STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
TEXAS EASTERN TRANSMISSION CORP.	:	DETERMINATION DTA NO. 815098
for Redetermination of a Deficiency or for Refund of Corporation Tax under Article 9 of the Tax Law for the Years 1989 through 1991.	:	

Petitioner, Texas Eastern Transmission Corporation, P.O. Box 1642, Houston, Texas 77251, filed a petition for redetermination of a deficiency or for refund of corporation tax under Article 9 of the Tax Law for the years 1989 through 1991.

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on February 5, 1997 at 10:45 A.M., with all briefs to be submitted by June 13, 1997, which date began the six-month period for the issuance of this determination. Petitioner appeared by Harold M. Seidel, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Kenneth J. Schultz, Esq., of counsel).

ISSUES

I. Whether petitioner was principally engaged in the business of supplying gas through mains or pipes or principally engaged in the conduct of a transportation business.

II. Whether, if petitioner was principally engaged in the business of supplying gas, the imposition of the tax imposed by Tax Law § 186 on petitioner's gross earnings from all sources within New York violates the Commerce Clause of the United States Constitution.

FINDINGS OF FACT

1. Petitioner, Texas Eastern Transmission Corporation, and the Division of Taxation ("Division") entered into a stipulation of facts. The stipulated facts have been substantially incorporated into this determination and supplemented by additional facts to more completely

reflect the record.

2. Petitioner is a Delaware Corporation with its principal office and place of business in Houston, Texas. Petitioner had no offices or employees in New York State during the years in issue, 1989 through 1991.

3. Before October 1985, petitioner was in the business of supplying natural gas to its customers in New York and other states. These customers were primarily utility companies. Petitioner purchased natural gas at the wellhead in Texas and Louisiana and transported it through its system of interstate pipelines to purchasers in other states. Because it was principally engaged in the business of supplying natural gas through mains or pipelines, it was subject to the taxes imposed by sections 186 and 186-b of the Tax Law. In the industry, petitioner was known as a "merchant" of natural gas, a term that will be adopted here.

4. As a merchant of natural gas, petitioner was subject to the regulatory jurisdiction of the Federal Energy Regulatory Commission ("FERC").

5. In October 1985, FERC issued an "Open Access Order" (Order 436) which required interstate pipeline companies to use their pipelines to transport natural gas owned by third parties on a nondiscriminatory basis. Under this order, petitioner acted as a common carrier in transporting natural gas owned by others. The natural gas was transported from the producing areas in the south to a delivery point designated by the owner of the gas, usually a conjunction point between petitioner's pipeline and the distribution system of a local gas distributing company.

6. During the years under consideration, petitioner was engaged in two businesses: (1) buying, transporting and selling gas as a natural gas merchant, and (2) transporting the natural gas owned by third parties as a common carrier.[1]

7. During the relevant years, the pipeline system owned and operated by petitioner extended from Texas to the Northeast and Midwest United States, terminating on Staten Island,

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[1]During the same period, petitioner operated natural gas storage facilities in Pennsylvania and Maryland. Storage of gas was not a separate business but was incidental to petitioner's businesses of functioning as a natural gas merchant and as a common carrier.

New York. The pipeline located in New York State was about 2.5 miles long. The total length of petitioner's pipeline system was about 1,900 miles. The terminus of the pipeline system in New York was a meter and regulating station located at North Washington and Western Avenues on Staten Island. From there, the pipeline was connected to a pipeline system owned by Brooklyn Union Gas Company. This, in turn, was part of a pipeline network owned by Brooklyn Union Gas Company, Consolidated Edison Company of New York and Long Island Lighting Company, known as the New York Joint Distribution Facilities System.

8. Petitioner could and did accurately measure (by use of meters and other devices) the volume of gas that it bought, transported and sold and the volume of third-party gas that it transported as a common carrier.

9. Petitioner filed 1989, 1990 and 1991 New York corporation tax reports as a supplier of natural gas under Tax Law § 186. In those years, petitioner's gross receipts from the sale of natural gas exceeded its gross receipts from the transportation of gas for third parties. In 1989, 84.6 percent of petitioner's total revenues were from the sale of natural gas; in 1990, 79.7 percent of petitioner's total revenues were from the sale of natural gas; and in 1991, 67.4 percent of petitioner's total revenues were from the sale of natural gas. The parties stipulated to the accuracy of the figures in the following table which compares petitioner's sales receipts with revenue from other sources. Figures are expressed in millions.

Year	Gross Sales Receipts	Transportation Receipts	Other Revenue[2]	Total Revenue
1989	1722.0	205.9	107.5	2035.4
1990	1339.9	239.2	101.9	1681.0
1991	1066.2	370.9	144.0	1581.1

10. Petitioner's corporation franchise tax returns for 1989, 1990 and 1991 show an

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[2] Other revenue represents amounts that were realized incidental to operation of petitioner's interstate natural gas pipeline. Specifically, they include income from the sale of high-BTU products removed from natural gas delivered to the pipeline in order to make the gas of pipeline quality; rent received from gas property; income from the sale of natural gasoline that is present in some natural gas but which condenses from the natural gas as it is transported by the pipeline; and transportation revenues from liquid hydrocarbons produced offshore which are transported under a transportation tariff in the following amounts: 1989- $700,000; 1990- $1,100,000; 1991- $300,000; and income from storage of gas.

allocation of gross earnings from interest, dividends and other revenue based on an allocation percentage calculated by dividing gross earnings from operating revenues sourced to New York by gross earnings from operating revenues everywhere. For 1989, petitioner calculated an allocation percentage of 6.8843 percent; for 1990, petitioner calculated an allocation percentage of 7.8062 percent; and for 1991, petitioner calculated an allocation percentage of 8.0782 percent. In calculating these percentages, petitioner apparently included sales receipts and transportation receipts in gross earnings from operating revenues sourced to New York and everywhere.

11. During the same three-year period, the volume of natural gas petitioner transported for third parties exceeded the volume of natural gas sold by petitioner. In 1989, 52.2 percent of the gas transported was for third parties; in 1990, 65.1 percent of the gas transported was for third parties; and in 1991, 79.9 percent of the gas transported was for third parties. The percentages are based on the following figures, representing billions of cubic feet of natural gas. Petitioner also transported relatively small amounts of liquid hydrocarbons which are not reflected in the table.

Year	Gas Transported for 3rd Parties	Gas Transported for Sale	Total Gas Transported
1989	574	525	1099
1990	677	363	1040
1991	778	196	974

12. On September 13, 1994, petitioner filed claims for refund of tax paid for the years 1989, 1990 and 1991. It claimed that it had improperly filed returns and paid tax as a supplier of gas under Tax Law § 186 when it should have filed and paid tax as a transportation business under sections 183 and 184 of the Tax Law. For each of the subject years, it filed a form CT-183 (Franchise Tax Return on Capital Stock), a form CT-184 (Franchise Tax Return on Gross Earnings), forms CT-183M and CT-184M (Metropolitan Transportation Business Tax

Surcharge Return[s]) and a CT-8 (Claim for Credit or Refund of Corporation Tax Paid).[3]

Petitioner calculated refunds of tax as follows:

Year	1989	1990	1991
Section 186 Tax Paid	1,194,073.58	1,096,280.07	1,157,080.00
Section 183 Tax Due	44,172.00	50,695.00	45,358.00
Section 184 Tax Due	1,520.00	1,175.00	994.00
Refund Requested	1,148,381.58	1,044,410.07	1,110,728.00

13. By letter dated April 7, 1995, the Division denied petitioner's refund claims on the ground that petitioner's returns were filed properly under section 186 of the Tax Law. The Division reasoned that since petitioner derived more than 50 percent of its gross receipts from the sale of gas it was principally engaged in the business of supplying gas and, therefore, subject to the tax imposed on gas suppliers under section 186. As relevant, the refund denial letter explains the Division's position as follows:

> "We have consistently applied a gross receipts test in order to determine which business a taxpayer is 'principally engaged' in. Advisory opinions on this subject, including TSB-A-89(11)C attached, mention that 'ordinarily' a corporation is deemed to be principally engaged in the activity from which it derives more than 50% of its gross receipts, however, we do not interpret 'ordinarily' to mean that alternative methods may be more appropriate, as you have stated. Instead, we feel the word is used in the sense that, if a taxpayer were to fall below the 50% threshold in any given year (say to 49% while other years exceeded 50%) we would not hold them to a reclassification."

14. FERC issued its Order 636, effective June 1, 1993, requiring interstate pipelines such as petitioner to provide only common carrier transportation services and barring such pipelines from purchasing, transporting and selling natural gas.

15. In a sworn affidavit, Greg P. Bilinski, petitioner's general manager for over 21 years, states that the transportation of a cubic foot of natural gas by petitioner uses the same amount of labor and assets whether the gas is owned by petitioner or a third party. He also states that the

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[3]Sections 183-a, 184-a and 186-b of the Tax Law impose tax surcharges on companies doing business within certain metropolitan districts in the State. For ease of discussion, a reference to Tax Law §§ 183, 184 or 186 may be considered to include a reference to the provision imposing the corresponding surcharge.

amount of assets and labor employed by petitioner's two businesses, gas merchant and common carrier, was directly proportional to the volume of gas transported by the pipeline in each business. Other statements made in the affidavit were stipulated to by the parties.

CONCLUSIONS OF LAW

A. As pertinent to the issues raised here, Tax Law § 186(1) provides as follows:[4]

> "Every corporation . . . formed for or principally engaged in the business of supplying water, steam or gas, when delivered through mains or pipes, . . . shall pay [a tax] for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity in this state" (emphasis added).

The section 186 tax is imposed on "gross earnings from all sources within this state" and "the amount of dividends paid upon the actual amount of paid-in capital employed in this state" (Tax Law § 186[1]). Before 1989, petitioner filed returns and paid tax under this provision. Petitioner claims that its business shifted beginning in 1989 and that it then began doing business primarily as a transportation company. Transportation companies are subject to a franchise tax on capital stock (Tax Law § 183) and an additional tax on gross earnings (Tax § 184). As pertinent to the issues raised here, companies subject to the taxes imposed by sections 183 and 184 are those "principally engaged in the conduct of a transportation or transmission business" (Tax Law § 183[1][b]; § 184[1]).

Both sections 183 and 184 contain apportionment provisions. Tax Law § 183(2) provides:

> "The measure of capital stock in this state . . . shall be such a portion of the issued capital stock as the gross assets . . . employed in any business within this state, bear to the gross assets . . . wherever employed in business."

Tax Law § 184(4) provides:

> "Allocation of gross earnings from transportation and transmission services.--(a) General. A transportation or transmission corporation shall determine its gross earning from transportation and transmission services within this state (except as otherwise provided for in this subdivision) by multiplying its gross earnings from transportation and transmission within and without the state by a fraction, the numerator of which is the taxpayer's mileage within this state and the denominator of which is the taxpayer's mileage within and without this state during the period

[4]All of the relevant Article 9 statutes have been amended several times since 1989. None of the amendments have any substantive affect on the issues being discussed in this determination. The citations in this determination are to the current versions of the statutes unless indicated otherwise.

covered by the report or reports required by this chapter."

Tax Law § 186(1) provides a formula for the apportionment of capital employed in New York, but no specific provision for the apportionment of gross earnings; rather, the tax is imposed on earnings "from all sources within [New York]. . . ."

B. The first issue to be resolved is whether petitioner was "principally engaged in the business of supplying . . . gas . . . delivered through mains or pipes" (Tax Law § 186) or "principally engaged in the conduct of a transportation or transmission business" (Tax Law §§ 183, 184). The parties agree that the standard to be applied is the one articulated in Matter of McAllister Bros. v. Bates (272 App Div 511, 72 NYS2d 532, appeal denied 272 App Div 979, 73 NYS2d 485) where the Court stated: "it has firmly been established that classification for franchise tax purposes is to be determined by the nature of [the corporation's] business" (id., 72 NYS2d at 536; see also, Matter of Stat Equipment Corp., Tax Appeals Tribunal, January 26, 1996; Matter of Capitol Cablevision Systems, Tax Appeals Tribunal, June 9, 1988). McAllister and the cases following it do not identify factors to be considered in determining the nature of the corporation's business; therefore, they offer little guidance in this case where the parties have stipulated that petitioner was engaged in two distinct business activities, each taxed by different sections of Article 9. The question here is which of those two activities was petitioner "principally engaged" in. The cited cases do not supply a standard for making that decision.

Petitioner and the Division offer two different measures for determining the nature of petitioner's business. The Division urges gross receipts as the best measure of petitioner's business activity. Since over 50 percent of petitioner's gross receipts were from its merchant activity, the Division contends that petitioner was principally engaged in the business of supplying gas and properly taxed under Tax Law § 186. The position taken by the Division in this proceeding is consistent with its long-standing policy of categorizing corporations by gross receipts. This policy was articulated in Matter of Joseph Bucciero Contracting (Advisory Opinion, July 23, 1981 [TSB-A-96(28)C]) where it states: "Ordinarily, a corporation is deemed to be principally engaged in the activity from which more than 50 percent of its receipts are

derived." That policy has been repeated frequently in Advisory Opinions (see, e.g., Upper Willow Properties Corporation, Advisory Opinion, May 9, 1996 [TSB-A-96(14)C]; Avoca Natural Gas Storage, Advisory Opinion, March 25, 1996 [TSB-A-96(10)C]), although it has not been promulgated as a regulation or tested in a judicial or administrative proceeding.

Petitioner submits that the use of gross receipts to determine its principal business activity produces a distorted picture that does not accurately reflect its true level of activity in New York. Petitioner claims that it was principally engaged in the business to which it dedicated more of its assets and employees, and it makes the additional claim that its use of assets and employees was directly proportional to the amount of gas travelling through its pipeline. Based on these claims, it submits that it was principally engaged in the transportation business. Finally, petitioner maintains that the use of the word "ordinarily" in the Division's statement of its policy is an implicit concession that a taxpayer's gross receipts may not always be the best measure of a taxpayer's business activity.

C. The term "principally engaged" as it is used in Article 9 is not defined by statute, and the legislative history that is available offers little insight into the legislative intent. Therefore, established principles of statutory construction must be applied in order to ascertain its meaning as used in the statute. Where possible, words of a statute should be interpreted in their ordinary, everyday sense (Matter of Automatique v. Bouchard, 97 AD2d 183, 470 NYS2d 791, 792). Ambiguity in tax statutes are to be construed in favor of the taxpayer and against the taxing authority (Matter of Quotron Systems v. Gallman (39 NY2d 428, 431, 384 NYS2d 147,149); however, they are to be construed in favor of a taxpayer only where a legitimate ambiguity exists Matter of RVA Trucking v. New York State Tax Commn. (135 AD2d 938, 522 NYS2d 689). If the Division's interpretation of the statute is reasonable, petitioner has the burden of showing that its own construction of the statute is the only reasonable one or that the Division's interpretation is unreasonable (Matter of Aetna Casualty and Surety Co. v. Tax Appeals Tribunal, 214 AD2d 238, 633 NYS2d 226).

D. In the absence of precedent explicitly considering whether the Division's policy is a

correct interpretation of the statute, the Division offers several arguments for using gross receipts as a measure of a corporation's principal business activity. First, the Division contends that gross receipts is a common denominator which provides a single standard for comparing different business activities of the same taxpayer and of different taxpayers. The Division argues that the use of a single standard permits the efficient and uniform treatment of all taxpayers. Second, the Division notes that the use of gross receipts as a measure of business activity was indirectly adopted in Matter of Stat Equipment Corp. (Tax Appeals Tribunal, January 25, 1996). The issue there was whether the petitioners were principally engaged in the conduct of a transportation business. The petitioners operated two services, an ambulette service that was conceded to be a transportation service and an ambulance service. The ambulette services constituted a small portion of the petitioners' gross receipts. Although the decisive issue was whether the ambulance service was a medical service or a transportation service, the decision is relevant here because the Tribunal used gross receipts as a measure of business activity. It concluded that the ambulance service was a medical service and, inasmuch as "[m]ore than 50% of petitioner's gross receipts were derived from ambulance services," petitioner was not principally engaged in a transportation service.

Finally, the Division argues that three judicial opinions indirectly support its position. Two of the opinions, Matter of Automatique v. Bouchard (97 AD2d 183, 470 NYS2d 791, 792) and Matter of Moran Towing and Transportation Co. (72 NY2d 166, 531 NYS2d 885), are of limited utility here. They hold that the word "principally" as used in Article 28 means more than 50 percent. There is no reason to define the word "principally" differently when it is used in Article 9, and petitioner agrees that the word means more than 50 percent. However, that conclusion does not help to resolve the primary issue. The third case cited by the Division is more directly on point and lends support to the Division's contention that it has reasonably interpreted the statute. In Matter of RVA Trucking v. New York State Tax Commn. (135 AD2d 938, 522 NYS2d 689), the Court used gross receipts as a measure of the petitioner's activities, as the Division seeks to do here. The outcome of that case turned on the definition of

"trucking" and "transportation". The Court held that the State Tax Commission reasonably defined "transportation" and "trucking" as those terms are used in Article 9; that the petitioner's activities fit within those definitions; and that it would be irrational not to tax the petitioner under Article 9 since 65 percent of its gross receipts were from activities that clearly fell within the definition of transportation or trucking (id., 522 NYS2d at 690).

E. For the reasons advanced by the Division, I find that petitioner's business activities are properly measured by its gross receipts. When determining which one of two business activities is predominant, the use of gross receipts provides an objective and reasonable standard for comparison. As the Division points out, it is a standard that has been relied on in other proceedings (see, Matter of RVA Trucking v. State Tax Commn., supra; Matter of Stat Equipment, supra). Moreover, the use of gross receipts as a measure of business activity is consistent with the intent of Tax Law § 186 as that intent is expressed in the statute. The tax imposed by section 186 is, in part, a tax on "gross earnings". "Gross earnings" is defined to mean "all receipts from the employment of capital without any deduction" (Tax Law § 186[1]). In short, "gross earnings" means "gross receipts" for purposes of Tax Law § 186. Since the tax is imposed on the taxpayer's gross receipts, it is reasonable to construe the statute to mean that a taxpayer is "principally engaged" in the activity from which it receives more than 50 percent of its gross receipts. Over 65 percent of petitioner's gross receipts were from its merchant activity in each year under review; therefore, it would be unreasonable not to tax petitioner as a supplier of gas under Tax Law § 186.

F. Petitioner has not demonstrated that the Division's interpretation of the statute is unreasonable. Petitioner states that the use of gross receipts produces a distorted picture of its business activity because petitioner's gross receipts include the cost of gas sold. As a consequence, the volume of gas petitioner transports for third parties would have to greatly exceed the volume transported for its own sales before petitioner would be categorized as a transportation company using the Division's gross receipts test. While this is true, it is an outcome of the statute itself, and it does not show that the Division's use of a gross receipts test

is unreasonable.

Ultimately, petitioner's objections to the use of gross receipts as a measure of its business activity is an objection to the definition of "gross earnings" found in section 186(1) of the Tax Law. The Legislature amended Tax Law § 186 in 1907 by adding the existing definition of gross earnings and changing the former judicial construction of the statute to eliminate any deduction for receipts representing the cost of raw materials (L 1907, ch 734; see, People v Gaus, 199 NY 147). The Court of Appeals characterized the 1907 amendment as offending against the normal concept of gross earnings (People v. Gaus, supra at 150). Nevertheless, it is within the prerogative of the Legislature to include the cost of goods sold in the tax base. If inclusion of the cost of gas sold in petitioner's gross earnings gives a distorted picture of petitioner's business activities, it gives a distorted picture of the business activities of every other supplier of gas taxed under Tax Law § 186 as well. The Legislature's determination to include costs of goods sold in gross earnings cannot serve as a reason for not categorizing petitioner as a supplier of gas.

In addition, petitioner has not established that its own construction of the statute is the only reasonable one. Petitioner contends that its principal business was the one in which it employed more of its assets and labor. However, petitioner has not established the facts which would show that more of its assets and labor were used in its transportation business. Petitioner relies entirely on the affidavit of its General Manager, Greg Bilinski, to establish the factual basis for its legal position. Although affidavits may be received into evidence at administrative hearings (20 NYCRR 3000.15[d][1]), the finder of fact is not required to find facts based on statements made in an affidavit (Matter of Orvis v. Tax Appeals Tribunal, 86 NY2d 165, 630 NYS2d 680). In his affidavit, Mr. Bilinski states that the same amount of labor and assets were used to transport a cubic foot of gas regardless of whether the gas transported was owned by third parties or by petitioner. Even if that statement is accepted, it does not follow as a correlative that "[t]he amount of assets and labor employed in each of TETCO's two businesses was directly proportionate to the volume of gas transported by the pipeline in each business"

(affidavit of Greg Bilinski). Although petitioner's entire position is premised on this statement, the record is barren of the factual detail which is necessary to support it. Petitioner elected not to provide witness testimony, affidavits or documents to describe its businesses, the nature of the labor and assets employed in each business or its method of accounting for assets and labor employed in each business. The few facts in the record at least raise questions about the accuracy of petitioner's main proposition. For instance, cash is an asset; presumably, it was an asset petitioner employed to purchase the gas it sold. Since petitioner would not have incurred the same expense in its common carrier activity, it follows logically that petitioner expended more of its assets in its merchant business than it did in its common carrier business.

As support for the conclusion that its principal business was the transportation of natural gas, petitioner states that its profits were earned from its common carrier business and not from its merchant business. To prove this fact, it cited in its brief to FERC regulations which prevent electing pipeline companies from earning a profit on the sale of gas (18 CFR 154.303[c]) and FERC regulations establishing that petitioner made such an election (18 CFR 154.304[c]). I do not understand how this supports petitioner's primary contention that a corporation is principally engaged in the business activity to which it dedicates most of its assets and labor.

Petitioner has not shown that the Division's interpretation of the statute, as expressed in its policy of using gross receipts as a measure of business activity, is unreasonable or that petitioner's interpretation of the statute is the only reasonable one; therefore, the Division's conclusion that petitioner properly filed its Article 9 returns under Tax Law § 186 is sustained.

G. Petitioner's alternative contention is that Tax Law § 186 is unconstitutional as applied. It states:

> "[T]o the extent the section 186 tax applies to interstate transactions, that is to sales in New York of gas that is brought into the state from a sister state, the section violates the Commerce Clause and . . . the section is therefore unconstitutional as applied to interstate transactions." (Petitioner's reply brief, p. 9.)

Petitioner characterizes Tax Law § 186 as an unapportioned gross receipts tax and, relying on the reasoning of Oklahoma Tax Commission v. Jefferson Lines (514 US 175, 131 L Ed 2d 261), argues that the application of the tax to petitioner's gross earnings is a violation of

the Commerce Clause.

The Division maintains that petitioner's arguments amount to a challenge to the constitutionality of Tax Law § 186 on its face, a challenge which the Division of Tax Appeals has no jurisdiction to consider (see, Matter of Allied Grocers Coop., Tax Appeals Tribunal, November 30, 1989, confirmed 162 AD2d 791, 557 NYS2d 707; Matter of Fourth Day Enterprises, Tax Appeals Tribunal, October 27, 1988). Alternatively, the Division argues that an apportionment of gross earnings is required by Tax Law § 186 since the tax base is "gross earnings from all sources within the state".

In Central Greyhound Lines, Inc. v. Mealey (334 US 653, 92 L Ed 1633), the United States Supreme Court struck down New York's gross receipts tax on transportation services imposed without apportionment on total receipts from carriage through New York and neighboring states (Tax Law former § 186-a). The Court held that the statute was flawed because of its failure to apportion taxable receipts according to miles traveled through the various states. In Oklahoma Tax Commission v. Jefferson Lines (supra), a common carrier did not collect or remit sales tax on bus tickets sold in Oklahoma for interstate travel originating there. Relying primarily on Central Greyhound, the lower Federal courts found that the sales tax was inconsistent with the Commerce Clause because it imposed an undue burden on interstate commerce and created a risk of multiple taxation by different states. The Supreme Court reversed the lower courts holding that the sales tax is distinguishable from the gross receipts tax struck down in Central Greyhound by the fact that the incident of the tax is on the buyer rather than the seller eliminating the possibility of double taxation Oklahoma Tax Commission v. Jefferson Lines (supra, 131 L Ed 2d at 275).

Petitioner states that "the close similarity between the section 186 tax involved in the instant case and Central Greyhound is apparent" (Petitioner's reply brief, p. 10). While there may be similarities between them, the two statutes are not identical. As the Division points out, petitioner computed an allocation percentage on each corporation franchise tax return filed for the subject years by dividing its gross earnings from operating revenue sourced to New York by

its gross earnings from operating revenue everywhere. If petitioner challenges the adequacy of this apportionment scheme, it had the burden of explaining why the apportionment fails to satisfy the Commerce Clause doctrine articulated in Jefferson Lines. It failed to do so. Its only argument as stated in its briefs is that "because the section 186 tax is unapportioned, the tax does not meet the test of fair apportionment necessary for a tax to apply to interstate transactions" (Petitioner's brief, p. 14). This argument lacks any reference to specific facts or circumstances of petitioner's case, and its logical conclusion is that the section 186 tax cannot be applied to any interstate transactions without violating the Commerce Clause. Therefore, I agree with the Division that petitioner's position is a challenge to the facial constitutionality of Tax Law § 186 (see, Matter of New Milford Tractor Co., Tax Appeals Tribunal, September 1, 1994; Matter of Barrier Oil Co., Tax Appeals Tribunal, January 4, 1991). Legislative enactments are deemed to be constitutional at the administrative level (Matter of Fourth Day Enterprises, supra).

H. The petition of Texas Eastern Transmission Corporation is denied, and the denial of petitioner's claims for refund of tax is sustained.

DATED: Troy, New York
September 18, 1997

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE