STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DAVE'S MOTOR TRANSPORTATION, INC.	:	DETERMINATION
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 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).

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, W.A. Harriman State Office Building Campus, Albany, New York on October 3, 1988. Petitioner appeared by Weston, Patrick, Willard & Redding (Paul F. Ryan, Esq., of counsel). The Audit Division appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUE

Whether petitioner's activities constitute the conduct of a trucking or transportation business within the meaning of Tax Law §§ 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

1. On February 20, 1986 the Audit Division issued notices of deficiency and statements of audit adjustment to petitioner, Dave's Motor Transportation, Inc., asserting deficiencies of tax under Tax Law §§ 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

2. 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.

3. 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.

4. 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.

5. 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.

6. 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.

7. 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.

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

CONCLUSIONS OF LAW

A. Sections 184 and 184-a of the Tax Law impose franchise taxes 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 its corporate franchise or doing business in this State.

B. It is now established that 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 of New York, 135 AD2d 938, 939), and that the term "trucking" involves "the process or business of carting goods on trucks" (Matter of Pitts Trucking, supra). It is clear that petitioner's activities are within these definitions. Therefore, in the absence of some other constraint, petitioner is liable for the franchise taxes imposed by sections 184 and 184-a of the Tax Law on an allocated portion of its gross receipts (Matter of American Trucking Assns. v. New York State Tax Commn., 120 Misc 2d 191, affd 60 NY2d 745).[1]

C. The Federal Aviation Act bars states from imposing a tax "directly or indirectly...on the sale of air transportation or on the gross receipts derived therefrom" (49 USC § 1513 [a]). Thus, the issue presented is whether the tax sought to be imposed is in contravention of this prohibition.[2]

In support of its position, petitioner relies upon Air Transp. Assn. v. New York State Department of Taxation and Finance (91 AD2d 169, affd 59 NY2d 917,

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[1]At the hearing, petitioner made reference to the question of whether 50 percent of its activity involves leasing. Petitioner apparently wishes to stress that only a small portion of its revenues arises from the leasing of vehicles in order to establish that it is not a leasing business which is subject to tax under Article 9-A of the Tax Law. In view of Conclusion of Law "B", this question becomes moot.

[2]At the hearing the Audit Division argued that petitioner has not established that freight was not removed from the containers upon arrival at J.F.K. This argument is contrary to the facts found herein.

cert denied 464 US 960) and upon Airborne Frgt. Corp. v. New York State Dept. of Taxation and Finance (134 Misc 2d 602, affd 137 AD2d 30).

In the Air Transport Association case, plaintiff was an unincorporated trade and service association consisting of air carriers, a portion of whom did business in New York State. Plaintiff commenced a declaratory judgment action maintaining that Tax Law § 184(1) was unconstitutional under the supremacy clause of the United States Constitution because it was prohibited by section 1113 of the Federal Aviation Act (49 USC § 1513). Upon a review of the pertinent statutory sections, the Court found that subdivision 1 of section 184 of the Tax Law imposes a tax on air transportation and that this tax is precluded by section 1113 of the Federal Aviation Act. Consequently, the Court held "subdivision 1 of section 184 of the Tax Law is pre-empted by the subject Federal statute insofar as gross earnings are measured by gross receipts from air carriage." (Air Transport Assn. v. Dept. of Taxation and Finance, supra, at 91 AD2d 172.)

In the Airborne Freight case, the Court examined the preemption question with respect to air freight forwarders. In this case, plaintiff operated as an air express transportation company and an air freight forwarder. Plaintiff's activities included picking up items at customers' locations and delivering them at the final consignees' destinations. Plaintiff provided the ground transportation required by this activity. The freight moved under a single airway bill which did not contain separate charges for the air and ground portions of the transportation. Most of plaintiff's domestic shipments traveled on airplanes owned by plaintiff's subsidiary. An intervenor plaintiff in the action was also an air freight forwarder who operated through a subsidiary.

Plaintiff paid the tax imposed by Tax Law § 184(1) and sought a refund. The Division of Taxation denied the refund on the ground that air freight forwarders are not involved in air transportation and therefore their gross receipts do not qualify for the Federal exemption. Following the commencement of a declaratory judgment action, the Supreme Court granted plaintiffs' motion for summary judgment.

On appeal, the Appellate Division, Third Department affirmed. In reaching this conclusion, the court stated:

> "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. v. New York State Dept. of Taxation & Fin., 91 AD2d 169, 170-171, affd 59 NY2d 917, cert denied 464 US 960)." (Airborne Freight v. New York State Dept. of Taxation and Finance., 137 AD2d 30, 32.)

The Appellate Division declined to consider whether tax could be imposed on the gross receipts for the ground portion of plaintiffs' services since the issue had not been raised prior to the appeal.

It is concluded that neither of the foregoing cases supports the claimed exemption from tax. In each instance the imposition of the tax was found to be violative of the Federal Aviation Act because the tax was being levied, at least in part, on the gross receipts for the providing of air transportation. In contrast, the gross receipts at issue herein were solely for providing ground transportation. The distinction is critical since the tax which is prohibited by section 1113 of the Federal Aviation Act is "on the sale of air transportation or on the gross receipts derived therefrom" (49 USC § 1513). The fact that petitioners were carrying AA's containers pursuant to an airway bill of lading and that the trucks bore the AA insignia is of no consequence. Similarly, it is irrelevant that AA was paid for providing air transportation.

D. Petitioner also relies on 49 USC § 10526(a)(8)(B), which exempts from the jurisdiction of the Interstate Commerce Commission: "transportation of property (including baggage) by motor vehicle as part of a continuous movement which prior or subsequent to such part of the continuous movement, has been or will be transported by an air carrier or (to the extent so agreed by the United States and approved by the Civil Aeronautics Board or its successor agency) by a foreign air carrier".

This argument is unpersuasive. There has been no showing that the policy considerations which govern the jurisdiction of the Interstate Commerce Commission are the same as those which govern the taxes to be precluded by the Federal Aviation Act.

E. That the petition of Dave's Motor Transportation, Inc. is denied and the notices of deficiency dated February 20, 1986 are sustained.

DATED: Albany, New York
March 2, 1989

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE