STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
HARSA CORP., SUCCESSOR IN INTEREST TO HARSA TRUCKING CORP.	:	DETERMINATION DTA NO. 816902
for Redetermination of Deficiencies or for Refund of Corporation Tax under Article 9 of the Tax Law for the Years 1991 through 1995.	:	

Petitioner, Harsa Corp., successor in interest[1] to Harsa Trucking Corp., 500 Executive Boulevard, Elmsford, New York 10523-1234, filed a petition for redetermination of deficiencies or for refund of corporation tax under Article 9 of the Tax Law for the years 1991 through 1995.[2]

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on November 4, 1999 at 10:30 A.M. and continued to conclusion at the same location on March 1, 2000 at 10:30 A.M., with all briefs to be submitted by November 3, 2000, which date began the six-month period for the issuance of this determination. Petitioner appeared by Morrison & Foerster, LLP

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[1] Harsa Corp., incorporated on January 1, 1955, has been in existence longer than Harsa Trucking Corp., which was incorporated in the year 1968. Consequently, it is not accurate to describe Harsa Corp. as "formerly known as" Harsa Trucking Corp. Rather, Harsa Corp. is most accurately described as a successor in interest to Harsa Trucking Corp. since it followed Harsa Trucking Corp. in ownership or control of certain property previously owned by Harsa Trucking Corp. (***see***, Blacks Law Dictionary 1283 [5th ed. 1979]).

[2] The years 1991 and 1992 are no longer at issue. In addition, according to petitioner's representative and confirmed in the auditor's report, the years at issue were the fiscal years ended June 30, 1993, June 30, 1994 and June 30, 1995. However, since the relevant notices of deficiency asserted tax due on a calendar year basis, the caption of this matter references calendar years and not fiscal years.

(Irwin Slomka, Esq., and Hollis L. Hyans, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billett, Esq. (Robert A. Maslyn, Esq., of counsel).

ISSUES

I. Whether petitioner was properly subject to tax as a transportation corporation under Article 9 of the Tax Law, and not subject to tax as a general business corporation under Article 9-A of the Tax Law, for its fiscal years ended in June 1993, June 1994 and June 1995.

II. Whether penalties imposed against petitioner should be abated.

FINDINGS OF FACT

1. Petitioner, Harsa Corp., during the years at issue, was one of four corporate subsidiaries of Singer Holding Corp. ("parent corporation"). Petitioner was part of a consolidated group of related corporations involved in the heating oil business in the New York City metropolitan area, which was run by the Singer family. Its three sister subsidiaries were Original Consumers Oil Heating Corp., Robison Oil Corp. and Sinco Corp.[3] In addition to Saul[4] L. Singer ("Mr. Singer"), who was the majority shareholder of each of the corporations which form the Singer corporate organization, including the parent corporation, other corporate officers listed on petitioner's *pro forma* Federal income tax return for its fiscal year ended June 30, 1995[5] included

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[3] The parent corporation's Federal income tax return for the fiscal year ended June 30, 1993 includes a statement of combined income and deductions which included "Sinro [sic] Corp." as a distinct entity. However, as noted in this determination's Findings of Fact, at some point during the fiscal year ended June 30, 1993, Sinco Corp. was merged into Harsa Trucking Corp. to form Harsa Corp.

[4] The transcript identified Mr. Singer as "Sol" Singer when he was sworn in under oath. However, he is listed as "Saul" Singer on the cover page of the transcript where appearances were noted, and on petitioner's Federal income tax return for the fiscal year ended June 30, 1995 which listed petitioner's corporate officers. Consequently, in this determination, Mr. Singer has been referred to as Saul Singer

[5] The record includes copies of only a scattering of petitioner's and its related corporations' Federal tax returns for the periods at issue. No New York returns were introduced for petitioner or any of its related corporations.

David Singer, Michael Singer, Daniel Singer, Fran Singer, and Samuel Weinstein. The Singer family business traces its roots back to 1926 when Mr. Singer's grandfather, also Saul Singer, started the business. Harsa Corp. honors Mr. Singer's father, *Har*ry Singer, and his grandfather, *Sa*ul Singer, by using the first few letters of their first names as its own corporate name.

2. The Singer family's commercial heating oil delivery business has daily deliveries during the heating season of approximately 1,000,000 gallons. The Singer family is not involved in the residential end of the heating oil business. Rather, its heating oil customers are apartment buildings, office buildings, schools, hospitals, i.e., large volume customers.

3. Up until the years at issue, petitioner's predecessor in interest, Harsa Trucking Corp., made all the heating oil deliveries for the family business, which conducted its business with the public and provided customer service as Original Consumers Oil Heating Corp. ("Original Oil"), petitioner's sister corporation. Deliveries were the responsibility of Harsa Trucking Corp., a separate and distinct trucking company owned by the parent corporation, due to liability concerns. It is a common arrangement in the heating oil business, especially in the commercial end of the business, to have a separate trucking company operate the delivery trucks, which are roughly 40 tons when laden with fuel. In contrast, in the residential end of the heating oil business, much smaller delivery trucks are used. In this way, the parent corporation's assets are shielded from liability for any accidents that might occur. For example, during the period in question, a driver who was delivering heating fuel to a bank customer fell asleep and spilled 4,000 gallons into the bank's parking lot.

4. In the early 1990s, the Singer family, in order to lower costs, improve efficiency, and become more competitive, decided to alter the way in which their heating oil business made its deliveries. Harsa Trucking Corp.'s truck terminal was located in the Bronx, and since union

rules required its trucks to be parked at the terminal overnight, deliveries to customers in Brooklyn, Queens, Staten Island, Nassau County, and lower Manhattan were inefficient, often requiring substantial round-trip travel across bridges in the congested New York City metropolitan area. In addition, Harsa Trucking Corp. employed unionized drivers, and Mr. Singer believed he could reduce delivery costs by having a trucking company with nonunionized drivers provide delivery services to Original Oil. All of Harsa Trucking Corp.'s employees, including its delivery men and truck mechanics, were members of a local of the Teamsters Union. Mr. Singer, on behalf of Original Oil, successfully negotiated an agreement with T & S Trucking Co., Inc. ("T & S"), an established, well-known trucking company unrelated to the Singer family business, located in Brooklyn with nonunionized drivers. T & S agreed to take over deliveries for Original Oil in Brooklyn, Queens, Staten Island, lower Manhattan and Nassau County from Harsa Trucking Corp., which would continue to make deliveries for Original Oil only in the Bronx, Westchester County and upper Manhattan. These areas were more convenient to Harsa Trucking Corp.'s truck terminal in the Bronx and did not require the crossing of bridges as did deliveries to Brooklyn, Queens, Staten Island and Nassau County, areas to be serviced by T & S. In order to avoid difficulties with the union, Mr. Singer timed the changeover to T & S to occur during the summer months of 1992, when many drivers were already laid off due to the seasonal nature of the heating oil delivery business. Every year, two-thirds of Harsa Trucking Corp.'s drivers were laid off in the regular course of operations. In this way, any potential difficulty with the union of firing drivers which might lead to a strike could be avoided by, instead, not hiring back as many drivers in the fall since Original Oil would be utilizing its sister company for only a portion of its heating oil deliveries in the limited geographic area of the Bronx, Westchester and upper Manhattan.

5. The Singer family was successful in lowering the cost of its heating oil deliveries by utilizing T & S pursuant to Original Oil's contract with this nonunionized trucking company. Harsa Trucking Corp. had charged Original Oil the "industry standard" rate for deliveries of heating oil. T & S, on the other hand, had agreed pursuant to its contract with Original Oil to accept payments per gallon of heating oil delivered at a price of between two and eight cents per gallon of heating oil delivered, depending on the grade and volume of oil, which overall was less than the standard industry per gallon delivery rate. During the period at issue, T & S delivered on behalf of Original Oil the following gallons of heating oil:

	Fiscal Year Ended June 30, 1993	Fiscal Year Ended June 30, 1994	Fiscal Year Ended June 30, 1995
# 2 Heating Oil	4,171,093 gallons	6,012,252.3 gallons	4,894,093 gallons
# 4 Heating Oil	8,156,588 gallons	7,137,235.6 gallons	5,820,416 gallons
# 6 Heating Oil	21,579,815 gallons	18,910,777.1 gallons	15,002,856 gallons
Total Heating Oil	33,907,496 gallons	32,060,265.0 gallons	25,717,365 gallons

During the period at issue, petitioner charged its sister company, Original Oil, the following industry standard rates for delivering heating oil:

	Cents Per Gallon Rate (CPG)
#2 Heating Oil	$ 0.080
#4 Heating Oil	0.039
#6 Heating Oil	0.029

Consequently, if petitioner had delivered the heating oil, which T & S had, in fact, delivered on behalf of Original Oil, petitioner would have charged Original Oil the following amounts:

	Fiscal Year Ended June 30, 1993	Fiscal Year Ended June 30, 1994	Fiscal Year Ended June 30, 1995
# 2 Heating Oil	4,171,093 gallons @ $0.080 CPG = $333,687.44	6,012,252.3 gallons @ $0.080 CPG = $ 480,980.18	4,894,093 gallons @ $0.080 CPG = $ 391,527.44
# 4 Heating Oil	8,156,588 gallons @ $ 0.039 CPG = $318,106.93	7,137,235.6 gallons @ $ 0.039 CPG = $ 278,352.19	5,820,416 gallons @ $ 0.039 CPG = $ 226,996.22
#6 Heating Oil	21,579,815 gallons @ $ 0.029 CPG = $ 625,814.64	18,910,771.1 gallons @ $ 0.029 CPG = $ 548,412.36	15,002,856 gallons @ $ 0.029 CPG = $ 435,082.82
Total charge at petitioner's industry rates	$ 1,277,609.01	$ 1,307,744.73	$ 1,053,606.48

Instead of the standard industry rates used above, T & S was paid the following lesser amounts for the heating oil which it delivered on behalf of Original Oil:

	Fiscal Year Ended June 30, 1993	Fiscal Year Ended June 30, 1994	Fiscal Year Ended June 30, 1995
Amount paid to T & S	$1,023,980.00	$1,122,666.00	$ 833,454.00
Total charge at petitioner's industry rates	1,277,609.01	1,307,744.73	1,053,606.48
Differential	$253,629.01	$185,078.73	$220,152.48

As noted in Finding of Fact "4", petitioner continued to make deliveries of heating oil for Original Oil in the Bronx, Westchester and upper Manhattan. Petitioner's receipts from Original Oil for its own deliveries during the period at issue were as follows:

	Fiscal Year Ended June 30, 1993	Fiscal Year Ended June 30, 1994	Fiscal Year Ended June 30, 1995
Petitioner's receipts from Original Oil for its own deliveries of heating oil	$2,979,132.00	$3,022,677.00	$2,228,020.00

6. Since the Singer family was reducing the geographic area in which it would be utilizing its own company to make deliveries of heating oil, petitioner did not need all the delivery trucks that were owned and operated by Harsa Trucking Corp., its predecessor in interest. Consequently, petitioner agreed to sell a substantial portion of its trucking fleet to T & S, which needed more trucks to accommodate its increased delivery routes as a result of its contract with Original Oil. In July 1992, petitioner and T & S contracted for the sale of 20 delivery trucks for $300,000.00, to be paid in a series of payments rather than a lump sum. Pursuant to their contract, executed by Saul Singer as president of Harsa Trucking Corp., petitioner's predecessor in interest, and by Tonino Solimin, as president of T & S, T & S authorized Original Oil to pay petitioner "four mills multiplied by each gallon of oil which [T & S] delivers for Original pursuant to [the agreement between T & S and Original Oil, as detailed in Finding of Fact "4"]." Under this payment arrangement, petitioner would continue to be paid by Original Oil for *all* oil deliveries, both those performed by petitioner and those performed by T & S, at the higher industry standard rate for each grade of heating oil. Petitioner would then pay to T & S the lower price that T & S had agreed to accept for each gallon of oil it delivered. Petitioner would retain from the amounts it received from Original Oil an amount representing (I) the monthly installments on the purchased trucks and (ii) compensation for administrative services it performed for Original Oil, which was determined by Mr. Singer based upon, in his words,

"industry standards" (tr., p. 240). Petitioner's compensation for administrative services rendered for its sister corporation also included an element of profit.

7. The administrative services provided by petitioner for Original Oil, its sister corporation, consisted mostly of record-keeping and the services of dispatchers who would pass on delivery information to T & S. The most important service provided by petitioner was the maintenance of records so as to monitor Original Oil's inventory of heating oil by keeping track of amounts of heating oil withdrawn and delivered by T & S. This monitoring could become a complicated matter since T & S, on a truckload of Original Oil's heating oil, might on occasion deliver one stop of Original Oil and two of other companies, for example. Consequently, in Mr. Singer's words; "So the next day he will use Joe Blow's oil and deliver to my accounts, thereby trying to balance his inventory" (tr., p. 208). Therefore, petitioner performed an important function for Original Oil by maintaining a perpetual inventory of Original Oil's heating oil. By having this one control point concerning Original Oil's inventory of heating oil, an "inventory situation" could be avoided, by knowing, in Mr. Singer's words, "what we have, what he had, and we were able to watch what the terminals had" (tr., p. 209). Nonetheless, although petitioner performed this important record-keeping function, Original Oil retained control over the oil delivery system performed on its behalf. Original Oil had established the geographic delivery areas for T & S. Further, if an overdraw of oil by T & S occurred, Original Oil, which had the oil delivery contract with T & S, handled the problem and instructed either petitioner or T & S on how to resolve it. If a customer had any delivery problems, Original Oil was contacted by the customer, who did not even know that petitioner existed. Original Oil never utilized petitioner to make a delivery in the geographic areas serviced by T & S on the odd occasion when T & S was unable to make a delivery. Rather, Original Oil would be forced to hire a third-party

trucking company to make any such delivery. In addition, the certificate of insurance maintained by T & S named Original Oil as its additionally named insured, and did not mention petitioner at all. If losses or damages were caused by the heating oil itself, it was Original Oil, and not petitioner, that was liable. The services provided by petitioner's dispatchers consisted of the clerical functions of entering into the computer system data given to them by Original Oil concerning deliveries to be made to Original Oil's customers that were to take place each day. Petitioner's dispatchers printed out delivery tickets for petitioner's own deliveries in its own office, and also ensured that information concerning deliveries to be made by T & S was received by T & S in its Brooklyn office, where delivery tickets were printed out and T & S trucks were dispatched. Petitioner's dispatchers did not exercise any control over which loads would be delivered by T & S or by petitioner because Original Oil had decided which geographic areas of the greater New York metropolitan area would be serviced by petitioner and T & S, respectively, for the reasons detailed in Finding of Fact "4". Further, petitioner did not issue any bills of lading to T & S, did not make any contracts in its own name with T & S for trucking services, and did not receive heating oil from Original Oil for transport by T & S.

8. At about the same time that Mr. Singer was negotiating with T & S in order to alter Original Oil's arrangement for heating oil deliveries, the Singer family also decided to merge Harsa Trucking Corp. with its sister corporation, Sinco Industrial Process Corporation ("Sinco"), to create petitioner, Harsa Corp. Sinco was the "service arm" of the Singer family's heating oil business, which had been engaged in servicing and installing boilers, burners, and related electronic equipment for Original Oil's customers. By combining the operations of Sinco with those of Harsa Trucking Corp., the Singer family business was able to improve its efficiency, reduce staff, and lower its overall expenses. But whether petitioner, the entity resulting from the

merger on July 1, 1992 of Harsa Trucking Corp., a trucking company, and Sinco, an installation and service company, was a transportation company itself subject to franchise taxes under Article 9 of the Tax Law was a much more complicated matter than the straightforward identity of Harsa Trucking Corp. as one. The Singer family, with the advice of professionals, decided that petitioner was not a transportation company for purposes of Article 9 and timely filed a corporation franchise tax return under Article 9-A of the Tax Law for each of the years at issue as a general business corporation rather than tax returns under Article 9 as a transportation corporation. Petitioner informed the Division of Taxation ("Division") at the time it filed its first corporation franchise tax return under Article 9-A that its predecessor in interest, a trucking company, had been merged with a boiler service company which changed the nature of its business so that its trucking receipts were less than 50% of its total receipts and therefore was no longer required to file returns under Article 9.

9. The Division issued a Notice of Deficiency dated December 29, 1997 against Harsa Trucking Corp., petitioner's predecessor in interest, asserting franchise tax on transportation corporations under Tax Law § 183 due of $8,241.60 plus penalty[6] and interest as follows:

Year	Tax Asserted Due	Interest	Penalty
1992	$248.65	$123.25	$0.00
1993	2,925.57	1,154.36	767.91
1994	2,702.89	771.10	709.48
1995	2,364.49	406.11	591.10
Totals	$8,241.60	$2,454.82	$2,068.49

[6] The Division asserted penalties against petitioner for failure to file a return in each of the four notices of deficiency at issue pursuant to Tax Law § 1085(a)(1)

The Division also issued a Notice of Deficiency dated December 29, 1997 against Harsa Trucking Corp., asserting due the temporary metropolitan transportation business tax surcharge on transportation corporations under Tax Law § 183-a in the amount of $1,226.14 plus penalty and interest as follows:

Year	Tax Asserted Due	Interest	Penalty
1992	$36.80	$18.24	$0.00
1993	432.48	170.64	108.10
1994	399.56	113.99	100.00
1995	357.30	61.36	100.00
Totals	$1,226.14	$364.23	$308.10

In addition, the Division issued a third Notice of Deficiency dated December 29, 1997 against Harsa Trucking Corp., asserting additional franchise tax on transportation corporations under Tax Law § 184 due of $153,255.84 plus penalty and interest as follows:

Year	Tax Asserted Due	Interest	Penalty
1991	$1,658.70	$1,017.12	$0.00
1992	4,489.37	2,225.30	0.00
1993	49,561.57	19,555.77	13,009.86
1994	52,337.23	14,931.17	13,738.51
1995	45,208.97	7,764.80	11,302.20
Totals	$153,255.84	$45,494.16	$38,050.57

Finally, the Division issued a fourth Notice of Deficiency dated December 29, 1997 against Harsa Trucking Corp. asserting due the additional temporary metropolitan transportation business tax surcharge on transportation corporations under Tax Law § 184-a as follows:

Year	Tax Asserted Due	Interest	Penalty
1991	$244.80	$150.11	$0.00
1992	663.49	328.88	0.00
1993	7,689.70	3,034.17	2,018.52
1994	8,669.15	2,473.20	2,275.61
1995	7,018.65	1,205.48	1,754.65
Totals	$24,285.79	$7,191.84	$6,048.78

The audit report dated November 17, 1997, approximately one month prior to the date of the four notices of deficiency, noted that in calculating the taxes asserted due under Article 9 as detailed above, the auditor allowed a credit for taxes paid by petitioner under Article 9-A.

10. The auditor determined that petitioner was subject to tax as a transportation corporation under Article 9 on the basis that its trucking receipts were more than 50% of its total receipts for each of the years at issue. According to the auditor's report, "Since Harsa was exclusively hauling for Original, therefore, Original's trucking expense must had [sic] been Harsa's trucking income." Consequently, he calculated that petitioner's trucking receipts were 70.58%, 63.69% and 59.61% of petitioner's total receipts for 1993, 1994, and 1995, respectively, as follows:

Year	Total trucking receipts	Service revenue	Total of trucking receipts and service revenue	Transportation % (Trucking receipts÷ total receipts)

1993	$4,256,741.00	$1,774,395.00	$6,031,136.00	70.58%
1994	4,330,422.00	2,468,907.00	6,799,329.00	63.69%
1995	3,281,626.00	2,223,199.00	5,504,825.00	59.61%

The auditor believed that receipts of T & S for its deliveries of Original Oil's heating oil were properly included in petitioner's trucking receipts because petitioner was "acting as a Freight Forwarder for T & S" for several reasons outlined in the audit report as follows:

> 1. Harsa had a control over T & S because Harsa's dispatcher decided which loads were to be delivered by Harsa and which loads were to be delivered by T & S. . . .
>
> 2. Harsa made a profit [on][7] the loads delivered by T & S Trucking and performed some services in return (consideration) such as dispatching loads and [making] sure [of] compliance with given instruction. . . .
>
> 3. Harsa's receipts from Original for T & S [were] all transportation related; therefore, we decided to tax Harsa's entire gross receipts. . . .
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> 4. Since Harsa's receipts from Original for T & S [were] transportation related, we do not agree [with the taxpayer] that . . . Harsa's receipts should not [be included] in total gross receipts of Harsa Corporation. . . .
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> 5. Even though the contract existed between T & S and Original . . . [it] was not a valid contract [because T & S provided services to Original without direct consideration]. . . .
>
> 6. Even though T & S billed Original and the contract [existed] between T & S and Original, T & S worked for Harsa. . . .

Furthermore, the auditor noted that, in the alternative, if petitioner's receipts from Original for payment to T & S were excluded from petitioner's total transportation receipts as well as its total receipts, its transportation percentages for 1993, 1994, and 1995 would be 64.56%, 56.51% and 52.41%, percentages still greater than 50%, calculated as follows:

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[7] The auditor's English usage, including verb tenses and agreement between subject and verb, was at times incorrect. Rather than use "sic" to designate errors, simple grammatical corrections have been substituted.

Year	Total trucking receipts excluding amounts paid over to T & S by petitioner	Service revenue	Total of (I) trucking receipts excluding amounts paid over to T & S and (ii) service revenue	Transportation % (Trucking receipts excluding amounts paid over to T & S ÷ total of (I) trucking receipts excluding amounts paid over to T & S and (ii) service revenue
1993	$ 3,232,761.00	$ 1,774,305.00	$ 5,007,156.00	64.56%
1994	3,207,756.00	2,468,907.00	5,676,663.00	56.51%
1995	2,448,172.00	2,223,199.00	4,671,371.00	52.41%

The amounts in the second column in the table above representing "Total trucking receipts excluding amounts paid over to T & S by petitioner" excluded $1,023,980.00, $1,122,666.00 and $833,454.00, the amounts paid over to T & S by petitioner in the fiscal years 1993, 1994, and 1995, respectively. However, as noted in Finding of Fact "6", petitioner retained from the amounts it received from Original Oil an amount representing the monthly installments on the trucks purchased by T & S from petitioner and compensation for administrative services that Harsa Corp. performed for Original Oil. In the fiscal years 1993, 1994, and 1995, these amounts were $253,629.00, $185,079.00 and $220,152.00, respectively. If these amounts are considered nontrucking income receipts and are excluded from the calculation of petitioner's total trucking receipts so that the amounts shown in the second column in the table above are reduced by such retained amounts, petitioner's transportation percentages for 1993, 1994, and 1995 would be as follows:

Year	Total trucking receipts excluding amounts paid over to T & S by petitioner and excluding receipts from Original retained	Service revenue	Receipts from Original retained by petitioner for administrative services and for installments on trucks sold to T & S	Total of receipts and revenue shown in the 2nd, 3rd, and 4th columns	Transportation % (Amounts in 2nd column divided by amounts in 5th column)
1993	$2,979,132.00	$1,774,305.00	$253,629.00	$5,007,066.00	59.50%
1994	3,022,677.00	2,468,907.00	185,079.00	5,676,663.00	53.25%
1995	2,228,020.00	2,223,199.00	220,152.00	4,671,371.00	47.70%

11. Petitioner submitted 51 proposed findings of fact. Proposed findings of fact "2" through "46", and "49" through "51" are accepted and incorporated into this determination. Proposed finding of fact "1" is accepted in part and incorporated into this determination except for the rejected part which incorrectly stated that petitioner was engaged in making deliveries of *residential* heating oil since as noted in Finding of Fact "2", petitioner is not involved in the *residential end* of the heating oil business. Proposed findings of fact "47" and "48" are more in the nature of conclusions of law and are rejected.

SUMMARY OF THE PARTIES' POSITIONS

12. Petitioner contends that it properly filed franchise tax returns as a general business corporation under Article 9-A rather than as a transportation corporation under Article 9 because its trucking income as a percentage of its total income was less than 50%. Petitioner points out that the Tax Appeals Tribunal in ***Matter of Texas Eastern Transmission Corp.*** (November 12, 1998, ***confirmed*** 260 AD2d 127, 699 NYS2d 560) accepted the Division's position that a taxpayer is "principally engaged" in transportation if it derives *more than 50 percent* of its gross receipts from conducting transportation services. According to petitioner, its trucking income as

a percentage of its total income was 49.40%, 44.46% and 40.47% for the fiscal years ended June 30, 1993, June 30, 1994 and June 30, 1995, respectively, computed as follows:

	Fiscal Year Ended June 30, 1993	Fiscal Year Ended June 30, 1994	Fiscal Year Ended June 30, 1995
Total gross receipts	$6,031,136.00	$6,799,330.00	$5,504,825.00
Less: service income	(1,774,395.00)	(2,468,908.00)	(2,223,199.00)
Less: Total charge for heating oil delivered *by T & S* for Original Oil at *petitioner's industry rates*[8]	(1,277,609.00)	(1,307,745.00)	(1,053,606.00)
Petitioner's trucking income	$2,979,132.00	$3,022,677.00	$2,228,020.00
Trucking income as a % of total gross receipts	49.40%	44.46%	40.47%

Petitioner argues that the Division erroneously treated its receipts from Original Oil, which it paid over to T & S on behalf of Original Oil, as petitioner's own receipts from transportation services. According to petitioner, "transportation receipts must be from transportation services performed by the taxpayer itself" (Petitioner's brief, p. 18). Further, the receipts from Original Oil, which it paid over to T & S, may not be considered petitioner's own transportation receipts on the basis that it was a freight forwarder since petitioner "meets none of the criteria of a freight forwarder" (Petitioner's brief, p. 24).

13. The Division counters that "whether the monies received by [petitioner] for T & S deliveries were included both as transportation and as gross receipts, or excluded from both

[8] As detailed in Finding of Fact "5", T & S was not paid for delivering Original Oil's heating oil at the standard industry rates, as used by petitioner for its own delivery of Original Oil's heating oil, but rather at lower rates which resulted in a differential of $253,629.01, $185,078.73 and $220,152.48 for the fiscal years ended June 30, 1993, June 30, 1994, and June 30, 1995, respectively.

transportation and gross receipts, the transportation receipts still exceeded 50% of its gross receipts" (Division's brief, p. 10). According to the Division, petitioner was acting as a freight forwarder with reference to the heating oil delivered by T & S, and as a result all of its receipts from Original Oil to be paid over to T & S were properly viewed as transportation receipts. Alternatively, the Division argues that petitioner was actively involved in the transportation of oil by T & S so that the receipts it received from Original Oil to be paid over to T & S may be deemed petitioner's own transportation receipts. Further, the Division maintains that petitioner merged with Sinco in order to change its revenue mix and thereby avoid taxation as a transportation corporation under Article 9. Pointing to two intercompany payments made in 1994 by Original Oil to petitioner, in the amounts of $399,000.00 and $551,000.00, the Division contends that the Singer family could shift and allocate monies and payment "for whatever purposes necessary including modification of [petitioner's] revenue mix" (Division's brief, p. 32).

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 209, a corporation doing business in New York is subject to the corporation franchise tax under Article 9-A of the Tax Law, unless specifically exempted or subject to other New York franchise taxes. For example, transportation corporations are not subject to the corporation franchise tax under Article 9-A because they are subject to other franchise taxes on capital stock and gross earnings[9] under Tax Law §183 and Tax Law § 184, respectively, of Article 9 of the Tax Law. As noted by the Court of Appeals in ***Newchannels Corporation v. Tax Appeals Tribunal*** (__AD2d__, 719 NYS2d 182): "These statutes [sections

[9] The parties have used the term "gross receipts" interchangeably with the statutory term of "gross earnings."

183 and 184 of the Tax Law], *inter alia*, impose a franchise tax upon every domestic corporation 'principally engaged in the conduct of a transportation or transmission business' (Tax Law § 183[1][b], § 184[1]) [footnote omitted]." Consequently, the primary issue in this matter is whether, during the period at issue, petitioner was principally engaged in the conduct of a transportation business within the meaning of Tax Law §§ 183 and 184.

B. For purposes of Tax Law §§ 183 and 184, the Appellate Division in ***RVA Trucking v. N.Y. State Tax Commn.***, (135 AD2d 938, 522 NYS2d 689, 690) noted that the Division "quite reasonably defined 'transportation' as comprehending 'any real carrying about or from one place to another' and 'trucking' as generally involving 'the process or business of carting goods on trucks' [citations omitted]."

C. In determining whether petitioner was properly classified by the Division as a transportation company under Article 9 during the period at issue, a close examination of its business activities is required (***see, Matter of McAllister Bros. v. Bates***, 272 App Div 511, 72 NYS2d 532, ***lv denied*** 272 App Div 979, 73 NYS2d 485). As noted in Finding of Fact "8", prior to the period at issue, there is no dispute that petitioner's predecessor in interest, Harsa Trucking Corp., was a transportation company under Article 9. However, in the summer of 1992, petitioner's business activities were altered substantially. As noted in Finding of Fact "10", petitioner's gross receipts for its own trucking services provided to Original Oil in delivering heating oil in the more limited geographic area of the Bronx, Westchester County and upper Manhattan remained substantial: $2,979,132.00, $3,022,677.00 and $2,228,020.00 for its fiscal years ending in 1993, 1994 and 1995, respectively. However, during these fiscal years, petitioner also had substantial gross receipts from servicing and installing boilers, burners, and related electronic equipment for Original Oil's customers of $1,774,305.00, $2,468,907.00 and

$2,223,199.00 for its fiscal years ending in 1993, 1994, and 1995, respectively. Since gross receipts will usually provide the appropriate measure of the business in which a taxpayer is principally engaged, if only the preceding two types of receipts were considered, petitioner during the period at issue would properly be treated as taxable under Article 9 as a transportation company since it had more receipts from its trucking activities than from its service activities on behalf of Original Oil (***see, Texas Eastern Transmission Corp.***, Tax Appeals Tribunal, November 12, 1998, ***confirmed***, 260 AD2d 127, 699 NYS2d 560, ***affd*** 95 NY2d 323, 717 NYS2d 69).

D. However, the Singer family business, for business reasons as detailed in Findings of Fact "4" and "5", which were based on Mr. Singer's credible and convincing testimony, structured a somewhat complex corporate arrangement utilizing sister corporations, which resulted in T & S, an unrelated company, delivering a good portion of Original Oil's heating oil in a distinct geographic area covering Queens, Brooklyn, lower Manhattan, Staten Island, and Nassau County. The Division has contended that petitioner's receipts from Original Oil, which it in turn paid over to T & S, are properly considered as petitioner's "transportation receipts." The Division's first justification for such treatment is based upon the argument that petitioner was a freight forwarder acting as a principal, which is without merit. Rather, petitioner was not a freight forwarder of any kind. It did not utilize a common carrier to ship Original Oil's heating oil. Instead, Original Oil itself had negotiated a contract with T & S for the delivery of its heating oil, and petitioner neither solicited, arranged nor consolidated T & S's deliveries since Original Oil retained direction and control over T & S's deliveries. Original Oil, not petitioner, carved out the region that would be serviced by T & S. Further, as detailed in Finding of Fact "7", although petitioner performed an important record-keeping function for Original Oil and

also employed dispatchers who passed on delivery information to T & S, it was Original Oil, and not petitioner, that always retained control over the oil delivery system and was responsible for any problems arising from the delivery of its heating oil. Furthermore, petitioner never issued any bills of lading to T & S, did not make any contracts in its own name with T & S for trucking services, and did not actually receive heating oil from Original Oil for transport by T & S (***cf., Matter of United Cargo Management, Inc.***, Tax Appeals Tribunal, June 4, 1998). The Division's second justification for treating petitioner's receipts from Original Oil which it paid over to T & S as petitioner's own "transportation receipts" is based upon an overly expansive interpretation of what constitutes "transportation" for purposes of Article 9. In order to have received transportation receipts, petitioner *itself* must have performed transportation services in connection with those receipts. As detailed in Finding of Fact "7", the services provided by petitioner with regard to the receipts at issue did not consist of "any real carrying about or from one place to another" of Original Oil's heating oil (***see***, ***RVA Trucking v. N.Y. State Tax Commn, supra***). It is not enough that the services provided by petitioner were "related" to the provision of transportation services by T & S (***see, Matter of United Cargo Management, Inc., supra; Matter of E.S.F., Inc.,*** Tax Appeals Tribunal, March 21, 1996).

E. Consequently, in computing whether petitioner's gross receipts from transportation services represented 50% or more of its total gross receipts, the receipts it received from its sister corporation, Original Oil, which it, in turn, paid over to T & S, are not properly considered petitioner's own "transportation receipts." As detailed in Finding of Fact "10", the parties have suggested various ways to calculate whether petitioner's receipts from transportation services represented 50% or more of its total receipts. Initially, the Division's concern that petitioner's receipts could be manipulated by the Singer family since they control both the payer corporation,

i.e., Original Oil, and the payee corporation, i.e., petitioner, must be addressed. The Division's focus on two intercompany payments made in 1994 by Original Oil to petitioner, in the amounts of $399,000.00 and $551,000.00 is misplaced since these payments merely represented internal accounting entries. Furthermore, petitioner's service revenue from servicing and installing boilers, burners, and related electronic equipment for Original Oil's customers could not be manipulated by the Singer family since such revenue represented amounts actually billed and received from customers of the Singer family's heating oil business. In addition, petitioner's receipts from its own deliveries of Original Oil's heating oil during the period at issue were based upon industry standards as detailed in Finding of Fact "5", and there is no evidence of any sort to infer that such amounts were manipulated by the Singer family to alter petitioner's revenue mix so as to avoid classification as an Article 9 corporation. Finally, the amounts shown in the last table included in Finding of Fact "10" representing "receipts from Original Oil retained by petitioner for administrative services and for installments on trucks sold to T & S" were also based upon "industry standards" as noted in Finding of Fact "6", and there is also no evidence of any sort to infer that such amounts were manipulated by the Singer family to alter petitioner's revenue mix.

F. Since it has been concluded that amounts paid over by petitioner to T & S are not petitioner's own "transportation receipts," the first calculation of transportation percentages shown in Finding of Fact "10", whereby the auditor determined percentages of 70.58%, 63.69% and 59.61% for 1993, 1994, and 1995, respectively, is rejected. Furthermore, the second calculation of transportation percentages shown in Finding of Fact "10", whereby the auditor determined percentages of 64.56%, 56.51%, and 52.41% for 1993, 1994, and 1995, respectively, is also rejected. This calculation properly excluded the amounts paid over by petitioner to T & S

from petitioner's "transportation receipts." In addition, it properly excluded such amounts from petitioner's total receipts. If they were included in petitioner's "total receipts" for purposes of calculating petitioner's transportation percentages, the true nature of petitioner's business activities would not be reflected. Although the Tax Appeals Tribunal in ***Texas Eastern Transmission Corp. (supra)*** approved the Division's usual practice of using a company's gross receipts or gross earnings in determining its transportation percentage, it also recognized that such use is not always *automatic* where the true nature of a company's business activities would not be adequately reflected by using such methodology. However, this second calculation by the Division is flawed because it did not factor out from petitioner's transportation receipts, amounts received by petitioner from Original Oil, which represented the monthly installments on the trucks purchased by T & S from petitioner and compensation for administrative services that petitioner performed for Original Oil. Consequently, the third calculation of transportation percentages detailed in Finding of Fact "10", which factored out such receipts from petitioner's transportation receipts, properly computed petitioner's transportation percentages for 1993, 1994, and 1995 as 59.50%, 53.25%, and 47.70%, respectively, which adequately reflect the nature of petitioner's business activities. Petitioner's proposed calculation, as detailed in paragraph "12" is rejected since as noted in Footnote "8", T & S was not paid for delivering Original Oil's heating oil at the standard industry rates.

G. Since it has been concluded that petitioner's transportation percentage for its fiscal year ending in 1995 was 47.70%, a percentage less than 50%, it properly filed as a general business corporation under Article 9-A of the Tax Law for 1995. Therefore, the taxes asserted due plus penalty and interest for 1995 are canceled. However for its fiscal years ending in 1993 and 1994, petitioner's transportation percentages were 59.50% and 53.25%, percentages greater than

50%. For such years, petitioner was therefore required to file as a transportation corporation under Article 9 of the Tax Law. However, the Division is directed to recalculate petitioner's franchise taxes due on its gross earnings under section 184 of Article 9 for the fiscal years ending 1993 and 1994 by using as gross receipts the amounts which exclude what was paid over by petitioner to T & S.

H. Tax Law § 1085(a)(1) provides, in relevant part, as follows:

> (A) In case of failure to file a return under article nine . . . on or before the prescribed date . . . unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return five percent of the amount of such tax if the failure is for not more than one month, with an additional five percent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate.

Petitioner's failure to file returns under Article 9 for its fiscal years ended 1993 and 1994 was due to reasonable cause and not due to willful neglect. As noted in Finding of Fact "8", petitioner timely filed franchise tax returns under Article 9-A for each of these years thereby informing the Division that it viewed itself as a general business corporation and not a transportation corporation. The categorization of a corporation as either an Article 9-A or Article 9 corporation has been the subject of much litigation, and given the substantial alteration of petitioner's operation in the summer of 1993, as detailed in the Findings of Fact, its decision to file as an Article 9-A was reasonable and not due to willful neglect (***cf., Matter of International Nickel***, Tax Appeals Tribunal, October 19, 1995). Consequently, penalties asserted due for the 1993 and 1994 fiscal years are canceled.

I. The petition of Harsa Corp., successor in interest to Harsa Trucking Corp., is granted to the extent indicated in Conclusions of Law "G" and "H", and each of the notices of deficiency dated December 29, 1997 are to be modified to so conform, but, in all other respects, the petition is denied.

DATED: Troy, New York
April 12, 2001

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE