STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NEW YORK COIN TELEPHONE CO., INC.	:	DETERMINATION DTA NO. 815210
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9 of the Tax Law for the Years 1991 through 1993.	:	

Petitioner, New York Coin Telephone Co., Inc., 43 Market Street, Poughkeepsie, New York 12601, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9 of the Tax Law for the years 1991 through 1993.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on April 9, 1997 at 10:15 A.M., with all briefs to be submitted by September 15, 1997, which date began the six-month period for the issuance of this determination. Petitioner appeared by Jeffrey S. Battistoni, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Marvis A. Warren, Esq., and Kenneth Schultz, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly determined that petitioner, New York Coin Telephone Co., Inc., is principally engaged in the conduct of a telephone business subject to taxation under sections 183 and 184 of the Tax Law.

FINDINGS OF FACT

1. The record in this matter is rather sparse. The Division of Taxation ("Division") presented the sole witness. Petitioner submitted only two pieces of documentary evidence into the record. The remainder of the record was submitted by the Division.

2. The Division issued to petitioner, New York Coin Telephone Co., Inc. ("NYCTC"), a Notice of Deficiency (Notice number L-009963462-5) dated January 9, 1995 for corporation franchise tax due pursuant to Tax Law, article 9, in the amount of $21,810.00, plus interest of $3,103.95 for a total amount due of $24,913.95. The explanation section contained the following statement, among other things:

> "This notice of estimated additional tax is being issued because we did not receive the reports requested in our correspondence dated 08/19/94."

3. Petitioner, incorporated in New York State on July 6, 1990, is a provider of customer owned currency operated telephones ("COCOTS"), which it places at various locations. It purchases telephone service from a telephone exchange carrier, primarily NYNEX.

4. On March 20, 1991, petitioner filed with the Division a Form CT-6, Election by a Federal S Corporation to be Treated as a New York State S Corporation ("S Corporation election form"), effective January 1, 1991. On the S Corporation election form, two equal shareholders were listed, Robert Jankovics and Louis Galanos.

5. Petitioner timely filed a Tax Return for Gross Operating Income (Form CT-186-A) pursuant to Tax Law, article 9, § 186-a and a Metropolitan Transportation Business Tax Surcharge Return (Form CT-186-A/M) for each of the years in issue, 1991 through 1993. On each of the Form CT-186-A's petitioner listed the nature of its business as operating pay telephones.

6. The Division commenced a desk audit with the issuance of a Notice of Failure to File Corporation Tax Form ("failure to file notice") dated December 11, 1993 for the tax period ended December 31, 1992. The failure to file notice requests that Form CT-3-S/CT-4-S be filed.

7. Petitioner's response, dated May 31, 1994, written on the back of the failure to file notice, follows:

> "THE CORPORATION IS NOT A NYS SUBCHAPTER S CORPORATION. IT IS AN ARTICLE 9 UTILITY COMPANY. IT FILED A FORM CT-186 A FOR THE PERIOD ENDED 12/31/92. THE RETURN WAS FILED 3/15/93."

The Division's Corporation Tax Delinquency Unit processing section received petitioner's response on June 19, 1994.

8. In a letter dated July 15, 1994, an auditor requested additional information from petitioner concerning its New York State franchise tax reports for the years 1990 through 1993 as follows:

> "Your reply to our Notice of Failure to File a Corporation Tax Form states that the corporation filed form CT-186A for the period ended 12/31/92. In order to help us determine under which article of the Franchise Tax Law you should be taxable, please supply the following information:
>
> "1. A description of your business activities.
>
> "2. The amount of gross receipts you have received from each activity."

9. In response to the Division's July 15, 1994 correspondence, petitioner's accountants sent a letter dated August 11, 1994 containing the following information:

> "1. The corporation currently owns and operates coin operated pay telephones. In 1991 and 1992, the corporation also sold long distance service and received commission income from the sales of long distance service.
>
> "2. The amounts of gross receipts from each activity were as follows:

	1990	1991	1992	1993
Telephone Sales from Coin Operated Pay telephones	$-0-	$342,104	$648,881	$786,484
Commission Income	-0-	$270,628	$140,327	$ -0-

"The corporation also received gross rental income of $12,855 in 1992 and $17,061 in 1993 from the rental of a building the corporation owned."

10. After reviewing the description of the business activities and the source of the gross receipts for each activity outlined in petitioner's August 11, 1994 letter, the Division determined that petitioner was taxable under Article 9, §§ 183 and 184, in addition to § 186-a. The Division informed petitioner of its findings by letter dated August 19, 1994, and also requested that petitioner fill out enclosed tax forms CT-183, CT-184, CT-183M and CT-184M for the years 1991 through 1993.[1]

11. By a letter dated September 21, 1994, the Division responded to telephone inquiries from petitioner's staff as follows:

> "Page 5 of the instructions of CT-183/184-P for 1992 states in part that gross operating revenue from telephone and telegraph services includes receipts such as local service receipts from public telephones, toll service receipts and any other transmission receipts.
>
> "In determining gross operating revenue, receipts include cash, credits and property of any kind or nature without any deductions.
>
> "Based on the above, it appears that the corporation is taxable under Article 9, Sections 183 and 184 in addition to 186-A."

[1]At the hearing, the auditor explained that since there were no gross receipts for 1990, that year was not included in the audit period.

The Division enclosed Publication 130-D with its letter which explained petitioner's rights if it disagreed with the finding expressed in the letter.

12. Petitioner's attorney requested a determination from the Division's Technical Services Bureau ("TSB") regarding whether Tax Law §§ 183 and 184 applied to petitioner. Petitioner's request, contained the following assertions:

> "First, the Instructions for Form CT-186-A specifically indicate that customer owned currency operated telephones (COCOTS) must file that Form 186-A and pay the §186-A tax. However, the instructions for Forms CT-183 and CT-184 contain no such specific reference. The underlying statutes, Tax Law §183 and §184, impose franchise taxes only on 'transportation and transmission corporations or associations'. Specifically, the tax is imposed on a corporation engaged in the conduct of telephone business. My client owns (as more accurately described further herein) coin operated telephones which it places at various locations. My client collects the coins deposited in those phones and then pays portions of those deposits to the telephone company (NYNEX) and location owner. My client does not provide any telephone transmission lines, is not in the business of providing any telephone services and does not have the capability to do either of the above. Therefore, my client does not fall within the definition of the corporations and associations upon whom the taxes are imposed.
>
> "Second, although the §186-A tax is imposed on persons as well as corporations, the §183 and §184 taxes do not include 'persons' in the definition of the entities subject to the taxes. As I read §183 and §184, it is my impression that these taxes were intended for the 'heavy hitters', i.e. the large corporations that are truly utilities. They thus had to be imposed on corporations and associations, and not individuals and partnerships. They were not intended for COCOTS and do not apply to them. In reference to this point, I have found that all of the phones associated with my client are actually owned in individual names. In other words, they were never put in the corporate name and the corporation has no ownership interest in any property related to any sort of telephone business. (I can supply copies of phone bills to verify this or could possibly obtain some confirmation of this fact from NYNEX.) Thus, the subject taxes do not apply." (Emphasis in original.)

13. The TSB responded by letter dated November 3, 1994 which provided in pertinent part:

> "Sections 183 and 184 of the Tax Law impose a tax on corporations principally engaged in the conduct of, among other activities, telephone

businesses. To be considered to be principally engaged in the conduct of such business, more than 50 per cent of the corporation's receipts must be derived from the conduct of a telephone business. If the corporation meets the principally engaged test, they would be taxable under Article 9, Sections 183 and 184. If the corporation does not meet the principally engaged test, they would be taxable as a general business corporation under Article 9-A.

"In addition to the tax due under Article 9 or 9-A, if the corporation has receipts in excess of $500.00 in a calendar year from the furnishing of telephone services, they would also be subject to the tax under Section 186-a."

14. By letter dated December 13, 1994 petitioner's representative advised the Division that its TSB letter did not provide any specific comments about the arguments raised by petitioner. He requested that a statutory notice be issued so that his client could appeal the findings. He also stated:

"In my letter to you of October 28th, I set forth various reasons why the §183 and §184 taxes do not apply. There is no need to restate them here. However, my client wants me to reiterate that it is an escrow agent which merely collects money which three parties share. It pays out portions to NYNEX and the property location owner and then keeps its portion of the amount collected."

15. In December 1994, petitioner submitted New York S Corporation Franchise tax returns (Form CT-3-S) for the years 1991, 1992 and 1993 to the Division. The Division processed the returns and the respective payments for tax years 1991 and 1993 only. Review of the processed returns reveals that petitioner reported and remitted $552.00 for 1991 and $460.00 for 1993. In March 1997 the Division detached the 1992 Form CT-3-S and the attached uncashed check, in the amount of $504.00, from the 1993 return. The Division did not cash the check for tax year 1992.

16. As noted in Finding of Fact "2", the Division issued a Notice of Deficiency dated January 9, 1995 to petitioner based upon information and figures provided by petitioner's accountants in August 1994 (*see*, Finding of Fact "9"). At the hearing, the auditor explained that

the Notice of Deficiency issued in this matter did not reflect credit for the taxes paid with the S corporation tax returns because the returns were filed shortly before the notice was issued. The Division agrees that petitioner should receive credit for the taxes paid for the years 1991 and 1993.

17. After a conciliation conference, the conferee issued a Conciliation Order (CMS No. 145633), dated April 26, 1996, sustaining the Notice of Deficiency.

18. In its petition, petitioner asserts, among other things, that it is a provider of:

> "COCOTS which it places in various locations rented from other parties. A utility company, in most cases NYNEX, provides telephone lines to these telephones. NYCTC does not provide, and does not have the capability of providing, such lines or service. NYCTC collects the coins deposited into such phones and sums charged to calling or other cards, pays a fee to NYNEX for the line, pays a share to the location owner and retains the balance. NYCTC is not in the telephone business as contemplated in Tax Law §§ 183 and 184 and does not fall within the definition of the corporations and associations upon whom the subject taxes are imposed."

It contends that all phones "which it installs are actually owned in individual names", not by the corporation. Petitioner also argues that "Tax Law §§ 183 and 184 do not impose taxes on providers of COCOTS per se."

Petitioner also raises a constitutional challenge, contending that:

> "[i]f providers of COCOTS were subjected to these taxes, a double taxation would result to some extent, because the underlying telephone exchange carrier is then subject to these same taxes on what it receives from the providers of COCOTS."

19. The only documentary evidence which petitioner submitted at the hearing consisted of copies of the instructions ("CT-183/184-I") for forms CT-183 and CT-184 for the year 1991, and the instructions ("CT-186-A-I") for Form CT-186-A for the year 1992. The general instructions in CT-183/184-I (1991) provide that corporations formed for or principally engaged

in the conduct of a transmission business (e.g., telephone or telegraph business) must file forms CT-183 and CT-184. Telephone, telegraph and other transmission companies that sell or furnish telephone or telegraph transmission services must compute gross operating revenue and complete Schedule B of Form CT-184. Gross operating revenue from telephone and telegraph services include:

> "Receipts such as the following:
>
> "Local services receipts from subscriber's stations, public telephones, service stations, local private lines and other local service receipts.
>
> "Toll service receipts from message calls, wide area toll services, toll private line services and other toll service receipts.
>
> "Miscellaneous receipts from commissions, directory advertising and sales, rent receipts, general service receipts, license receipts and other miscellaneous receipts.
>
> "Any other transmission receipts."

According to the general information section of CT-186-A-I, providers of COCOTS must file Form CT-186-A.

20. At the conclusion of the hearing, petitioner's representative requested 30 days in which to submit phone bills, or statements from NYNEX or other telephone exchange carriers for the periods 1991, 1992 and 1993. No additional evidence was submitted and the record in this matter was closed on May 9, 1997.

21. Petitioner did not submit either a brief or a reply brief in this matter.

CONCLUSIONS OF LAW

A. For the privilege of exercising its corporate franchise, doing business, employing capital, owning or leasing property in New York State in a corporate or organized capacity, or 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 New York State (Tax Law § 209[1]). The tax is based on entire net income of the corporation or one of three other alternative bases.

Tax Law § 183(1) imposes a franchise tax on certain corporations:

> "principally engaged in the conduct of . . . telegraph, [or] telephone . . .business . . . or formed for or principally engaged in the conduct of two or more of such businesses . . . or principally engaged in the conduct of a . . . transmission business. . . ."

This tax, and the temporary metropolitan transportation business tax surcharge provided by section 183-a, are based upon the corporation's capital stock within New York State.

Tax Law § 184 imposes an additional franchise tax on certain corporations:

> "formed for or principally engaged in the conduct of . . . telegraph, [or] telephone . . . business . . . or formed for or principally engaged in the conduct of two or more of such businesses . . . or principally engaged in the conduct of a . . . transmission business. . . ."

This tax, and the temporary metropolitan business tax surcharge provided by section 184-a, are based on the taxpayer's "gross earnings from all sources within the state."

B. Tax Law § 186-a imposes a tax on every "utility" doing business in the State, whether or not it is regulated by the Department of Public Service, based upon "gross operating income" (Tax Law § 186-a[1]). This tax is imposed in addition to any tax imposed under Article 9-A or sections 183 and 184 of Article 9. Tax Law § 186-c provides for a surcharge on such "utilities," also based upon gross operating income as apportioned to the metropolitan commuter transportation district. The term "utility" includes every person:

> "who sells . . . telephony or telegraphy, delivered through . . . wires, or furnishes gas, electric, steam, water, refrigerator, telephone or telegraph service, by means of mains . . . or wires. . . ." (Tax Law § 186-a[2]).

Similarly, "gross operating income" is defined as:

> "receipts received in or by reason of any sale . . . made for ultimate consumption or use by the purchaser of . . . telephony or telegraphy, or in or by reason of the furnishing for such consumption or use of . . . telephone or telegraph service in this state. . . ." (Tax Law § 186-a[2]).

C. 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 laws a wide variety of chartered powers." (*Matter of McAllister Bros. v. Bates*, *supra*, 72 NYS2d at 536 [emphasis added].)

The regulations of the Department of Public Service define a COCOT as a "provider of telephone service by means of a customer-owned or leased currency or credit operated telephone" (16 NYCRR 650.1).

D. Both petitioner and the Division agree that petitioner provides currency or credit operated telephones at various locations. It is also undisputed that petitioner purchases telephone service from a telephone exchange carrier, primarily NYNEX. However, the parties disagree as to how petitioner should be classified for tax purposes.

In the instant matter, petitioner timely filed tax returns (forms CT-186-A) pursuant to Article 9, § 186-a for the audit period. However, it failed to file corporation franchise tax returns under either Articles 9-A or 9 for the years at issue until December 15, 1994, when it filed forms CT-3-S under Articles 9-A and 22 for the years at issue. As part of the Division's desk audit of petitioner, the Division asked petitioner for a description of its business activities and the gross receipts from each activity. Petitioner described its activities as follows:

> "[t]he corporation currently owns and operates coin operated pay telephones. In 1991 and 1992, the corporation also sold long distance service and received commission income from the sales of long distance service. . . . The corporation also received gross rental income . . . from the rental of a building the corporation owned."

The Division, based upon information supplied by petitioner concerning its business activities and the gross receipts for those activities, determined that petitioner was principally engaged in the conduct of a telephone business and issued a Notice of Deficiency pursuant to Tax Law §§ 183 and 184. Petitioner does not contest that it is a corporation furnishing a utility service (i.e., telephone service) for purposes of Tax Law § 186-a; rather, it contests the Division's determination that it is a corporation principally engaged in the conduct of a telephone business for purposes of Tax Law §§ 183 and 184.

Petitioner failed to submit either a brief or a reply brief in this matter. Therefore petitioner's arguments in support of its position that it is not engaged in the conduct of a telephone business must be ascertained from its petition. Petitioner argues that it does not provide either the telephone line or telephone service; rather, as a COCOTS provider, it simply provides the phone which a customer chooses to use. Petitioner maintains that it is "an escrow agent" which collects money and divides it among the telephone exchange carrier, the location owner and itself. It also argues that all the phones which it installs at various locations are

actually owned in individual names. Lastly, it contends that if COCOTS are subjected to tax pursuant to Tax Law §§ 183 and 184, "a double taxation would result to some extent," because the underlying telephone exchange carrier is also subject to these taxes on what it receives from the provider of COCOTS.

In its brief, the Division argues that petitioner failed to demonstrate that the Division erroneously assessed taxes due under Tax Law §§ 183 and 184. The Division points out that petitioner did not present any witnesses or submit a post-hearing brief. It also points out that even though petitioner was given the opportunity to submit additional proof post-hearing, it failed to do so. The Division also contends that the documentary evidence petitioner did present had little probative value. Addressing the arguments raised by petitioner in its petition, the Division contends that it correctly determined that petitioner is engaged in the conduct of a telephone business for purposes of Tax Law §§ 183 and 184. It maintains that the record clearly establishes that petitioner does not act as an agent for either the telephone exchange carrier or the location owners, but rather engages in the conduct of a telephone business for its own benefit. The Division also asserts that ownership of the telephones and telephone equipment is not relevant to a finding of tax liability under Tax Law §§ 183 and 184. It also argues that a finding of tax liability under these sections will not result in impermissible double taxation.

E. The Tax Appeals Tribunal noted in *Matter of Atlantic & Hudson Ltd. Partnership* (Tax Appeals Tribunal, January 30, 1992) that a determination of tax must have a rational basis in order to be sustained upon review (*see*, *Matter of Grecian Square v. New York State Tax Commn.*, 119 AD2d 948, 501 NYS2d 219). However, the presumption of correctness raised by the issuance of the assessment, in itself, provides the rational basis, so long as no evidence is introduced challenging the assessment (*Matter of Atlantic & Hudson Ltd. Partnership*, *supra*,

citing *Matter of Tavolacci v. State Tax Comm.*, 77 AD2d 759, 431 NYS2d 174; *Matter of Leogrande*, Tax Appeals Tribunal, July 18, 1991).

It is petitioner's burden to prove that the Notice of Deficiency issued by the Division is erroneous (20 NYCRR 3000.15[d][5]; Tax Law § 1089[e]; *Matter of Leogrande v. Tax Appeals Tribunal*, 187 AD2d 768, 589 NYS2d 383, *lv denied* 81 NY2d 704, 595 NYS2d 398). In the instant case, petitioner failed to submit any proof that the Division's Notice of Deficiency was incorrect. The notice was issued to petitioner based upon petitioner's own description of its activities and the gross receipts from each activity as supplied to the Division. At the hearing, petitioner did not present any witnesses. Petitioner's representative did request additional time post-hearing to present evidence in support of NYCTC's contention that the telephones were actually owned in individual names, rather than by the corporation. As noted in Finding of Fact "20", petitioner did not submit any additional documentation. The only evidence presented by petitioner, the instructions for Forms CT-183 and CT-184 for the year 1991 and the instructions for Form CT-186-A for the year 1992, are of little probative value. As for petitioner's argument that it is merely an escrow agent which collects and divides the money among three parties, petitioner failed to submit any evidence in support of that assertion. It is clear from the record that petitioner is reselling telephone service. Viewed from the perspective of its customers, what the users of COCOTS buy and pay for (*see*, *Matter of Capital Cablevision Systems*, Tax Appeals Tribunal, June 9, 1988), petitioner is engaged in the conduct of a telephone business and as such is a transmission corporation.

Petitioner has failed to submit any proof that the assessment was erroneous and, therefore, the Notice of Deficiency is presumed valid and correct (*see*, *Matter of Leogrande v. Tax Appeals Tribunal*, *supra*).

F. Petitioner also argues that if providers of COCOTS, such as itself, are subjected to taxation under Tax Law §§ 183 and 184, "a double taxation would result to some extent," because the underlying telephone exchange carrier is also subject to taxation under the same sections on what it receives from the providers of COCOTS. However, petitioner has not demonstrated that it or anyone else is subject to double taxation, and, moreover, taxing two parties on the same transaction is not per se unconstitutional.

G. The petition of New York Coin Telephone Co., Inc. is denied; and the Notice of Deficiency (Notice No. L-009963462-5) is sustained.

DATED: Troy, New York
March 5, 1998

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE