STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RUJAK TRUCKING CORP.	:	DETERMINATION DTA NO. 807073
for Redetermination of a Deficiency or for Refund of Corporation Tax under Article 9 of the Tax Law for the Period January 1, 1982 through December 31, 1987.	:	

Petitioner, Rujak Trucking Corp., 30 Hartz Way, Secaucus, New Jersey 07094, filed a petition for redetermination of a deficiency or for refund of corporation tax under Article 9 of the Tax Law for the period January 1, 1982 through December 31, 1987.

A hearing was commenced before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on September 18, 1990 at 2:45 P.M. and was continued to conclusion on January 9, 1991 at 1:15 P.M., with all briefs to be submitted by May 15, 1991. Petitioner appeared by Sheldon Eisenberger, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Vera R. Johnson, Esq., of counsel, at the initial hearing and James Della Porta, Esq., of counsel at the continued hearing).

ISSUES

I. Whether the Division of Taxation properly determined that petitioner was subject to tax as a transportation corporation pursuant to Tax Law §§ 183, 184 and 184-a.

II. If so, whether the Division of Taxation properly relied upon a test period analysis, utilized in assessing highway use tax under Article 21 ofthe Tax Law, to calculate corporation tax deficiencies, asserted pursuant to Tax Law §§ 184 and 184-a, for the periods at issue herein.

III. Whether additions to tax for failure to file returns and to pay tax required to be shown on such returns were properly imposed against petitioner.

IV. Whether the Division of Taxation should be estopped from pursuing the corporation tax

deficiencies based upon the issuance, from its Tax Compliance Division, of notices to petitioner, on March 7, 1990, advising that, as a result of its correspondence and/or recent conference, the balance of each of the assessments had been cancelled.

FINDINGS OF FACT

On May 1, 1989, the Division of Taxation issued notices of deficiency of corporation tax to Rujak Trucking Corp. ("petitioner") as follows:

Period	Tax Law §	Tax	Interest	Additional Charge	Total
Begun 1-1-82	183	$ 75.00	$ 86.26	$ 18.75	$ 180.01
Begun 1-1-83	183	75.00	64.12	18.75	157.87
Begun 1-1-84	183	75.00	48.61	18.75	142.36
Begun 1-1-85	183	75.00	35.70	18.75	129.45
Begun 1-1-86	183	75.00	23.48	18.75	117.23
Begun 1-1-87	183	75.00	14.63	18.75	108.38
Begun 1-1-88	183	75.00	8.11	18.75	101.86
Ended 12-31-81	184	6,228.00	7,162.26	1,557.05	14,947.31
Ended 12-31-82	184	6,059.00	5,179.32	1,514.66	12,752.98
Ended 12-31-83	184	6,195.00	4,016.11	1,548.79	11,759.90
Ended 12-31-84	184	6,109.00	2,908.54	1,527.21	10,544.75
Ended 12-31-85	184	6,259.00	1,959.69	1,564.81	9,783.50
Ended 12-31-86	184	6,254.00	1,220.15	1,563.62	9,037.77
Ended 12-31-87	184	7,159.00	773.90	1,789.65	9,722.55
Ended 12-31-82	184-a	1,091.00	932.28	272.64	2,295.92
Ended 12-31-83	184-a	1,053.00	682.75	263.30	1,999.05
Ended 12-31-84	184-a	1,039.00	393.49	259.63	1,692.12
Ended 12-31-85	184-a	1,064.00	333.15	266.02	1,663.17
Ended 12-31-86	184-a	1,063.00	207.42	265.82	1,536.24
Ended 12-31-87	184-a	1,217.00	131.56	304.24	1,652.80

Statements of audit adjustment were attached to each of the above notices of deficiency issued to petitioner.

On September 9, 1988, this case was assigned to Hallan E. Riley, Jr., Tax Auditor I, for the performance of a highway use tax audit. In addition, the auditor stated that he was also under instruction to determine whether or not petitioner had been filing corporation tax returns and paying the required corporation taxes.

On September 22, 1988, the auditor met with Peter B. Levine, petitioner's general manager, who, along with his wife, owns 100 percent of the stock of the corporation. At the initial meeting, which occurred at petitioner's place of business, Mr. Levine was not able to

produce all of the records requested. He stated that he had been trying to obtain trip report sheets from McDonnell Douglas Truck Services, Inc., the company which had been leasing trucks to petitioner. The auditor testified that, at the initial meeting, a test period audit method was discussed and that Mr. Levine orally consented both to the utilization of such method and to the period selected by the auditor (the fourth quarter of 1987).

Contained within the field audit record (Petitioner's Exhibit "1") is a form AU-377.15, audit method election, which was filled out and signed by the auditor on September 22, 1988. This form indicated that the auditor had advised that the records available for audit were adequate and sufficient to warrant an audit method which utilizes all records within the audit period, but in lieu thereof, petitioner elected to utilize a representative test period audit method to determine any truck mileage or fuel use tax liability. Neither Mr. Levine nor any other person signed this form on behalf of petitioner.

The auditor testified that, upon his next visit to petitioner's place of business in November 1988, Mr. Levine had obtained the necessary records to permit him to complete his audit, i.e., to check the fourth quarter of 1987 in detail. The audit checklist prepared by the auditor on January 18, 1989 described the condition of petitioner's records as "fair" and stated that odometer and hub readings, drivers' logs (I.C.C.), trip reports, lease invoices, fuel tax reports of other states and motor vehicle registrations had been utilized during the audit. The field audit report (on page 1 thereof) indicates that a review of the taxpayer's records indicated that records were adequate to do a complete audit, that detailed audit and test period methods were explained to the taxpayer, that a representative test period (fourth quarter of 1987) was agreed to and that the taxpayer signed a consent agreement.

The report further indicated that highway use tax had been understated by approximately $7,617.00 (the photocopy is illegible with regard to cents). It was the testimony of both the auditor and Mr. Levine that the results of the highway use tax audit were agreed to, that part payment was made to the auditor and that the remainder was subsequently paid in full.

The auditor's examination of the trip sheets supplied by McDonnell Douglas Truck

Services, Inc. for the fourth quarter of 1987 revealed that petitioner's total miles for the period were 67,616, 22,012 of which were New York miles. The percentage of New York miles was, therefore, determined to be 32.55 percent (22,012 divided by 67,616).

The auditor obtained petitioner's Federal income tax returns (forms 1120) for the years 1982 through 1987. Since the return for 1981 was unavailable, a Department of Labor statistical report was used. From this report and from the returns, the auditor took the total income figure (which he utilized as petitioner's gross receipts) and multiplied the total income by the New York allocation percentage to obtain New York revenue. The New York revenue was then multiplied by .75 percent to determine tax due pursuant to Tax Law § 184. For the years 1982 through 1987 (no metropolitan surcharge was in effect for 1981), the tax due pursuant to Tax Law § 184 was multiplied by 18 percent for 1982 and 17 percent for the years thereafter to determine tax due per Tax Law § 184-a. For tax due per Tax Law § 183, minimum tax of $75.00 per year was imposed.

Petitioner, on its Federal income tax returns, entered business code number 4200 for each of the years at issue. This code number represented a transportation business, more particularly a trucking and warehousing business. Based upon the use of this code number and the auditor's determination that petitioner operated a trucking business, it was determined by the Division of Taxation that petitioner was subject to Article 9 taxes as a transportation corporation. For the years at issue, petitioner did not file returns or pay taxes imposed pursuant to Article 9 of the Tax Law.

Peter B. Levine became petitioner's general manager in 1985. Prior thereto, he was a foreman-supervisor (Rujak was a family business). At the hearing, Mr. Levine testified that, prior to 1986, petitioner's business consisted of trucking, drayage, warehousing, cross docking and freight brokerage. Mr. Levine stated that, for the years 1981 through 1985, approximately 40 to 45 percent of petitioner's revenues were derived from trucking. Up until 1986, petitioner employed non-union labor for its warehousing and handling (cross docking, freight brokerage, etc.) functions. In 1986, the labor unions applied pressure to employ union workers.

Mr. Levine was forced, therefore, to use union workers or give up much of the handling operation. He chose the latter option which resulted in trucking becoming approximately 70 percent of petitioner's business. The percentages were estimates made by Mr. Levine in or around 1986. To make up for lost revenue after ceasing much of its handling activities, petitioner leased trucks from Leaseway Transportation on full service leases (lessor was responsible for fueling, maintenance and much of the administrative functions such as mileage reporting and paying of taxes). Therefore, petitioner sold the 8 trucks which it owned and began leasing 13 to 16 trucks from Leaseway. Leaseway Transportation was subsequently sold to Hertz-Pensky and, approximately nine months later, McDonnell Douglas took over petitioner's account. Petitioner's trucking business consisted primarily of deliveries for Panasonic, Toshiba America, MacGregor Sporting Goods, Technika of Fairfield, New Jersey and certain other businesses.

Mr. Levine also testified that petitioner's invoices often included demurrage charges (such as wharfing) and disbursements made on behalf of customers (approximately $300,000.00 per year) except where customers requested separate billing for these other charges. In its sales journals, everything was listed as "trucking".

With respect to the corporation tax audit, the parties concur that no sales invoices, cash receipts or any other records were requested other than mileage records for the fourth quarter of 1987 and Federal income tax returns for each of the years at issue.

It is unclear from the record as to the period under audit for highway use tax purposes. The auditor stated that, prior to performing this audit, he reviewed a prior highway use tax audit of petitioner for the period of approximately 1977 through 1980. While Mr. Levine testified that a Martin Sherman performed a highway use tax audit of petitioner in 1985 (the auditor in this matter was unaware of this audit), no other evidence of such audit was presented herein. Mr. Levine stated that petitioner's invoices for the years 1981 through 1985 were disposed of because of the audit by Mr. Sherman through 1985. Mr. Levine testified that he had invoices from 1987 through 1989 (only 1987 is at issue herein), although only one such invoice was

offered into evidence at the hearing (and this invoice by the Division as Exhibit "J").

At or about the time at which the highway use tax audit was completed, the auditor informed Mr. Levine that he was probably subject to New York corporation taxes under Article 9 of the Tax Law. The auditor stated that it was standard auditing procedure, when performing a highway use tax audit, to also check for franchise tax compliance.

On or about March 7, 1990, the Tax Compliance Division issued 20 notices (corresponding to each of the notices of deficiency) advising petitioner that, "as a result of your correspondence and/or recent conference, the balance of the above assessment has been cancelled".

An affidavit by Duncan Kerr, Chief Audit Clerk in the Division's Processing Division, stated that such notices were issued in error based upon a miscommunication between certain personnel.

Peter Levine stated that, upon receipt of these notices, he immediately contacted his attorney.

The auditor testified that, in 1985, the Division sent a limited mailing to all trucking corporations with 25 or more vehicles registered with the then-Truck Mileage Tax Bureau which advised them of potential liability for Article 9 taxes. He further testified that, in 1987, another such notice was sent to all carriers registered with the Truck Mileage Tax Bureau (this notice was accepted into evidence as Exhibit "I").

Petitioner stated that it was not until the audit at issue that he first became aware of potential Article 9 liability and that, for subsequent years, returns were filed and taxes due were paid to the State.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner's position may be summarized as follows:

(a) No rational basis existed for the Division's determination that petitioner was liable for Article 9 taxes. Petitioner was not a "trucking corporation" since it did not derive more than 50 percent of its gross receipts from the transportation of goods by motor

vehicle. Moreover, no rational basis could have existed since no franchise tax audit was ever conducted. Books and records pertaining to the totality of petitioner's business were never requested;

(b) The audit method employed and the results derived therefrom were erroneous since the auditor utilized the results of a test period analysis for highway use tax liability which, although petitioner subsequently consented to the highway use tax audit results, was never consented to by petitioner as evidenced by his failure to sign the audit method election agreement; and

(c) With respect to the issue of penalty, petitioner contends that it never willfully failed to file Article 9 returns and pay taxes due and that, subsequent to this audit, petitioner began filing returns and paying these taxes.

The position of the Division of Taxation is as follows:

(a) The testimony of Peter B. Levine, petitioner's general manager, was not credible in proving that petitioner was not subject to Article 9 taxation for the years at issue;

(b) The activities which Mr. Levine testified were not trucking, i.e., cross docking, handling and pier importing, were in fact trucking activities since they involved the use of motor vehicles or other motorized devices and, therefore, the revenues derived therefrom were subject to Article 9 taxation;

(c) The Division did conduct an audit for franchise tax purposes, i.e., records and income tax returns were reviewed and its use of the test period analysis was proper. However, the Division further contends that there is no requirement that a field audit be conducted prior to making a determination that a corporation is subject to franchise taxes. It maintains that petitioner's Federal income tax returns (using code number 4200), its name and the highway use tax audits formed a sufficient factual basis for its determination that this petitioner was subject to Article 9 taxation; and

(d) Petitioner's failure to file Article 9 returns is premised upon its ignorance of its responsibility to do so. The Division contends that ignorance of the law does not

constitute reasonable cause for failure to file returns and pay taxes and penalties imposed should, therefore, be sustained.

CONCLUSIONS OF LAW

A. Tax Law §§ 183, 184 and 184-a impose a franchise tax, an additional franchise tax and an additional temporary metropolitan business tax surcharge, respectively, on transportation and transmission corporations and associations. The tax imposed by Tax Law § 183 is computed upon the basis of the amount of the corporation's capital stock within the State during the preceding year (pursuant to subdivision 3 thereof, a minimum tax of $75.00, which was asserted against this petitioner, is imposed). The taxes imposed by Tax Law §§ 184 and 184-a are computed based upon gross earnings from all sources within the State.

All of these taxes are imposed upon corporations and associations which are formed for or principally engaged in the conduct of, among other things, a trucking business. A corporation is deemed to be principally engaged in the activity to which more than 50 percent of its receipts are attributable.

B. By virtue of the provisions of Tax Law § 1089(e), which, pursuant to Tax Law § 207-b, is made applicable to Article 9 of the Tax Law, the burden of proof is on petitioner to show that it is not subject to the imposition of Article 9 taxes, i.e., that 50 percent or less of its receipts were attributable to a trucking business for the years at issue. Petitioner has failed to sustain this burden. The testimony of its general manager, Peter B. Levine, as to the percentages of petitioner's various business activities, which was based, in part, upon a review (see, Finding of Fact "5") of such activities in 1986 cannot, standing alone, sustain this burden of proof. Absent sales invoices, books and records, etc., such oral testimony did not prove that petitioner's trucking activities constituted 50 percent or less of its total business. Moreover, the use of "trucking" in its name and its declaration on its Federal income tax returns that trucking (and warehousing) was its principal business suggests that even petitioner considers itself a trucking operation (see, RVA Trucking, Inc. v. New York State Tax Commn., 135 AD2d 938, 522 NYS2d 689). It is hereby determined, therefore, that the Division properly determined that

petitioner was subject to tax as a transportation corporation. Deficiencies of tax pursuant to Tax Law § 183 (minimum tax of $75.00 for each of the seven years at issue was imposed) are, therefore, sustained.

C. What must then be determined is whether the Division properly relied upon the results of a test period analysis, performed for the purpose of a highway use tax audit, to determine petitioner's liability for Article 9 corporation taxes. The Division of Taxation correctly points out that, for purposes of determining corporation and personal income taxes, it is not necessary to perform a detailed audit of available books and records (see, Hennekens v. State Tax Commn., 114 AD2d 599, 494 NYS2d 208) as is the case in determining sales and use taxes. However, the requirements for performance of a highway use tax audit do parallel those of a sales tax audit.

In Application of Babylon Milk & Cream Co. (5 AD2d 712, 169 NYS2d 124, affd 5 NY2d 736, 177 NYS2d 717), the court held that, where the exact amount of taxes owed on tank truck-trailers could have been determined from the taxpayer's books and records (all of which were available), it was improper to have utilized a four-month test check and to have then determined a percentage formula to estimate the tax due (see also, Lionel Leasing Industries v. State Tax Commn., 105 AD2d 581, 481 NYS2d 520).

Since it has heretofore been determined that a review of available books and records is required in both highway use and sales and use tax audits, it logically follows that case law pertaining to sales tax audits would also be applicable, in most cases, to highway use tax audits as well.

In Matter of George, Ismini and Nicholas Sarantopoulos, Officers of TAK Diners, Inc. (Tax Appeals Tribunal, February 28, 1991), the Tribunal set forth the procedures which must be followed by the Division of Taxation before it can resort to external indices to estimate tax. The Tribunal stated:

> "To determine the adequacy of a taxpayer's records, the Division must first request (Matter of Christ Cella, Inc. v. State Tax Commn., 102 AD2d 352, 477 NYS2d 858, 859) and thoroughly examine (Matter of King Crab Rest. v. Chu, 134 AD2d 51, 522 NYS2d 978, 979-80) the taxpayer's books and records for the entire

> period of the proposed assessment (Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, 828, lv denied 71 NY2d 806, 530 NYS2d 109). The purpose of the examination is to determine, through verification drawn independently from within these records (Matter of Giordano v. State Tax Commn., 145 AD2d 726, 535 NYS2d 255, 256-57; Matter of Urban Liquors v. State Tax Commn., 90 AD2d 576, 456 NYS2d 138, 139; Matter of Meyer v. State Tax Commn., 61 AD2d 223, 402 NYS2d 74, 76, lv denied 44 NY2d 645, 406 NYS2d 1025; see also, Matter of Hennekens v. State Tax Commn., 114 AD2d 599, 494 NYS2d 208, 209), that they are, in fact, so insufficient that it is 'virtually impossible [for the Division of Taxation] to verify taxable sales receipts and conduct a complete audit' (Matter of Chartair, Inc. v. State Tax Commn., supra, 411 NYS2d 41, 43), 'from which the exact amount of tax can be determined' (Matter of Mohawk Airlines v. Tully, 75 AD2d 249, 429 NYS2d 759, 760)."

In the present matter, there is no evidence that the auditor ever requested books and records for the entire period under audit for highway use tax. While the Division maintains that Mr. Levine admitted that books and records did not exist for periods prior to 1986 due to Martin Sherman's alleged audit in 1985 (see, Finding of Fact "7"), the audit method election form which was signed by the auditor (see, Finding of Fact "2") indicates that the records available for audit were adequate and sufficient to perform a detailed audit. The field audit record and the testimony of the auditor indicate, however, that books and records were requested and reviewed only for the fourth quarter of 1987. Despite the auditor's statements that Mr. Levine consented to the use of a test period analysis, his failure to sign the audit method election form belies such statements. Moreover, had there been a request for books and records for the entire audit period and a determination by the auditor that complete books and records for such period did not exist, it would have been unnecessary to present an audit method election form for Mr. Levine's signature. The resort to external indices (in this case, a test period analysis) would have been warranted with or without petitioner's consent.

While the results of this highway use tax audit were agreed to and paid by petitioner despite the obvious flaw in audit methodology and, while those results are not at issue herein, such methodology is of great import to the corporation tax deficiencies since the test period analysis provided the basis for asserting the deficiencies under Tax Law §§ 184 and 184-a.

D. It is a well-settled principle of law that the results of an audit conducted under one article of the Tax Law may properly be used in an audit conducted under another article of the

Tax Law (Matter of Castaldo, State Tax Commission, February 15, 1985). Just as well settled, however, is the principle that a notice of deficiency which has no rational basis must be set aside (Matter of Donahue v. Chu, 104 AD2d 523, 479 NYS2d 889; Rosenthal v. State Tax Commn., 102 AD2d 325, 477 NYS2d 767; Matter of Stephen Fortunato, Tax Appeals Tribunal, February 22, 1990).

In Matter of Golden Coach, Inc. (State Tax Commission, November 7, 1985), certain markup percentages applied to purchases of food and beer were the product of negotiations between the auditor and the petitioner's accountant and were not computed by actually determining the difference between costs and selling prices. The State Tax Commission held that while the use of the negotiated figures did not vitiate the sales tax assessment to which the petitioner consented, such petitioner was not made aware of and clearly did not consent to their use for franchise tax purposes. The Commission held, therefore, that those figures, standing alone, could not constitute a foundation for the franchise tax deficiencies asserted (see also, Matter of Nautilus Restaurant, Inc., State Tax Commission, November 7, 1985; Matter of Clarke & O'Sullivan Wines & Liquors, State Tax Commission, July 3, 1986).

While the percentages derived from the test period analysis performed during the highway use tax audit were not the product of negotiations as was the case in Matter of Golden Coach, Inc. (supra), they were the product of an audit method which, under the facts and circumstances surrounding its utilization, appears to have been improper, i.e., books and records were not requested for the entire audit period and, despite the audit method election form's statement that such records were adequate, a test period analysis was performed without the taxpayer's written consent. It must, therefore, be determined that utilization of such test period results for purposes of the imposition of taxes pursuant to Tax Law §§ 184 and 184-a was also improper and the notices of deficiency issued to petitioner on May 1, 1989 pertaining to such taxes must be cancelled.

E. Since only the deficiencies of tax pursuant to Tax Law § 183 (see, Conclusions of Law "B" and "D") have been sustained, only those additions to tax imposed thereon will be

addressed herein.

Tax Law § 1085 imposes additions to tax for, among other things, failure to file returns and failure to pay tax required to be shown on such returns, unless it is shown that such failure is due to reasonable cause and is not due to willful neglect. Petitioner's sole contention with respect to its failure to file Article 9 corporation tax returns and to pay the required taxes is ignorance of the law, i.e., Mr. Levine was unaware of his responsibility to so file and, upon learning of the requirement to file, he immediately began to do so. It is not clear when or if the Division of Taxation notified this petitioner that it could have Article 9 tax liability as a transportation corporation. However, ignorance of the law will not be considered as a basis for reasonable cause (see, 20 NYCRR 46.1[d][4]). Such additions to tax imposed upon the section 183 deficiencies are, therefore, sustained.

F. As a general proposition, the doctrine of estoppel is not available to governmental acts absent a showing of exceptional facts which require its application to avoid a manifest injustice (see, Matter of Sheppard-Pollack, Inc. v. Tully, 64 AD2d 296, 298, 409 NYS2d 847, 848). This rule applies particularly to a taxing authority because sound public policy favors full enforcement of the Tax Law (Matter of Turner Construction Co. v. State Tax Commn., 57 AD2d 201, 203, 394 NYS2d 78, 80). Exceptions to the doctrine have been rare and limited to unusual fact situations (see, Haber v. United States, 831 F2d 1051, affd on remand 904 F2d 45; Bolton v. Commr., 562 F Supp 30; Matter of Maximilian Fur Co., Tax Appeals Tribunal, August 9, 1990).

In the instant matter, petitioner has shown no detriment as a result of the Division's issuance of the notices of cancellation. The Division should not, therefore, be estopped from pursuing the corporation tax deficiencies which have heretofore been sustained.

G. The petition of Rujak Trucking Corp. is granted to the extent indicated in Conclusion of Law "D"; the notices of deficiency issued to petitioner on May 1, 1989 which assert deficiencies of tax pursuant to Tax Law §§ 184 and 184-a are cancelled; and, except as so granted, the petition is in all other respects denied.

DATED: Troy, New York

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ADMINISTRATIVE LAW JUDGE