. Hoffman testified that in creating PTC-NJ its purpose was not to run at a profit but to break even, and that to facilitate this purpose intercompany expenses were allocated on a discretionary basis to keep PTC-NJ's income and expenses closely aligned (Tr. at 56). Mr. Hoffman also testified that the transportation rates charged to the affiliated subsidiaries varied from one affiliate to another.

In its New Jersey corporation business tax returns for the years 1983, 1984 and 1985, petitioner reported tax (based on entire net income) of $2,454.00, $554.00 and $0, respectively.

Mr. Hoffman further testified that he believed there was no advantage to maintaining PTC-NJ as a separate corporate entity other than to centralize the transportation services for greater efficiency. He noted that if each corporate entity performed its own transportation services, it would not be subject to the franchise tax because such revenue would constitute less than 50% of its total revenues. He noted that PTC-NJ's charges to the five affiliated corporations compared to their respective revenues for the fiscal years ending March 31, 1985 and March 31, 1986 as follows:

March 31, 1985

	PTC Charges to Each Affiliate	Affiliate Revenue	% of Revenue
NJ Propane	$102,640	$ 2,854,532	3.6
Synergy Gas-NY	500,463	6,842,694	7.3
Garden State Propane	166,837	4,423,096	3.8
NY Propane	32,241	355,970	9.1
Bottled Gas Serv.	8,928	296,913	3.0
	$811,109	$14,773,205	5.5

March 31, 1986

	PTC Charges to Each Affiliate	Affiliate Revenue	% of Revenue
NJ Propane	$114,784	$ 2,755,380	4.2
Synergy Gas-NY	584,527	7,407,432	7.9
Garden State Propane	178,091	4,208,658	4.2
NY Propane	31,588	475,206	6.6
Bottled Gas Serv.	8,029	252,573	3.2
	$917,019	$15,099,249	6.1

After a field audit, the Division of Taxation ("Division") issued to Propane Transportation Corp. 17 notices of deficiency, dated January 29, 1988, under Article 9 of the Tax Law as follows:

	Tax	Interest	Additional Charge	Total
Period ended 12/31/81	$ 4,409.00	$ 4,061.83	$ 1,102.00	$ 9,572.83
Period begun 1/1/82	75.00	69.10	19.00	163.10
Period ended 12/31/82	8,463.00	5,564.79	2,116.00	16,143.79
Period ended 12/31/82	762.00	501.06	191.00	1,454.06
Period begun 1/1/83	75.00	49.32	19.00	143.32
Period ended 12/31/83	581.00	274.77	145.00	1,000.77
Period ended 12/31/83	6,843.00	3,236.22	1,711.00	11,790.22
Period begun 1/1/84	75.00	35.47	19.00	129.47
Period ended 12/31/84	10,909.00	3,480.94	2,727.00	17,116.94
Period ended 12/31/84	927.00	295.79	232.00	1,454.79
Period begun 1/1/85	75.00	23.93	19.00	117.93
Period ended 12/31/85	1,206.00	209.12	302.00	1,717.12
Period ended 12/31/85	14,184.00	2,459.55	3,546.00	20,189.55
Period begun 1/1/86	75.00	13.00	19.00	107.00
Period ended 12/31/86	977.00	66.39	244.00	1,287.39

Period ended 12/31/86	11,795.00	781.12	2,874.00	15,150.12[4]
Period begun 1/1/87	75.00	5.10	19.00	99.10
Total	$61,506.00	$21,127.50	$15,304.00	$97,637.50

After a conciliation conference, the conferee, by conciliation order dated March 31, 1989, cancelled 11 notices of deficiency with respect to the periods begun 1/1/82, 1/1/83, 1/1/84, 1/1/85, 1/1/86 and 1/1/87 and the periods ended 12/31/81, 12/31/82 and 12/31/83. The conferee revised six notices of deficiency by cancelling the penalties and reducing the amount of deficiency for the periods ended 12/31/84, 12/31/85 and 12/31/86 as follows:

1984	1985	1986	Total
$3,078.00	$2,724.00	$2,932.00	$8,734.00

By petition dated June 22, 1989, petitioner contested the $8,734.00 as determined in the conciliation order. Petitioner argued that it was not a transportation company within the meaning and purpose of Article 9 because it was not in the "business" of providing transportation services but "exist[ed] solely for the purpose of affording taxpayer's parent company a means to account for the costs of transportation services encompassed in the operation of certain of the parent's subsidiaries."

The Division filed an answer, dated August 3, 1989, alleging, inter alia, that Tax Law § 184-a imposes a corporate franchise tax on every corporation engaged in trucking for the privilege of exercising its corporate franchise, or doing business, or employing capital or owning or leasing property in the metropolitan commuter transportation district.

At a hearing scheduled on March 20, 1990, the Division's attorney submitted into evidence as part of Exhibit "B" a report of the conciliation conferee dated March 15, 1989[5] along with two worksheets. In that report the conferee noted that the auditor cancelled the assessments for the years 1981, 1982 and 1983 because petitioner filed returns under Article 9-A and the statute of limitations had expired. The auditor also gave the taxpayer credit for payments made under

---

[4]In the Notice of Deficiency for the period ended 12/31/86, the total was misstated as $15,150.12 when it should have been $15,450.12.

[5]It should be noted that although the report is dated March 15, 1989, it makes reference to the fact that on March 31, 1989 a conciliation order was issued revising the assessments for 1984, 1985 and 1986.

Article 9-A. At the hearing, however, the Division's counsel argued that the revisions made in the conciliation order should be cancelled and that the full liability of $61,506.00, plus penalty and interest, should be reinstated because the auditor erred in reducing the assessments. Because petitioner was not notified prior to the hearing that the Division was requesting reinstatement of the original assessments, the Administrative Law Judge ("ALJ") bifurcated the proceeding and rescheduled the hearing. The ALJ stated that the first hearing was to determine the amount at controversy and whether the conciliation order was binding on the Division and the second hearing was to determine whether petitioner was a transportation company subject to tax under Article 9.

At the first hearing scheduled on October 24, 1990, the parties stated that they had reached a tentative resolution as to the amount in controversy and would submit a stipulation to that effect.

On or about November 6, 1990, the parties agreed to adjust the amount stated in the conciliation order by increasing the assessments by $1,667.00 for a total amount of $10,401.00. Essentially, the increase was due to an addback of a credit mistakenly allowed by the Division for the years 1984, 1985 and 1986.

On June 11, 1991, the second hearing was held on the issue of whether petitioner was a "transportation company."

OPINION

In the determination below, the Administrative Law Judge held that because petitioner was a separate corporate entity engaged in a valid business activity, it was "doing business" within the meaning of Tax Law §§ 184 and 184-a and was, therefore, subject to additional franchise tax under these sections. In so holding, the Administrative Law Judge stated that although petitioner's "profits may [have been] minimal, the fact that its business activities generate[d] revenues is sufficient to constitute 'doing business' within the meaning and intent of Article 9" (Determination, conclusion of law "A").

On exception, petitioner, relying on the Division's statement of policy in TSB-M-82(13)C, contends that the conclusion reached by the Administrative Law Judge is erroneous for the following reasons: 1) the Administrative Law Judge erred in applying a "transactional" analysis traditionally applied in sales tax cases to the corporate franchise tax area; and 2) because petitioner's activities were limited to delivering fuel to its brother and sister affiliates, and it merely received credits from these affiliates to offset expenses it incurred, the holding below is in conflict with the Division's own regulations and other published guidelines which state that "doing business" requires that business activities be undertaken for profit.

In response, the Division argues that in light of this "for profit" requirement set out in the Division's regulations which define "doing business," the only instance in which a corporation is not organized for profit is when it has been organized as a not-for-profit corporation. The Division points to the following facts which indicate that petitioner is a corporation operating for profit: 1) petitioner is incorporated in the State of New Jersey as a business corporation rather than as a not-for-profit corporation; 2) its failure to show that it sought authorization to operate in New York State as a not-for-profit corporation under New York State's Not For Profit Law; 3) the cost containment benefits provided to petitioner's shareholders; 4) petitioner generated income and expenses, employed drivers, maintained profit sharing plans and owned assets; and 5) that petitioner filed New Jersey Business Corporation Tax Returns. The Division also cites several New York and Federal tax cases, including State sales tax cases, to support its position that petitioner cannot elevate the substance of its activities over their form because the form yields unfavorable tax consequences. Finally, the Division argues that petitioner is subject to tax under sections 184 and 184-a on the independent bases that petitioner's activities within New York constitute an exercise of its corporate franchise, petitioner owned or leased property in New York, and petitioner was employing capital in New York.

We affirm the determination of the Administrative Law Judge, but not for the reasons stated in the determination.

Tax Law § 184 states in relevant part that:

> "[e]very corporation . . . formed for or principally engaged in the conduct of a transportation or transmission business . . . for the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity, or maintaining an office in this state, shall pay a franchise tax which shall be equal to three-quarters of one per centum upon its gross earnings from all sources within this state . . . ."[6]

The Division's policy statement concerning the tax imposed under section 184 defines "doing business" as follows:

> "the term 'doing business' is used in a comprehensive sense and includes all activities which occupy the time and labor of men for profit. Regardless of the nature of its activities, every corporation organized for profit and carrying out any of the purposes of its organization is deemed to be 'doing business' for purposes of the tax" (TSB-M-82[13]C, emphasis added).[7]

The term "profit" has been defined as "[g]ain realized from business or investment over and above expenditures" (Black's Law Dictionary 1090 [5th ed 1979]). In determining whether a corporation is operated "for profit," petitioner appears to advocate restricting this inquiry to the corporation itself without regard for the economic impact its actions may have on the corporation's affiliates or shareholders. Petitioner states that its owners did not seek to operate petitioner at a profit, but merely to "break even," evidenced by the fact that its affiliates were charged only the cost of these services, thereby keeping "income and expenses closely aligned" (Petitioner's brief, p. 8).

It has been held that where a corporation provides goods and services to affiliated entities for an amount less than what would normally be charged to unrelated parties, a "profit" in the form of cost savings flows to the corporation's owners. This principle was set forth in State ex rel. Troy v. Lumbermen's Clinic (186 Wash 384, 58 P2d 812 [1936]), where the Supreme Court of Washington stated:

---

[6]Tax Law § 184-a imposes a surcharge based on identical activities undertaken in the "metropolitan commuter transportation district" at a rate equal to eighteen percent of the tax imposed under section 184.

[7]This language is identical to language contained in 20 NYCRR 1-3.2(b)(1) which defines "doing business" as that term is used in Tax Law § 209(1), the Article 9-A Corporate Franchise Tax. Sections 184 and 209 impose tax on corporations on the same basis, i.e., "for the privilege of exercising its corporate franchise, or of doing business . . . in this state . . ." (Tax Law §§ 209[1], 184[1]).

> "[p]rofit does not necessarily mean a direct return by way of dividends, interest, capital account, or salaries. A saving of expense which would otherwise necessarily be incurred is also a profit to the person benefitted. If [the corporation] renders to its incorporators or members, or to businesses in which they are interested and whose profits they share, a service at a cost lower than which would otherwise be paid for such service, then [the corporation's] operations result in a profit to its members" (State ex rel. Troy v. Lumbermen's Clinic, supra, 58 P2d 812, 816).

This principle has been recognized by courts in several states (see, e.g., Commonwealth v. 2101 Coop., 408 Pa 24, 183 A2d 325 [1962]; Pine Grove Manor v. Director, 68 NJ Super 135, 171 A2d 676 [1961] ["not-for-profit" corporations produce benefits to owners; thus, they are held not exempt from corporate franchise tax]; State ex rel. Russell v. Sweeney, 153 Ohio St 66, 91 NE2d 13 [1950] [because entity produced benefits to owners, held not entitled to incorporate as nonprofit corporation]; cf., American Auto. Assn. v. Bureau of Revenue, 87 NM 330, 533 P2d 103 [1975] [benefits received by dues-paying members did not disqualify corporation from enjoying nonprofit status]).

In the case before us, petitioner's sole business activity was the transport of propane gas from third party suppliers to five distribution companies, three of whom were located in New York. Petitioner and these distribution companies were owned by a common parent, Synergy Group, Inc. (hereinafter "Synergy"). It is not disputed that petitioner, viewed as a single entity, was intended to and did function as a break-even operation. It did not receive cash payments for the transportation services provided to its affiliates; instead, it received accounting credits equal to the costs incurred for providing these services. These credits were subsequently offset by simply allocating these operating costs to the affiliates on the consolidated books of Synergy. With petitioner providing this necessary task of transporting the propane, these distributors received a benefit equal to the difference between the cost of these services and their fair market value. By virtue of Synergy's ownership of the distributors, the benefit created by petitioner providing transportation services at cost ultimately ran to Synergy. These services resulted in a corporate shareholder (Synergy) receiving a benefit in the form of cost savings from its subsidiary corporation (petitioner). The benefit to Synergy is no less tangible merely because the

savings are received through its ownership of the affiliated distributors rather than received directly (see, Wendy L. Parker Rehabilitation Found. v. Commissioner, TC Memo 1986-348, 52 TCM 51). Accordingly, we hold that petitioner was operating "for profit" and, therefore, was doing business within the meaning of Tax Law §§ 184 and 184-a.

We find it necessary to respond to petitioner's argument on exception that "there was absolutely no evidence admitted at hearing, and no finding of fact, that supports the position that the aim or purpose of petitioner's activities was, in whole or in part, the making or pursuit of profit" (Petitioner's brief, p. 7). The burden to prove that tax was incorrectly assessed under Article 9 of the Tax Law rests with the taxpayer (Tax Law §§ 207-b[1] and 1089[e]). Thus, it was petitioner's burden to introduce evidence establishing that it was not operating for profit, and "the party upon whom the burden of proof rests, loses if no evidence is offered on the fact at issue" (Matter of Sliford Rest., Tax Appeals Tribunal, October 10, 1991). We find that this burden was not met in this case.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Propane Transportation Corp. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Propane Transportation Corp. is denied; and

4. The notices of deficiency dated January 29, 1988 are sustained.

DATED: Troy, New York
February 18, 1993

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

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

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