STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
LAND TRANSPORT CORPORATION	:	DECISION DTA NO. 816111
for Revision of a Determination or for Refund of Highway Use Tax under Article 21 of the Tax Law for the Period January 1, 1990 through November 30, 1993 and for Redetermination of a Deficiency or for Refund of Corporation Tax under Article 9 of the Tax Law for the Years 1987 through 1992.	:	

Petitioner Land Transport Corporation, c/o Donald J. Malkin, President, P. O. Box 81240, Wellesley Hills, Massachusetts 02481-0001, filed an exception to the determination of the Administrative Law Judge issued on April 29, 1999. Petitioner appeared by its president, Donald J. Malkin. The Division of Taxation appeared by Barbara G. Billet, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a letter in response stating it was relying on its brief submitted to the Administrative Law Judge below. Oral argument, at petitioner's request, was heard on February 10, 2000 in New York, New York.

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

ISSUE

Whether, as a result of an audit, the Division of Taxation properly determined additional highway use tax and corporation tax due.

FINDINGS OF FACT

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

On January 23, 1995 and January 30, 1995, following an audit, the Division of Taxation ("Division") issued to petitioner, Land Transport Corporation, three notices of deficiency which assessed corporation tax under Article 9 of the Tax Law for the years 1987 through 1992 as follows:

Assessment Number	Tax Law Section	Tax Assessed
L-010021442-4	§ 184	$ 16,521.00
L-010021417-8	§ 184-a	$ 628.00
L-010025748-9	§ 183	$ 483.00

For the years 1990 through 1992, the tax assessed under Tax Law §§ 183 and 184 included a 15 percent surcharge imposed pursuant to Tax Law § 188.

On February 16, 1995, following the same audit, the Division issued to petitioner two notices of determination which assessed highway use tax under Article 21 of the Tax Law for the period January 1, 1990 through November 30, 1993 as follows:

Assessment Number	Tax Law Section	Tax Assessed
L-010074180-6	§ 503-a (fuel use tax)	$ 7,512.63
L-010074179-6	§ 503 (truck mileage tax)	$ 1,707.49

Each of the statutory notices listed herein also assessed penalty and interest.

Petitioner is a carrier which hauls general freight throughout the United States. At the beginning of the audit, the Division requested all of petitioner's books and records for the period January 1, 1991 through November 30, 1993. Petitioner complied with this request.

The Division used a test period audit method in its highway use tax audit of petitioner. The test period selected was October 1, 1992 through December 31, 1992. Within that period, the Division examined the trips of 18 vehicles. Based on this examination the Division determined that petitioner had inaccurately reported total mileage and Thruway mileage on certain trips. The Division also found that petitioner had inaccurately reported its total in-state fuel usage and the miles per gallon efficiency of its vehicles. The Division calculated that petitioner had underreported its truck mileage tax liability by 2.9 percent and its fuel use tax liability by 10.2 percent during the test period. The Division applied these error factors to the amounts reported on petitioner's filed highway use tax returns for the audit period to calculate the assessments of additional tax due set forth in the notices of determination dated February 16, 1995 (***see***, above).

Petitioner did not file Article 9 corporation tax returns after 1986. Through examination of petitioner's records and conversations with petitioner, the Division determined that petitioner was subject to tax under Article 9 of the Tax Law because it had made at least three pickups or

deliveries in New York in each of the years in question. The Division therefore decided to audit petitioner's liability under Article 9.

The Division determined petitioner's liability under Article 9 of the Tax Law, §§ 184 and 184-a, for the years 1989 through 1992 by using miles driven in New York State as reported on petitioner's monthly highway use tax returns for the same period. The Division increased such reported mileage figures by 10.2 percent to reflect the error factor determined in the highway use tax audit. Petitioner advised the Division during the audit that it was paid approximately $1.00 per mile driven in New York. Accordingly, the Division multiplied annual total audited mileage amounts by $1.00 to reach annual New York gross earnings. Tax under sections 184 and 184-a of the Tax Law for the years 1989 through 1992 was then calculated by applying the appropriate tax rates to the gross earnings as determined on audit.

During the audit, the Division requested, but petitioner did not produce, documentation of petitioner's gross earnings for the years 1987 and 1988. Therefore, the Division estimated petitioner's liability under sections 184 and 184-a for those years by using audited New York gross earnings for 1989 determined as noted above and applying the appropriate tax rates.

The assessment of tax herein pursuant to Tax Law § 183 (exclusive of the 15 percent surcharge pursuant to Tax Law § 188 for the years 1990 through 1992) was in the amount of $75.00 per year.

In its letter-brief, the Division conceded that it had improperly resorted to an estimation audit method. Accordingly, the Division conceded that the highway use tax assessments should be canceled for all periods except the three-month test period. The Division thus reduced the fuel use tax assessment to $1,040.89 and the truck mileage tax assessment to $208.64, exclusive

of penalty and interest. With respect to the corporation tax assessments, the Division conceded that it improperly increased petitioner's reported New York mileage by 10.2 percent and reduced its corporation tax assessments under Tax Law §§ 184, 184-a and 183 by approximately $1,650.00, $62.00 and $48.00, respectively, exclusive of penalty and interest.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge concluded that the Division had calculated petitioner's fuel use tax and truck mileage tax liability for the period October 1, 1992 through December 31, 1992 based upon a detailed examination of petitioner's records for that period. As petitioner did not submit any evidence to show that the Division's calculations were erroneous, the Administrative Law Judge sustained the tax imposed by the Division for that period. The Administrative Law Judge found no documentation in the record to support petitioner's claim that it had overreported mileage and failed to claim Thruway credits, thus overpaying its highway use taxes during the audit period. The Administrative Law Judge also noted that any evidence regarding petitioner's highway use tax liability outside the period October 1, 1992 through December 31, 1992 would not be relevant to the tax at issue.

After reviewing the basis of the corporation taxes imposed pursuant to Tax Law §§ 183, 184 and 184-a, the Administrative Law Judge found that the Division had imposed the minimum charge payable under Tax Law § 183 for each of the years at issue. Petitioner had submitted no evidence to show that it was not subject to tax under Tax Law § 183. Accordingly, the Administrative Law Judge sustained this assessment.

The Administrative Law Judge found that the assessments imposed pursuant to Tax Law §§ 184 and 184-a for the years 1987 and 1988 were estimated by the Division. The

Administrative Law Judge concluded that since petitioner presented no evidence of its actual gross revenue for the year 1987 or 1988, the estimation of tax was reasonable. The Administrative Law Judge also noted that petitioner did not allege any errors in the Division's calculation of tax due for those years.

For the years 1989 through 1992, the Administrative Law Judge found that the assessments were based on petitioner's own highway use tax returns filed for this same period. The Administrative Law Judge found that petitioner presented no evidence to show that its highway use tax returns were erroneous nor did petitioner allege any errors in the Division's calculation of tax due. Accordingly, the Administrative Law Judge sustained the assessments of tax pursuant to Tax Law §§ 184 and 184-a as modified by the Division.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that the Administrative Law Judge incorrectly sustained the notices of determination at issue herein. Petitioner maintains that a proper audit would have resulted in no additional fuel use tax and truck mileage tax liability because of New York State Thruway credits never given to petitioner. Petitioner claims, as it did to the Administrative Law Judge, that erroneous reporting entries by one of its drivers in 1990, 1991 and early 1992 resulted in an over-reporting of 12,000 miles to the State of New York for that period. Additionally, petitioner asserts that its liability under Tax Law § 184 is only $896.00 due to the fact that, for most of its miles in New York, it was merely passing through the State and it did not engage in any financial transactions within New York.

The Division, in opposition, argues that the Administrative Law Judge correctly decided the issues presented to him and that his determination should be affirmed.

OPINION

A presumption of correctness attaches to a properly issued statutory notice (***see, Matter of Atlantic & Hudson Ltd. Partnership***, Tax Appeals Tribunal, January 30, 1992). Once a Notice of Deficiency was issued to petitioner, petitioner bore the burden of proof to demonstrate that the basis for assessment was unreasonable or that the amount of tax assessed was incorrect (***Matter of Micheli Contr. Corp. v. New York State Tax Commn.***, 109 AD2d 957, 486 NYS2d 448). Petitioner waived its right to a hearing in this matter and agreed to have this controversy determined on submitted evidentiary documents. However, petitioner introduced no evidence which would support either the unreasonableness of the assessment or the incorrectness of the tax assessed. Therefore, petitioner was deemed to have submitted to the presumption of correctness. We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and we see no reason to modify them in any respect. As a result, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Land Transport Corporation is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Land Transport Corporation is denied; and

4. The notices of determination dated February 16, 1995 and the notices of deficiency dated January 23, 1995 and January 30, 1995, as modified in accordance with Finding of Fact "11" of the Administrative Law Judge's determination, are sustained.

DATED: Troy, New York
June 29, 2000

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner