STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CAPITAL TELEPHONE COMPANY, INC.	:	DECISION DTA No. 807248
for Redetermination of a Deficiency or for Refund of Corporation Tax under Article 9 of the Tax Law for the Years 1976 through 1980 and 1985.	:	
	:	

Petitioner Capital Telephone Company, Inc., 32 Sunnyside Road, Scotia, New York 12302, filed an exception to the determination of the Administrative Law Judge issued on February 25, 1993. Petitioner appeared by John H. Dennis, Esq. The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

Both parties filed briefs on exception. The six-month period to issue this decision began on October 13, 1993, the date by which petitioner could have filed a reply brief.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioner Koenig concurs.

ISSUES

I. Whether petitioner is entitled to a refund of tax paid pursuant to Article 9, sections 184 and 186-a.

II. Whether petitioner is entitled to a refund of penalties paid on the taxes assessed pursuant to Article 9, sections 184 and 186-a.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Capital Telephone Company, Inc. ("Capital"), was a corporation incorporated under the laws of the State of New York on April 6, 1960. Capital was what is referred to as a

"radio common carrier" ("RCC") that provided two-way mobile radio telephone service and one-way paging to members of the public.

Until July 1984, Capital was considered a "telephone corporation" subject to the jurisdiction of the New York State Public Service Commission, and operated during those years under a Certificate of Public Convenienceand Necessity issued by said Commission and subject to tariffs filed with and approved by the Commission.

Petitioner was not clear on the issue of whether it was a Tax Law Article 9 or 9-A corporation and employed an accountant and attorney during the 1970s, both of whom had no expertise in the area of New York corporation tax law, and were unable to provide it with an opinion on said issue. The result was that petitioner did not file any franchise tax reports during the 1970s and early 1980s. At the same time, a Division of Taxation ("Division") report of delinquency follow-up, dated June 28, 1971, indicated that the Division had determined that the company was taxable under Article 9-A and Tax Law § 186-a.

Sometime prior to July 31, 1980, petitioner was notified by the corporation tax unit of the Division that its delinquency in filing franchise tax reports for a period of two or more consecutive years would subject it to the loss of its charter to do business in New York State by proclamation of the Secretary of State on recommendation of the State Tax Commission. Petitioner's attorney at that time, Keith J. Roland, Esq., responded to the notice requesting blank report forms for the delinquent periods and a statement of unpaid assessed taxes.

A letter was sent to Mr. Roland by the corporation tax unit on April 23, 1981 indicating that franchise tax reports were due for the periods ended December 31, 1973 through December 31, 1979. A separate memorandum from Michael Siciliano, Tax Technician, set forth for each of the years stated above the tax, interest and penalty due and totals.

Mr. Roland responded to said schedule indicating that the corporation agreed to pay the total amount stated as due by Mr. Siciliano, the sum of $2,921.51, but "because the corporation is in a negative earnings position, payment of this entire sum at once will put a tremendous

burden on our finances." However, petitioner's president, Dr. Bakal, testified at hearing that the corporation was never in financial difficulty.

On June 30, 1982, the corporation was dissolved by proclamation of the New York State Secretary of State pursuant to the provisions of Tax Law § 203-a.[1]

By letter agreement dated June 3, 1985 from the law firm of Phillips, Nizer, Benjamin, Krim & Ballon to Mr. Robert Quirk, director of the corporate tax section of the Division, countersigned by Mr. Quirk on June 12, 1985, an understanding was reached between the radio common carrier industry and the Division with respect to the application of the initial State utility taxes to the radio common carrier industry. The salient terms of that letter agreement were as follows:

> "1. The industry will, as expeditiously as possible but not later than September 1, 1985, file retroactive returns and remit any tax due pursuant to Section 186-a, as follows:
>
> "(a) With respect to two-way service, retroactive filings to January 1, 1981.
>
> "(b) With respect to one-way paging service, retroactive filings to January 1, 1983.
>
> "(c) The tax will be computed upon the gross income of the carrier derived from service income (air time) only.
>
> "(d) Carriers will be entitled to appropriate credit for corporate income tax paid during the respective taxing periods.
>
> "(e) Interest will be applied to all computed balances, computed at the rates in effect during the respective taxing periods, in accordance with Department regulations regarding interest computations, a copy of which you have forwarded to me.
>
> "(f) Companies filing in a timely manner will not be subject to penalties.
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> "(g) For purposes of determining what constitutes New York State income, through 1982, it shall be presumed that income received from a customer with a New York address is New York State income. Thereafter, the industry will adhere to the allocation method outlined in the Department's Technical Service

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[1]It is noteworthy that on March 29, 1974, petitioner was notified by the acting district tax supervisor of the Albany District Office that the corporation was being referred to the dissolution unit of the Corporation Tax Bureau for dissolution by proclamation for failure to file franchise tax reports due or for nonpayment of franchise taxes pursuant to Tax Law Article 9-A.

Memorandum dated February 8, 1982 for transmission companies (TSB-M-82(6)-C).

"(h) All income attributable to service sold for resale shall be excluded from gross income.

"2. Corporations which have filed corporate income tax returns shall file amended returns with respect to Sections 183 and 184, retroactive to January 1, 1981. It is understood that individuals (not corporate carriers) shall have no obligation to file the Section 183 and 184 returns, that computation of such taxes shall be made in accordance with the applicable statute and that taxpayers shall be entitled to appropriate offsets for taxes paid pursuant to Section 9-A of the Tax Law during the pertinent period."

By letter dated November 1, 1985, the president of Capital, Dr. Peter A. Bakal, submitted a check in the amount of $11,291.06 which purportedly represented 3¾% of gross receipts, or $301,095.00, for the period January 1, 1981 through June 30, 1984. The letter referenced two companies, petitioner and a related corporation, Hudson Mohawk Telephone Company, Inc.

The proceeds of this check were applied to the account of Hudson Mohawk Telephone Company, Employer Identification Number 14-1633674, as follows:

12/82 - 184	$ 1,000.00
12/82 - 186-a	2,750.00
12/83 - 184	1,000.00
12/83 - 186-a	2,791.00
12/84 - 184	1,000.00
12/84 - 186-a	2,750.00
Total	$11,291.00

On December 11, 1985, the Division, by Jeannette R. Durand, Corporation Tax Auditor, informed Dr. Bakal that it had received his letter of November 1, 1985 with the accompanying check of $11,291.00. Ms. Durand indicated that Dr. Bakal did not submit any franchise tax reports with this check to show proper application. Ms. Durand informed Dr. Bakal that common carriers were taxable under sections 183, 184 and 186-a of Article 9, applicable to transportation and transmission corporations. She informed Dr. Bakal that those franchise tax reports were required for both Capital and Hudson Mohawk Telephone Company, Inc., as well as another related corporation, Mobilfone Industries, Inc.

With specific regard to petitioner herein, Ms. Durand stated the following in her letter:

"If the corporation was inactive and had no gross receipts, reports are due under Article 9-A on Form CT-4 for the period ended December 31, 1973 to date, or to the period in which the corporation was active.

"For the periods in which the corporation was active, reports are required under Article 9, section 183, 184 and 186-A as follows:

"December 31, 1973 to December 31, 1975 - CT-40 (Section 183)
December 31, 1973 to June 30, 1976 - CT-36 (Section 184)
December 31, 1973 to December 31, 1975 - CT-11A (Section 186-A)
December 31, 1976 to December 31, 1978 - CT-183 (Section 183)
December 31, 1976 to December 31, 1978 - CT-184 (Section 184)
December 31, 1979 to December 31, 1983 - CT-183/184 (Sections 183/184)
December 31, 1976 to December 31, 1984 - CT-186-A (Section 186-A)

"Copies of all pages of the corresponding Federal returns will also be required."

On February 18, 1986, Ms. Durand called Dr. Bakal to ask about a response to her December 11, 1985 letter and was informed that it had been turned over to Mr. Roland. Ms. Durand followed up with a telephone call to Mr. Roland, who said that he did not understand the requirements for previous years, referring to the agreement between the radio common carrier industry and the Division which only dealt with tax years 1981 forward. Mr. Roland was informed that petitioner was due to be dissolved by proclamation because petitioner had not filed reports for years prior to 1981 and that said returns were still due.

On April 22, 1986, in a telephone conversation between Ms. Durand and Mr. Roland, it was disclosed that the reports had been completed for petitioner and the two related corporations and a conference was scheduled to review said reports.

On April 25, 1986, a conference was held with petitioner, who submitted CT-4's for the period 1973 through 1980 and CT-183's, CT-184's and CT-186-P's for the period 1981 through 1984. On October 1, 1986, the business of petitioner was sold. A final return for 1986 was filed on behalf of petitioner on Form CT-184 on December 10, 1986.

Petitioner filed the CT-184, Franchise Tax Report on Gross Earnings, for 1985 on April 25, 1986 and its CT-186-P's, Reports of Gross Income, for the years 1976 through 1980 on March 24, 1987. None of these reports was filed with the tax indicated as due.

On April 6, 1987, Ms. Durand sent a letter to Mr. Roland which stated, in pertinent part, as follows:

"We have received the Forms CT-186-A for the periods December 31, 1976 through 1980 and Forms CT-184 for the periods ended December 31, 1985 and 1986. These reports have been sent for processing.

"However, you did not submit the reports under Article 9, sections 183 and 184 for the periods ended December 31, 1976 through 1980 and Form CT-183 for December 31, 1985. Please send these reports so we may finalize this case."

By letter dated April 23, 1987, the processing division of the New York State Department of Taxation and Finance sent a letter to petitioner indicating that the corporation had been dissolved by proclamation of the Secretary of State in December 1982.

By letter dated May 4, 1987, Mr. Roland responded to said notice indicating that he had been working with the Division with regard to past franchise taxes owed by Capital and that, pursuant to an agreement with Ms. Durand, the corporation was not to be dissolved by proclamation.

Mr. Roland indicated that the corporation had been formally and voluntarily dissolved at the end of 1986 and that the company had filed a final return.

In fact, petitioner did file a CT-184, Franchise Tax Report on Gross Earnings, marked "Final Return" on December 10, 1986 (see above).

On or about May 7, 1987, the Division issued notices and demands for payment to petitioner as follows:

Statement Date	Tax Article and Section	Taxable Period Ended	Tax, Penalty & Interest Due
5/7/87	9, 184	12/31/85	$ 1,783.92
5/7/87	9, 186-a	12/31/76	9,029.04
5/7/87	9, 186-a	12/31/77	9,085.83
5/7/87	9, 186-a	12/31/78	10,037.64
5/7/87	9, 186-a	12/31/79	10,599.90
5/7/87	9, 186-a	12/31/80	13,184.14

By letter dated August 25, 1987, Mr. Roland forwarded a check to the corporation tax section of the Division to the attention of Mr. Earl Womer in the sum of $53,720.47 indicating that the check was in payment of Article 9 gross revenue taxes due from petitioner under Tax Law § 186-a for the years 1976 through 1980 and Tax Law § 184 for the year 1985. It was in this August 25, 1987 letter that Mr. Roland requested that the penalty amounts be waived due to

the confusion as to the applicability of corporation franchise taxes to the RCC industry. However, the auditor, Ms. Durand, responded by letter, dated July 27, 1988, in which she refused to abate penalties because tax remained unpaid under Tax Law §§ 183, 184 and 186-a for subsequent periods.

OPINION

The Administrative Law Judge determined that the Division properly required petitioner to pay tax pursuant to section 186-a of the Tax Law, the tax on the furnishing of a utility, for the years 1976 through 1980 since it was clear from the record that petitioner was a utility as defined by Tax Law § 186-a(2) and, therefore, subject to the tax imposed by section 186-a(1).

The Administrative Law Judge determined further that:

> "this petitioner was not discriminated against or intentionally treated differently than other companies in the radio common carrier industry. Any taxpayer may be assessed at any time if no return is filed (Tax Law § 1083[c][1][A]). Presumably, the agreement was intended for companies in compliance with reporting requirements of the statute. To assume otherwise would extend a benefit to nonfilers which was not a stated intention of the letter agreement between the Division and the industry. Therefore, the Division was justified in requesting reports and payments pursuant to Tax Law § 186-a for the years 1976 through 1980 since no reports had been filed by petitioner for those years" (Determination, conclusion of law "C").

The Administrative Law Judge also sustained the imposition of penalties by the Division for the years 1976 through 1980 on the basis that petitioner was subject to section 186-a for these years; petitioner did not file any returns for these years; nothing in the agreement between the Division and the RCC industry supports the proposition advanced by petitioner that confusion as to how the industry was to be taxed, i.e., under Article 9 or Article 9-A, was justification for non-filing; and, referring to Tax Law § 1085(a)[2] and the Division's regulations[3]

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[2]Tax Law § 1085(a) provides, in pertinent part, for a penalty for:

> "(1) Failure to file return. -- (A) In case of failure to file a return under article nine, nine-a, nine-b or nine-c on or before the prescribed date (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect . . . .
>
> * * *

petitioner did not prove that its failure to file returns or remit taxes for the years at issue was due to reasonable cause and not willful neglect.

On exception, petitioner raises the same arguments advanced at hearing: first, that the Division is bound by the letter agreement and that the agreement, in essence, prevents the Division from asserting the tax under Article 9 for years prior to 1981; second, that the "penalties and interest penalties assessed by [the Division] with respect to this matter should be waived in accordance with the provisions of the Letter Agreement entered into between the Department of Taxation and Finance and the representatives of the Radio Common Carrier industry" (Petitioner's Brief on Exception).[4]

"(2) Failure to pay tax shown on return. -- In case of failure to pay the amounts shown as tax on any return required to be filed under article nine, nine-a, nine-b or nine-c on or before the prescribed date (determined with regard to any extension of time for payment), unless it is shown that such failure is due to reasonable cause and not due to willful neglect . . . ."

[3]

The regulation promulgated thereunder states, in pertinent part, as follows:

"(a) Where a taxpayer:

"(1) fails to file a return on or before the last date prescribed for filing (see section 1085[a][1] of the Tax Law for the addition to tax);

"(2) fails to pay the amount shown as tax on a return on or before the last date prescribed for paying (see section 1085[a][2] of the Tax Law for the addition to tax); or

"(3) fails to pay the amount required to be shown as tax on a return within 10 days of the date of a notice and demand therefor (see section 1085[a][3] of the Tax Law for the addition to tax);

"the applicable addition or additions to tax set forth in section 1085(a) of the Tax Law must be imposed, unless it is shown that such failure was due to reasonable cause and not due to willful neglect. In the event that these additions to tax have been imposed and it is later determined that failure to timely file the return or timely pay the tax was due to reasonable cause and not due to willful neglect, all or part of such additions to tax will be cancelled. The absence of willful neglect alone is not sufficient grounds for not imposing additions to tax or for cancelling additions to tax" (20 NYCRR 46.1).

[4]In its post-hearing brief, petitioner asserted that it should be:

"extended the same status as was offered to all other Radio Common Carriers in this state, i.e., being allowed to pay Article 9-A taxes prior to 1981 or 1983, instead of being

On exception, the Division argues that the determination of the Administrative Law Judge is correct.

The Administrative Law Judge dealt fully and correctly with the issues in this matter and we affirm his determination for the reasons stated therein. We would add only that: 1) petitioner has failed to show that it meets the basic requirement for the agreement to apply to it, i.e., that it filed retroactive returns and remitted any tax due pursuant to section 186-a, not later than September 1, 1985; 2) our reading of the Letter Agreement provides no basis for petitioner's assertion that such agreement allowed RCCs to pay Article 9-A taxes rather than Article 9 taxes for the years prior to 1981; and 3) we find no basis in the agreement to conclude that it shields petitioner or any other RCC from imposition of penalties for failure to file any returns or remit any taxes, whether under Article 9 or 9-A, for the years prior to 1981.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Capital Telephone Company, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Capital Telephone Company, Inc. is denied; and

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subject to Article 9 gross revenue taxes on services prior to those years.

"The refusal of the Department to extend such treatment to [petitioner], while it was enjoyed by other firms in the exact same business, is a violation of the June 3, 1985, Agreement, and constitutes unjust discrimination and a denial of equal protection of the laws.

"Similarly, because the 1985 Agreement stated that no penalties would be applied with respect to prior periods, and in light of the taxpayer's good faith efforts to clear up its franchise tax liabilities, no penalties should be assessed against the taxpayer even if Article 9 taxes are held to be applicable" (Petitioner's Brief at Hearing, pp. 6-7).

4. The Division of Taxation's imposition of penalties and denial of petitioner's refund claim are sustained.

DATED: Troy, New York
March 24, 1994

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

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