STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:
of	:
E.S.F., INC. TOTAL TRANSPORTATION SERVICES	:DETERMINATION
	DTA NO. 812119
for Redetermination of a Deficiency or for Refund of Corporation Tax under Article 9 of the Tax Law for the Years 1988, 1989 and 1990 and for Revision of a Determination or for Refund of Highway Use Tax under Article 21 of the Tax Law for the Period July 1, 1990 through June 30, 1991.	:

Petitioner, E.S.F., Inc., Total Transportation Services, P.O. Box 1114, Hightstown, New Jersey 08520, filed a petition for redetermination of a deficiency or for refund of corporation tax under Article 9 of the Tax Law for the years 1988, 1989 and 1990 and for revision of a determination or for refund of highway use tax under Article 21 of the Tax Law for the period July 1, 1990 through June 30, 1991

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on August 24, 1994 at 1:15 P.M. Petitioner filed two letters in lieu of briefs on September 6, 1994. The Division of Taxation filed a brief on January 25, 1995. Petitioner had until February 15, 1995 to submit its reply brief, and this date began the six-month period for the issuance of this determination. Petitioner appeared by Elliot S. Frankfort, President. The Division of Taxation

appeared by William F. Collins, Esq. (Vera R. Johnson, Esq., of counsel).

ISSUES

I. Whether petitioner is a transportation business within the meaning and intent of Tax Law §§ 183 and 184.

II. Whether the Division of Tax Appeals has jurisdiction to direct the Division of Taxation to allow petitioner to offset its truck mileage tax liabilities with fuel use tax refunds, some of which are claimed for subsequent periods.

FINDINGS OF FACT

On May 18, 1992, the Division of Taxation ("Division") issued to petitioner, E.S.F., Inc., Total Transportation Services ("ESF"), a Notice of Determination under Article 21 of the Tax Law for the quarters ended September 30, 1990, December 31, 1990, March 31, 1991 and June 30, 1991 and assessing tax due of $19,171.29, plus penalty and interest.

On June 1, 1992, the Division issued three notices of deficiency to ESF as follows:

Year	Tax Section	Tax	Interest	Total
1988	183	$ 75.00	$ 29.64	$ 104.64
1989	183	75.00	19.01	94.01
1990	183	86.00	10.57	96.57
Total		$ 236.00	$ 59.22	$ 295.22

Year	Tax Section	Tax	Interest	Total
1988	184	$2,349.00	$ 928.25	$ 3,277.25
1989	184	3,076.00	779.66	3,855.66

1990	184	4,179.00	513.67	4,692.67
Total		$9,604.00	$2,221.58	$11,825.58

Year	Tax Section	Tax	Interest	Total
1988	184A	$ 399.00	$ 157.67	$ 556.67
1989	184A	523.00	132.56	655.56
1990	184A	618.00	75.96	693.96
Total		$1,540.00	$ 366.19	$ 1,906.19

The notices were the result of an audit as discussed hereinafter.

ESF was incorporated in the State of New Jersey on November 17, 1983 and began doing business in New York State in 1988. It operated out of the home of its president, Elliot S. Frankfort, which was located at 97 Bennington Drive, E. Windsor, New Jersey. Petitioner had a contract with NTS, Inc. ("NTS") to haul food product from NTS's two warehouses in Edison, New Jersey and Wallkill, New York to numerous Shop Rite supermarket food stores in Connecticut, Massachusetts, New Jersey, New York and Pennsylvania. On occasion, the tractor-trailers would pick up goods at the Shop Rite stores and deliver it to the warehouses. ESF also had a contract with Sort Freight Systems, Inc. ("Sort") by which Sort was to provide tractors and drivers to allow ESF to satisfy the conditions of its agreement with NTS.

Petitioner filed two applications for highway use and/or automotive fuel carrier permits on August 30, 1990 and December 18, 1990. The applications requested permits for 13

different tractors that were being leased from Sort.

In performing the audit, the auditor reviewed petitioner's books and records in detail, including vehicle manifests, odometer readings, trip reports, dispatcher records, New York State Thruway receipts, fuel tax reports of other states, the amount of fuel purchased by ESF in New York State and settlement sheets from NTS which indicated mileage, trips and location of the vehicles. These records were maintained at 97 Bennington Drive, E. Windsor, New Jersey. The auditor reviewed petitioner's U.S. corporation income tax returns (Form 1120) for the years 1988, 1989 and 1990 which indicated, among other things, that ESF took a deduction for repairs in all three years and took a deduction for depreciation in 1990. The Federal income tax returns reported the transportation activities of the vehicles and drivers leased by ESF.

The auditor explained that ESF met the three criteria necessary for a business to be classified as an Article 9 transportation corporation: that the entity must be a corporation; that the business operation must have made two pickups in New York State during any period; and that the revenue of the business must be more than 50% from trucking. It was the auditor's opinion that ESF met these criteria.

The auditor utilized petitioner's U.S. corporation income tax returns to initially verify income. For Federal purposes, petitioner reported gross receipts of $782,851.00, $1,025,372.00 and $1,012,076.00 for the years 1988, 1989 and 1990, respectively. The Division applied to the gross receipts a

mileage ratio to arrive at revenue subject to Article 9 franchise tax.[1] The auditor applied the appropriate franchise tax rate, added the surcharge taxes and minimum tax imposed under Article 9, Tax Law § 183 for tax on capital stock, to arrive at the total franchise tax deficiency of $11,380.00.

The truck mileage tax ("TMT") notice issued by the Division asserts the tax due based upon the results of an audit for the period September 11, 1990 through June 30, 1991. Petitioner filed truck mileage tax/fuel use tax returns (MT-903) for the period under audit but never completed the TMT portion of the returns. The Division determined the mileage traveled in New York State by petitioner for the audit period and multiplied it by the applicable tax rate to arrive at the TMT due of $19,171.00.

On the fuel use tax ("FUT") portion of the MT-903's filed for the period at issue, petitioner claimed a refund of $10,743.00. After review, the auditor allowed a refund in the amount of $4,823.00. Petitioner's refund claims were based upon taxes paid to the states of New Jersey, Connecticut, Massachusetts and Pennsylvania. Petitioner filed motor carrier's tax returns with the Massachusetts Department of Revenue and motor fuel use tax returns with the Division of Motor Vehicles; bureau of motor carriers' returns in New Jersey; motor carriers road tax returns with the Commonwealth of

---

[1]Error ratios of 40% were agreed upon for 1988 and 1989. For 1990, the Division compared the actual mileage traveled in New York State to the total mileage traveled by the vehicles operated by petitioner to arrive at the ratio of .4787.

Pennsylvania; and motor carrier road tax returns with the State of Connecticut, Department of Revenue Services.

Petitioner contends that it is not a transportation company but a sales company, with no employees and no equipment, and that 100% of its revenue is derived from Edison, New Jersey. ESF pays other companies for doing the trucking of the goods, submitting bills to these other companies for fuel charges and taxes. Mr. Frankfort testified that ESF received 10% of the gross receipts for the transportation of goods, with Sort being paid the remaining 90%. He also testified that the depreciation, repairs and insurance on ESF's U.S. corporation income tax returns were for automobiles, not trucks.

Petitioner concedes the TMT due of $19,171.00, plus interest. In fact, petitioner entered into a deferred payment agreement with the Division which provided that petitioner was to pay 25% of the liability within 30 days of the date of the agreement and $1,250.00 a month thereafter. ESF paid $5,233.60 initially, and then made four payments of $1,250.00 before stopping payments because certain refunds claimed to be due were not being paid by the Division. Petitioner claimed that the refund approved by the Division in the amount of $4,823.00 for the period September 11, 1990 through June 30, 1991 and the refund of $11,053.00 claimed by ESF for the period July 1, 1991 through June 30, 1992 should be used to offset the TMT liability. At the time of the hearing, petitions had not been filed with the Division of Tax Appeals concerning the refunds claimed for the period July 1, 1991 through June 30, 1992.

The Division contends that ESF is a transportation corporation because it obtained highway use permits, filed motor carrier returns with states other than New York, has Federal corporation tax returns that report the transportation activities of the vehicles and drivers it leases, submits bills to Sort charging fuel taxes, maintains records regarding the trucking activities and obtains highway use tax stickers.

The Division further contends that petitioner may not offset the refund claimed for the later period because no petition has been filed with the Division of Tax Appeals and thus there is no jurisdiction to hear this issue. As for the refund claimed for the earlier period, it is the position of the Division that no offset is allowed as ESF is attempting to credit a FUT refund against a TMT liability.

CONCLUSIONS OF LAW

A. For the privilege of exercising its corporate franchise, of doing business, of employing capital, or of owning or leasing property in this State in a corporate or organized capacity, or of maintaining an office in this State, every domestic or foreign corporation (except those corporations subject to tax under sections 183 through 186 and such other corporations as are specified in Tax Law § 209[4]) must pay an annual franchise tax to this State (Tax Law § 209[1]). Sections 183 and 183-A impose a tax and surcharge tax on the capital stock of domestic and foreign transportation and transmission corporations and associations. Tax Law §§ 184 and 184-a impose a tax and surcharge tax on the gross earnings of all transportation and

transmission corporations and associations. A transportation or transmission corporation or association is one formed for or principally engaged in the conduct of aviation, railroad, canal, steamboat, ferry, express, navigation, pipeline, transfer, baggage express, omnibus, trucking, taxicab, telegraph, telephone, palace car or sleeping car business or formed for or principally engaged in the conduct of two or more such businesses.

B. Whether a given corporation is properly classified and held subject to taxation under Article 9 or under Article 9-A is to be determined from an examination of the nature of its business activities. Neither the laws under which petitioner was incorporated nor the provisions of petitioner's certificate of incorporation are controlling (see, Matter of McAllister Bros. v. Bates, 272 App Div 511, 72 NYS2d 532, lv denied 272 App Div 979, 73 NYS2d 485; Matter of Holmes Electric Protective Co. v. McGoldrick, 262 App Div 514, 30 NYS2d 589, affd 288 NY 635). In Matter of McAllister Bros. v. Bates (supra), the court set forth a de facto test with respect to such determination as follows:

> "[I]t has firmly been established that classification for franchise tax purposes is to be determined by the nature of [the corporation's] business and that the purposes for which the Corporation was organized are immaterial. This rule with respect to classification for franchise tax purposes applies especially to corporations organized under the general business corporation laws which have within their certificates of incorporation a wide variety of chartered powers." (Matter of McAllister Bros. v. Bates, supra, 72 NYS2d at 536 [emphasis added].)

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 Tax Commn., 135 AD2d 938, 522 NYS2d 689).

C. In determining whether a corporation is properly classified as a transportation company under article 9 it is most appropriate to examine the nature of its business activities (see, Matter of McAllister Bros. v. Bates, supra). As the Tax Appeals Tribunal stated in Matter of Capital Cablevision Systems (Tax Appeals Tribunal, June 9, 1988): "the business must be viewed in its entirety and from the perspective of its customers -- what they buy and pay for (citations omitted)". The record here establishes that NTS engaged the services of ESF to operate a transportation service for the benefit of NTS.

ESF leased the drivers and tractors. ESF maintained all records normally associated with a transportation business. It held the State permits necessary to enable it to operate as a transportation business. It filed tax returns as a transportation business, and filed motor carrier returns with states other than New York. Its Federal corporation tax returns reported the transportation activities of the vehicles and drivers it leased.

ESF was involved in the business of transporting goods. Viewed from the perspective of NTS, what it bought and paid for (see, Matter of Capital Cablevision Systems, supra), it is clear that ESF was conducting a transportation business for the benefit of NTS (Matter of Transervice Lease Corportation, Tax

Appeals Tribunal, October 14, 1993).

D. Petitioner contends that it is involved in the business of sales; that it in effect sells its contract rights to Sort and other suppliers of the vehicles used to transport the goods. However, if it were not for the fact that ESF provides a transportation service which offers to move goods, its business would not exist. The "sale" of the contract rights was provided in conjunction with the transportation service provided to its customers.

E. Petitioner seeks to offset the TMT liability with the FUT refund approved by the Division for the audit period and with FUT refunds claimed to be due for the period following the audit period: July 1, 1991 through June 30, 1992. The Division contends that the earlier refund is not proper because petitioner is attempting to offset TMT with FUT refunds, and the later refund cannot be addressed because no petition exists and it is for a period not under audit. For the reasons stated, the first refund is granted and the subsequent refund is denied.

In essence, petitioner's contention is that equitable recoupment is applicable to the situation herein. The basic rule concerning recoupment is that credit for overpayment of taxes in a previous year which is barred by the statute of limitations may not be recouped against taxes due for a different year on different transactions not under audit (Matter of Mobil Oil Corp. v. State Tax Commn., 62 AD2d 668, 406 NYS2d 365). Stated alternatively, credit for overpayment may be recouped against taxes for the same period on the same

transactions under audit (National Cash Register Co. v. Joseph, 299 NY 200). Here, the initial request for credits for refund of fuel use taxes covered the period of the audit and the same transactions under audit. The Division approved the refund in the amount of $4,823.00 but its denial of the offset because two different taxes were involved is not supported by the record. Both the TMT (Tax Law § 503) and the FUT (Tax Law § 503-a) are highway use taxes under Article 21 of the Tax Law (see, Riluc Co. v. Tax Appeals Tribunal, 169 AD2d 988, 565 NYS2d 265). Therefore, petitioner is entitled to an offset of $4,823.00 for the period September 11, 1990 through June 30, 1991 against the TMT liability for the same period.

F. With regard to the subsequent claim for refund, petitioner is not entitled to the offset of $11,053.00. The year of the refund is different from the year of the liability. There is very little evidence in the record so as to be able to determine whether the refund relates to the same transactions as those upon which tax was assessed (Matter of Abbe L. Kadish, Tax Appeals Tribunal, November 15, 1990). Finally, there is no petition filed with the Division of Tax Appeals with regard to the refund. Without such petition, the Division of Tax Appeals lacks jurisdiction over the claims for refund totalling $11,053.00 for the period July 1, 1991 through June 30, 1992 (20 NYCRR 3000.3).

G. The petition of ESF, Inc., Total Transportation Services, is granted as indicated in Conclusion of Law "E". In all other respects, the petition is denied.

DATED: Troy, New York
August 10, 1995

/s/ Thomas C. Sacca

ADMINISTRATIVE LAW JUDGE