STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PROPANE TRANSPORTATION CORP.	:	DETERMINATION 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., 175 Price Parkway, Farmingdale, New York 11735, filed a 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.

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 March 20, 1990 at 1:15 P.M. at which time two issues were identified and rescheduled for two separate hearings. The two hearings were held before Marilyn Mann Faulkner, Administrative Law Judge. The first hearing took place at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on October 24, 1990 at 10:00 A.M. The second hearing took place at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on June 11, 1991 at 10:15 A.M., with all briefs to be submitted by October 15, 1991. Petitioner submitted a brief on August 15, 1991. The Division of Taxation submitted a brief on September 16, 1991. Petitioner submitted a reply brief on October 15, 1991. Petitioner appeared by Samuel R. Dolgow, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Vera R. Johnson, Esq., of counsel).

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

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 the parent 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.

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-owned bobtail trucks to manufacturers or end users. PTC-NJ did not have an Interstate Commerce Commission license.[1]

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

[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).

officer of the parent corporation, testified that Synergy Gas Corp.-Delaware[2] maintained the 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

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[2]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.

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	Additional Interest	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[3]
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

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[3] 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.

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[4] 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 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

[4]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.

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".

SUMMARY OF THE PARTIES' POSITIONS

Petitioner argues that it was not "doing business" in New York and, thus, was not subject to tax under Article 9 because it did not make a profit and performed no services other than for its own affiliates. Petitioner further notes that if its operations were merged into any of the affiliates it serviced, the combined entity would derive less than 50% of its total revenues from transportation activities and, therefore, would not be subject to Article 9 liability. Petitioner concludes that the substance of the transactions should prevail over form because it does not collect or receive revenues or consideration of any kind for its services "but instead merely receives bookkeeping 'credits' that are balanced out by bookkeeping adjustments that reflect reasonable adjustments about petitioner's share of intercompany (i.e., the parent and its

subsidiaries) expenses." (Pet. Reply Brf. at 4.)[5]

The Division rejects petitioner's contention that its transportation activities are so integrally related to the affiliated corporations' activities that it is not conducting business within the meaning and intent of Tax Law §§ 183 and 184. The Division refers to petitioner's 1983, 1984 and 1985 New Jersey business corporation tax returns as evidence that petitioner was "doing business" as a transportation company generating income and expenses. The Division argues that the fact that petitioner's income and expenses involve only paper transactions between it and its affiliates "does not diminish the fact that the petitioner generates revenue and incurs debt in a corporate capacity thus exercising its corporate franchise" (Div. Brf. at 12-13).

CONCLUSIONS OF LAW

A. Tax Law §§ 184 and 184-a provide that an additional franchise tax will be imposed on every corporation formed for, or principally engaged in, the conduct of a transportation business for the privilege of "doing business" in the State and metropolitan area of New York City. Petitioner does not question that the transportation activities themselves are subject to tax but whether it is "doing business" within the meaning of the statute.

In support of its case, petitioner refers to the Division's public statement in a Technical Services Bureau Memorandum (TSB-M-82[13]C) which discusses the term "doing business" with respect to Tax Law §§ 183 and 184. Specifically, petitioner notes the following language contained in that document:

"the term 'doing business' is used in a comprehensive sense and includes all

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[5]At the June 11, 1991 hearing, petitioner raised for the first time a defect in the conciliation order inasmuch as it indicated that Assessment No. C880129884F was revised to $2,575.00 under Tax Law § 185. Petitioner argues that section 185 provides no authority with respect to the $2,575.00 liability. It appears that petitioner abandoned this argument. However, in any event, as noted by the Division, there is no merit to the defect claim inasmuch as the defect constitutes a typographical error that is harmless and does not effect the validity of the conciliation order (see, Matter of Pepsico v. Bouchard, 102 AD2d 1000, 477 NYS2d 892).

> 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 of any of the purposes of its organization is deemed to be 'doing business' for purposes of the tax."

Based on the above language, petitioner argues that the Division is not following its own guidelines because petitioner was not organized for "profit" but instead, to provide, in a more efficient manner, the transportation needs of the affiliated corporations which if handled by the affiliates themselves would not be subject to tax. Thus, argues petitioner, it was not "doing business" within the meaning of the statute. Essentially, petitioner's argument rests on the theory that its corporate entity should be disregarded for tax purposes because its only customers were its affiliated corporations.

This theory has been rejected in various tax contexts. In Matter of Prospect Dairy, Inc. v. Tully (53 AD2d 755, 384 NYS2d 264), the court held that there was no basis for ignoring the separate corporate entities of a parent and a subsidiary corporation so as to hold that a transfer of property for consideration by a parent to a subsidiary did not constitute a sale. The court made this decision notwithstanding the taxpayer's argument that the sale achieved the same result as could have been accomplished by a corporate merger where the same transfer of property would have been exempt from taxation. The court noted that the parent and subsidiary made a choice as to the procedures they would follow and could not avoid the tax consequences thereof merely because they could have accomplished the same objective through different procedures.

Similarly, in the present case, the tax consequences of petitioner's separate corporate entity cannot be ignored merely because its business activities could have been carried on by another affiliate without being subject to tax as a transportation business. The taxpayer is bound, for tax purposes, by the business format it chooses (see, Matter of 107 Delaware Assoc. v. State Tax Commn., 64 NY2d 935, 488 NYS2d 634, revg on dissent 99 AD2d 29, 33-34, 472 NYS2d 467). The corporate entity may not be disregarded, for tax purposes, where the corporation performs a genuine business activity for which it was created (see, 10 Mertens, Law of Federal Income Taxation, § 38.12). Here, the fact that petitioner engaged in its intended

business activity of transporting propane gas only with its affiliates does not immunize it from taxation (see, Merit Oil of New York v. State Tax Commn., 124 AD2d 326, 508 NYS2d 107). To the extent that a corporate entity is a legal creation, there are certain legal ramifications where, with few exceptions, the form of the transaction and not its substance controls, contrary to petitioner's assertion. The present tax situation does not constitute such an exception (see, e.g., Matter of Greco Brothers Amusement Co., Inc. v. Chu, 113 AD2d 622, 497 NYS2d 206; Matter of Sunny Vending Co. v. State Tax Commn. of the State of N.Y., 101 AD2d 666, 475 NYS2d 896; see also, Matter of Concrete Delivery Co., Inc. v. State Tax Commn., 71 AD2d 330, 423 NYS2d 293 [legal rights in ownership of truck determinative]).

Thus, because of its separate corporate identity, business transactions between petitioner and the affiliated corporations are taxable events. The fact that the revenues and expenses are closely aligned does not alter the fact that petitioner is a separate corporate entity engaged in a valid business activity with other affiliates. While its profits may be minimal, the fact that its business activities generate revenues is sufficient to constitute "doing business" within the meaning and intent of Article 9. Indeed, a company may operate at a loss and nonetheless be "doing business" within the meaning of the statute.

B. Moreover, petitioner's cite to McAllister Bros., Inc. v. Bates (272 App Div 511, 72 NYS2d 532) does not support its theory that it is not a transportation corporation. In that case, the court was determining whether the taxpayer corporation was a "transportation" or "business" corporation under Article 9 or Article 9-A. The court held that it was the nature of the business and not the corporation's chartered rights that controlled its classification for franchise tax purposes. Here, there was no question that the nature of petitioner's business and its chartered rights warranted its classification as a "transportation" corporation. The only question was whether its separate corporate identity should be disregarded for tax purposes because its only business dealings were with other affiliated corporations.

C. The petition of Propane Transportation Corp. is denied and the notices of deficiency dated January 29, 1988, as reduced by stipulation to $10,401.00, plus interest, are sustained.

DATED: Troy, New York

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ADMINISTRATIVE LAW JUDGE